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THE LAW OF MOTOR INSURANCE

SHAWCROSS ON THE LAW OF MOTOR INSURANCE

SECOND EDITION

BY

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PREFACE

SINCE the First Edition of this book was published in 1936, a lot of legislation affecting Motor Insurance law and practice has flowed from Westminster.

Many of the problems which were discussed in the First Edition have now been resolved by decisions of the Courts. But the most important development of all is that most of the innumerable questions which arose upon the Motor Insurance enactments are now of interest chiefly to lawyers and others professionally interested in Motor Insurance, rather than to persons injured in motor accidents and their advisers. This is due to the combined action of the Insurance Companies and Underwriters on the one hand, and the Government on the other, who have recently made an agreement which in effect is the equivalent of new legislation. It provides in practically every case an incontestable policy for the benefit of all pedestrians, cyclists and others (including the driver and passengers in another vehicle) who may be injured in a collision with a motor vehicle caused by the negligence of its driver.

In such cases the injured person (or his dependents if he is killed) will now always find that there are insurers ready and willing to satisfy any judgment which may be obtained against the driver or owner of the vehicle at fault.

The result will be that the emphasis in Motor Insurance cases will shift from disputes between insurers and "third parties" as to whether the policy covers the accident to disputes between them about the driver's liability and between the insurers and the assured about the latter's liability to repay the insurers what they have paid to the third party. For this reason the First Chapter of this book has been largely expanded to deal more adequately with the new situation in which the law relating to running-down actions and the procedure of arbitration assumes a relatively greater position. It is hoped that this and other extensive revisions will make this Edition useful in a much wider field than that for which the first was designed. We have endeavoured throughout to live up to the high standard which Mr. Maxwell-Fyfe (now the Rt. Hon. Sir David Maxwell-Fyfe, P.C., K.C., M.P.) gave in his Introduction to the First Edition, viz.: "a law book which will be readily comprehensible to the lay reader, and at the same time really useful to those who do not enjoy facilities for immediate access to a law library, as well, of course, as to those who do."

The decisions of the Courts since 1936 are too numerous to mention in this Preface. But it is as well to bear in mind that several Statutes—the Law Reform (Contributory Negligence) Act, 1945, the National Insurance Act, 1946, and the Law Reform (Personal Injuries) Act, 1948, have made substantial and permanent changes which will have a far-reaching effect in practice.

It may be said that with the conclusion of the Motor Insurers' Bureau Agreement in 1946 the development of Motor Insurance law, which in 1936 was so active, has now reached a definite stage from which future advances

will be slow and short. This paradox—namely that an agreement between the representatives of private enterprise and a Government Department should retard the development of the Common Law and arrest the progress of legislation on a topic of such public importance—is unique in our history. But surely it may be said fully to conform to the British characteristic of compromise and to the tradition of convention in our system of Government.

Whilst the heat and burden of the long and difficult task of editing this new Edition has been borne by Mr. Michael Lee, the responsibility for the work and for the opinions expressed is joint.

Temple, August, 1948.

CHRISTOPHER SHAWCROSS
MICHAEL LEE

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INTRODUCTION

A. THE MEANING AND SCOPE OF MOTOR INSURANCE LAW

THIS book was first published in early 1935, immediately after the Road Traffic Act, 1934, had come into force. That Act, together with the principal Act, the Road Traffic Act of 1930, it will be remembered, made compulsory the duty to insure against certain risks of causing personal injury to members of the public on the roads arising out of the use of a motor vehicle. The book was written primarily for the practitioner in motor insurance work, and the arrangement of the book was intended to suit his purpose.

In motor insurance business, a legal problem can normally be classed under one of four headings. First, it may be one concerned with the rights or liabilities of an insured motorist against or to another user of the roads arising from a motor accident, the most common form being what is colloquially called a "running-down case." Secondly, a problem may arise as to the effect of one of the three statutes which directly apply to motor insurance on the insurer's liability to indemnify an assured motorist in respect of any damage caused by that road accident: the three statutes referred to being the Third Parties (Rights against Insurers) Act, 1930, and the Road Traffic Acts of 1930 and 1934. Thirdly, a problem may arise as to the meaning of the terms and conditions of the policy of insurance issued to the motorist, to which must be applied the general rules of the law of contract and the special rules of law applicable to contracts of motor insurance. Lastly, a problem may arise as to the position of parties in an action at law or in an arbitration concerning a matter of motor insurance.

The arrangement, therefore, of the book fell naturally into four parts. In the first part, the general principles of law applicable to an action in contract or in tort had to be considered, with special emphasis on the rights and liabilities of a motorist arising out of a road accident. In Chapters I and II these general principles of law are set out, and they include as well as the principles of "running-down" law a broad discussion of the general law of contract, of the rules of procedure in arbitrations, and of the more special rules of law affecting policies of insurance and, in particular, policies of motor insurance.

Secondly, in Chapters III, IV and V, the relevant parts of the three statutes affecting motor insurance business are set out and considered clause by clause.

Thirdly, in Chapters VII, VIII and IX, the relations of the insurer to the assured arising from the issue, operation and termination of a motor insurance policy are described and analysed. Finally, in Chapter X, are considered the various problems which arise in legal proceedings brought to determine the rights and liabilities of the several parties concerned in a road accident.

Since the publication of the first edition there has been no fresh legislation

directly affecting motor insurance (a). There has, however, been a great deal of litigation the consequence of which was in many cases to deprive the innocent victims of road accidents of any compensation by decisions to the effect that the insurers of the motorist responsible were not liable to pay any compensation under the policy issued to him. Cases of great hardship were thus brought to light and although in innumerable instances reputable insurers made *ex gratia* payments of compensation, the defects of the existing legislation as an instrument for the protection of the public against the dangers of a constantly increasing road traffic were sharply demonstrated.

The war, by reducing the volume of traffic and by imposing upon the Government more urgent requirements, postponed proposals for an amending Act and in the interval thus afforded the Government and the industry were able to agree upon a plan designed to secure all the results of legislation without any Act of Parliament.

In 1946 the Motor Insurers' Bureau, an association of the individual insurers of Great Britain, was formed, whose main purpose is to satisfy the judgments of third parties which have been obtained against a motorist as a result of a motor accident and which have not been satisfied by that motorist. The history of the formation of this organisation is described in greater detail in Part B of this prefatory chapter, and it is only necessary to state here that now, as a result of the agreements entered into by the Motor Insurers' Bureau, the third party (aa) who has suffered personal injuries and who has recovered a judgment against one or more motorists or persons responsible for those injuries, has no longer this anxiety to beset him that the motorist may not be properly insured and may be personally unable to pay the damages awarded against him. These damages, if unsatisfied, will be paid, if the accident occurred after July 1st, 1946, either by the insurer concerned or the Motor Insurers' Bureau. So far as an injured third party is interested, therefore, all other problems have become of secondary importance to that of the liability of the motorist in tort arising from the misuse of a motor vehicle, and it has been thought proper in this second edition to increase in length the section of Chapter I which deals with the rights and liabilities of motorists. The agreements into which the Motor Insurers' Bureau has entered are discussed at some length in a new Chapter VI. In other respects, the arrangement of the book in this Second Edition remains the same as in the First Edition.

The reader who is inexperienced in motor insurance law might, however, find this arrangement a little confusing, in so far as the scope of motor insurance law is nowhere precisely defined for his particular benefit. In this section of the preface, therefore, a very short synopsis of the scope of motor insurance law is set out, so that he may have a clear idea of the whole subject.

Section 42 of the Road Traffic Act, 1930, describes Motor Insurance business as

"the business of effecting contracts of insurance against loss of or damage to or arising out of or in connection with the use of motor vehicles, including third party risks."

As already stated, there are in general three classes of persons concerned, directly or indirectly, with this business of motor insurance. First, insurers: apart from a few exceptions, insurers of motor vehicles must be authorised

(a) Other than the Assurance Companies Act, 1946; see *post*, p. 227.

(aa) It must always be remembered that the phrase "third party" in motor insurance practice bears a specialised meaning. It does not signify, as it does in the general law of contract, any person other than the parties to a particular contract, but it means to insurers a member of the public who in his capacity of a road user has suffered personal injury or damage to his property as a result of a motor accident and who has or may have a claim against a motorist who is or who should be insured against such injury or loss.

insurers, that is to say, an insurer who proposes to undertake such business has to comply with certain requirements before he is allowed to make a business of issuing insurance policies (b). Secondly, insured persons, and in this class come not only those insured persons who take out and pay for policies of motor insurance themselves, but also any persons who by the terms of the policy issued are deemed to be insured by it. Thus, in most policies that cover the driving of a private motor car, those persons are expressly covered by the policy who drive the car with the permission, authority or consent of the owner of the vehicle who takes out the policy and who pays the premium therefor. By the law of contract, these "authorised drivers" would normally be held to be "third parties" in respect of the contract and therefore unable themselves to sue insurers for an indemnity under it, but by section 36 (4) of the Road Traffic Act, 1930, as has now been held (c) that they have been given a statutory right to sue insurers for such an indemnity, within certain limits. Thirdly, there is the class of third parties within the meaning of that term in motor insurance law, that is, persons who may suffer loss or injury as a result of the misuse of a motor vehicle on the road. It will be seen that even a party insured by a contract insurance may in certain rare circumstances become a third party in the insurance sense (d).

The relations of these three classes of persons form the subject-matter of Motor Insurance Law, but it should be clearly born in mind that any work on Motor Insurance Law must be concerned with two wholly different parts of the law. First, it is concerned with the insurance policy, and the law relating to contracts of motor insurance. Secondly, in so far as the policy indemnifies the motorist assured against certain legal liabilities which he may incur as a result of the use of that vehicle on the road, it is closely concerned with the motorist's use of the assured vehicle. The difference between the rules of law applicable to the contract of indemnity and those relating to the subject-matter of that indemnity, *i.e.*, the legal liability of the motorist arising out of a running-down action, should be borne in mind.

To take first the subject-matter of the indemnity provided by the policy of motor insurance. The insurer is concerned with the use of the insured vehicle in the following respects.

1. The motorist may become liable at common law to other road users by causing personal injury to their persons or damage to their property. Liability may be incurred in this respect to passengers in the insured vehicle, but in so far as liability to voluntary passengers is not required by the Road Traffic Acts to be the subject of compulsory insurance, the claims of voluntary passengers must be considered in some respects separately from those of other road users against the assured motorist.

By injuring one person, also, the motorist may become liable in damages to others who suffer loss thereby. Examples of these other persons are employees of the injured person, those who receive other services from the injured person, and the injured person's dependents and his personal representatives in cases where death results from the injuries.

Secondly, liability caused by the use of a motor vehicle on the road may arise under statutory provisions.

(b) See chapter IV, *post*, p. 227.

(c) *Tattersall v. Drysdale*, [1935] 2 K. B. 174.

Austin v. Zurich General Accident Insurance Co., [1945] 1 All E. R. 318.

(d) See *Digby v. General Accident Assurance Corporation*, [1943] A. C. 121, H.L.. In this case, the assured, though not insured against personal injury herself under the policy, sued her chauffeur in a running-down action and recovered damages. The House of Lords decided that the chauffeur while driving the car became the assured, and the employer of the chauffeur became a third party.

Thirdly, although the motorist may have been partly to blame for the accident, it may be that the injured plaintiff in the running-down action was also guilty of negligence, and in such a case a problem arises as to which of the parties caused the accident or as to their respective degrees of responsibility for it. This aspect is considered under the heading of Contributory Negligence.

2. Other persons may be responsible for the use of the insured vehicle by the driver, on the principles of vicarious liability. The principles of the law of principal and agent, master and servant, husband and wife, and the liability of the Crown for the acts of its servants fall to be considered in this respect.

3. The motorist may at common law or under statutory provisions acquire a right to claim for loss against which he is insured. In this respect, his rights as a plaintiff in a running-down action must be taken into account, and his rights of action for, for instance, loss or damage to himself caused by the unlawful obstruction of the highway. Secondly, even if he is found to blame for causing injury or loss to a member of the public using the roads it may be that another motorist or user of the road was also partly liable for that injury or loss; if so, the motorist becomes entitled to seek contribution from that other tortfeasor by way of apportionment of the damage caused (e).

4. The effect of the death or bankruptcy of the assured motorist, both on the policy of motor insurance and on any claim arising thereunder must also be considered.

5. The measure of damages awarded to a successful plaintiff as a result of a motor accident is also of great importance to an insurer of motor vehicles.

Before passing to a consideration of the motor insurance contract itself, there are three points that have to be discussed. These are

(a) The liability of others, not of the motorist, for failure to fulfil the statutory duty to insure against "third party risks" (f). It has been held that in certain circumstances an action at common law may be brought against him who causes or permits a vehicle to be used on the roads whilst uninsured, the action being based on the breach of statutory duty.

(b) In insurances of property or against liability which are contracts of indemnity, although there is no limit to the number of policies which an assured may effect, the total amount recovered from all his insurers may not exceed such sum as is sufficient fully to indemnify him against the insured loss. Apart from any term in any such policy, however, the assured may select any one insurer in order to secure his full indemnity, and the selected insurer has the right to call upon the other insurers to share the liability when he, the selected insurer, has satisfied the claim. The conditions under which a case arises of contribution in this sense are set out in Chapter X.

(c) By the doctrine of subrogation, once a claim made by an insured motorist has been met in full by insurers as a result of a promise of indemnity contained in the motor insurance policy, insurers are entitled to step into the insured's shoes and to take advantage of such means of recoupment as are available to him to make good his loss or damage. Thus if the insured motorist's car is badly damaged in a motor accident and a claim is made by him against his insurers to have it restored to its

(e) By virtue of the Law Reform (Married Women and Tortfeasors) Act, 1935.

(f) Cf. *Monk v. Warby*, [1935] 1 K. B. 75. The meaning of the phrase "third party risks" in this context is discussed below; see *post*, p. lxxxiii, and note (l), p. lxxxv.

original condition, the insurers after meeting that claim are entitled to sue, in the name of the assured, any person who was liable in law for causing the damage to that car.

So much for the subject-matter of the promise of indemnity contained in the policy. The business of motor insurance is of "effecting contracts of insurance." The book therefore contains a broad exposition of the essentials of the contract (*g*), a more detailed discourse on the characteristics of a contract of insurance (*h*), and thereafter a complete survey of the legal aspect of the formation (*i*) of contracts of motor insurance, of the terms and conditions (*j*) of the standard forms of policies, and of their operation and termination (*k*). In these chapters the rights and liabilities of the insurer and the insured under the policy are exhaustively discussed.

Lastly, in the scope of motor insurance business as described in section 42 of the Road Traffic Act, 1930, is included "third party risks." Even at the expense of repetition, it must be stressed that the reader who is inexperienced in Motor Insurance Law should constantly bear in mind two points in regard to the use of this phrase. The first, already mentioned, is that the phrase as it is used in the world of motor insurance differs in meaning from the same phrase when it is used in the law of contract. It does not mean, in this book, a person who is strictly not a party to the contract of insurance.

Secondly, while the words "third party" are used loosely by insurers to describe any person who has a claim in damages against an assured motorist or against any assured person who is responsible for a motorist's use of a vehicle on the road, for injury or loss *whether to property or person* as a result of the use of that motor vehicle, the words "third party risks" when used in the sections of the two Road Traffic Acts of 1930 and 1934 (and in the Motor Insurers' Bureau's agreements) and especially in section 36 (1) (b) of the Road Traffic Act, 1930, bear the highly technical meaning of the risks of incurring "liability in respect of the death of or bodily injury to any person caused by or arising out of the use of the insured vehicle on a road." The complete definition of a third party in that section 36 (1) (b) makes it clear that the legislature has not required insurance against risk of personal injury to voluntary passengers in the insured vehicle, or against risk of damage to property.

"Third party risks" in this sense have been the subject of considerable legislation, and a brief historical review is desirable to enable the present position with regard to the satisfaction of judgments obtained by these third parties against motorists to be fully ascertained. This review is therefore set out here in Part B of this Introduction.

B. THIRD PARTY RISKS

By 1947, a stage has been reached in Motor Insurance Law whereat those members of the public who form the class of third parties as defined by the Road Traffic Acts and who are injured or killed by the fault of a driver of a motor vehicle, receive compensation for their injuries irrespective of the financial condition of him who caused the damage. It is not possible to understand the present system without a full knowledge of the various stages leading up to the present, and of the broad outlines of commercial practice in this country, relating to the issue of motor insurance policies. In sixteen years, by the impact of various enactments on the commercial practice referred to, and finally by means of an agreement between the

(*g*) Chapter I.
(*j*) Chapter VIII.

(*h*) Chapter II.
(*k*) Chapter IX.

(*i*) Chapter VII.

Government and the individual insurance companies and underwriters of this country, injured third parties, as these members of the public have come to be called, may be certain of receiving the fruits of any judgment obtained against any person as a result of a motor accident, for which the person is found to blame, provided the judgment is in respect of a liability required by law to be covered by insurance. The transition from the stage where motor drivers might or might not be insured, and might or might not be able to satisfy any such judgment out of their own pockets, to one where all claims of third parties that are pursued to judgment against the offending road user are certain to be met has not been easy, and has been fruitful of much litigation. To make clear much of what is written in this book, a very short historical record of the past sixteen years is set out here, so that the reader who comes new to the somewhat confusing collection of rules that make up the Motor Insurance Law of this country may fully understand the reasons underlying statutes passed between 1930 and 1934, and finally the institution of the Motor Insurers' Bureau in the summer of 1946. The new reader must bear this historical sequence, which is about to be related, constantly in mind, and should refer to it once again before reading Chapters III, IV, V and VI.

1. Between 1919 and 1930 a great number of motor vehicles were added to the traffic on the roads, and accidents became numerous. It became the practice of owners of these vehicles voluntarily to insure against the risk of injuring other road users, and a system of different types of policies was set up by private insurers which accorded with the material risks involved. Different rates of premium were charged according to the type of vehicle insured, the use to which it was to be put on the road, and the driving record of the insured person. The different types of motor policy in this era may be classified as follows :—

- (A) Classification according to class of vehicle.
 - i. Private cars and motor cycles.
 - ii. Commercial vehicles.
 - iii. Paying passenger vehicles.
- (B) Classification according to risk covered.
 - i. Comprehensive cover.
 - ii. Third party cover.
 - iii. Other forms of limited cover.
- (C.) Classification according to the use of the vehicle.
 - i. Use for pleasure only.
 - ii. Use for business only.
 - iii. Use for both business and pleasure.

Any combination of these nine types of policy could be obtained on payment of the appropriate premium. It was found essential by insurers that, if premiums were to be kept low, the risk insured must be fully understood by them at the date of issue of the policy so that the vehicles should be used in the way in which the assured stated that they would be used in the proposal form.

Stringent conditions were therefore imposed on the assured in every case to make clear the class of policy he required, and the sort of driver that would use the vehicle. It was inevitable that in a number of cases assured persons found themselves in breach of the conditions of the policy and unable to recover thereunder, so that the injured third party found no one of any substance capable of paying his damages.

Secondly, although the majority of motorists had previously insured voluntarily against third party risks, in a number of other cases serious

hardship was caused where the person inflicting the injury was devoid of means and, being uninsured, was unable to pay the damages for which he was liable. It was primarily to meet the second class of hard cases that the Road Traffic Act, 1930, was passed, and a system of compulsory insurance against certain risks was instituted by it.

2. The system of compulsory insurance required by Part II of the Road Traffic Act, 1930, was limited in scope. Its object was to reduce in number the cases where the judgment for personal injuries obtained against a motorist was not met owing to the lack of means of the defendant in the running-down action and his failure to insure against such a liability. Although the admitted object of the Act was to aid these injured "third parties" (1), they were given no right to sue insurers direct for payment of the damages awarded against their assured by virtue of the promise of indemnity contained in the policy. Furthermore, no attempt was made to control the number or nature of the conditions imposed by insurers upon the insured motorists by the policy: so long as insurance cover against third party risks was provided by the policy, the terms of the Act were satisfied, even though the area in which the vehicle was to be used and the nature of that use were severely limited. Complete freedom of contract was permitted by the Act between insurer and insured, with the single exception contained in section 38 of the Act, whereby nothing done or left undone after the accident which gave rise to the liability could be relied upon as a breach of condition of the policy whereby the insurer could escape his liability, under the promise of indemnity contained in the policy to pay the damages awarded to the third party. Penalties were laid down by the Act to be imposed upon motorists who failed to insure or who by some means obtained a policy which did not in fact cover them in their use of a vehicle on the road against personal injuries to members of the public. It must here be repeated that the classes of liability against which motor insurance was made compulsory by the 1930 Act did not include injury to voluntary passengers or damage to property.

3. Another Act was passed in the same year which, though applicable to all forms of insurance, conferred on third parties a limited advantage. This Act was the Third Parties (Rights Against Insurers) Act, 1930, and it was concerned with the position in law where the assured went bankrupt after the accident which gave rise to the third party's claim in damages. Prior to this Act, if the insurer paid the assured's trustee in bankruptcy (he having succeeded to the benefit of the policy on the assured's bankruptcy) the amount of the third party's claim, the trustee was bound to distribute that sum among all the creditors generally, with the result that the third party did not get fully paid for his injury. The Third Parties (Rights Against Insurers) Act of 1930 provided that on a bankruptcy of an assured motorist or on the liquidation of an assured company the rights in a policy should vest in a third party to whom liability was incurred.

The Act therefore gave a direct right to a third party to bring an action on the policy direct against the insurer, although at common law no person other than he who could strictly be called a party to the contract could sue upon it. The right of the insurer, however, to set up against the third party any defences which would have been available to him against the assured was preserved intact.

(1) In this context "third parties" means the persons against whose injury section 36 (1) (b) of the Road Traffic Act of 1930 required compulsory insurance. They must be distinguished as a class from those persons who, though not parties to the contract of insurance in the strict sense, are given cover by a clause contained therein which extends the insurance to drivers of the insured vehicle other than the original assured. These persons are given a statutory right to sue insurers direct for an indemnity by virtue of section 36 (4) of the Road Traffic Act, 1930.

This Act applied, as has been said, to all forms of insurance, not only to motor vehicle insurance, and in so far as it had only the limited purpose of reversing a legal decision made shortly before the Act was passed, it did not advance the position of the third party to any great extent, and owing to the greater advantages provided by the succeeding Road Traffic Act of 1934 it was little used in the years between 1930 and 1946.

4. The position of a third party who failed to receive damages awarded to him in a running-down action owing to the defendant's failure to comply with a statutory obligation to insure was no worse than that of a third party injured by a motorist who was under no obligation to insure and who was not in fact insured. Nevertheless, after the Road Traffic Act of 1930 brought into force the system of compulsory insurance, injured third parties who failed to recover damages awarded against a motorist not unnaturally felt that their claims ought not to be allowed to fail because of a refusal, legitimate enough, of an insurer to accept liability under a policy owing to a breach by the assured of the conditions under which the policy was issued, or by reason of misrepresentation or non-disclosure of material facts by the assured which destroyed the very basis on which the contract of insurance rested.

5. In consequence of the growth of public feeling on this matter, sections 10-15 of the Road Traffic Act, 1934, were enacted. These went much further than the previous legislation in improving the position of injured third parties. By section 10 (1), directly judgment had been obtained in a running-down action against an insured motorist, the insurer of that motorist was required to pay the damages awarded by that judgment direct to the persons entitled to the benefit thereof. Secondly, by section 10 (3) the insurer could only avoid the effect of his promise of indemnity under the policy, so far as the third party was concerned, by obtaining a declaration of the Court that the policy had been obtained by material misrepresentation or non-disclosure, and that declaration had to be obtained in proceedings commenced not later than three months after the running-down action had been started. Lastly, by section 12, a large number of conditions normally contained in the standard policy of insurance, and additional to those referred to in section 38 of the Road Traffic Act of 1930 were declared invalid in respect of the third party risks required to be covered by section 36 (1) (b) of the 1930 Act.

But although the 1934 Act marked a great advance in the struggle to obtain compensation for all persons injured on the roads by the negligence of motorists, there were still three classes of cases in which funds might not be available from insurers to meet the just claims of third parties against motorists.

For instance, the motorist might have failed to comply with conditions in the policy other than those rendered ineffective against injured third parties by section 38 of the Road Traffic Act of 1930 and section 12 of the Road Traffic Act of 1934. Thus, he might himself be a person specifically excluded from driving the vehicle, or he might at the time of the accident have been using the vehicle for a purpose in no way covered by the policy. Secondly, quite a number of policies were in practice avoided by insurers on the ground that they were void for material misrepresentation or non-disclosure. Thirdly, the motorist might have failed altogether, deliberately or through forgetfulness, to take out a policy of insurance on his vehicle or to renew a policy that had come to an end through effluxion of time.

6. The principle of compulsory insurance having once been accepted, the general scheme of insurance could not be regarded as wholly satisfactory if it admitted of an injured third party without any fault of his own finding that

there was no insurer to whose liability upon a third party policy he could turn for a satisfaction of damages which the motorist at fault could not pay. On the other hand, it was clear that as a matter of commercial practice, individual insurers would find it very difficult to keep their premium rates at a consistently low level if they were forced to pay the very large sums awarded for personal injuries and in cases of death if the assured drivers of motor vehicles who were found liable to pay those sums claimed indemnity from their insurers in circumstances which the insurers had never envisaged when drawing up the contract of insurance. A further difficulty confronted insurers in that among the many drivers of motor vehicles there were to be found some who did not read the terms of their policies or who, even if they did so, yet deliberately used their vehicles in a way that was not covered by the policy. Nevertheless, it was impossible to find any logical justification for some of the differences in the classes of risks which insurers kept distinct in order to differentiate between the various premiums payable for the separate policies. For example, by section 12 of the Road Traffic Act, 1934, it was not permissible to insert a condition relating to the age or physical or mental condition of the persons driving the vehicle. Yet it was legally possible to insert a clause in "hire-drive" policies prohibiting an undergraduate, an actor or an officer in the Royal Air Force from driving the insured vehicle.

7. In 1936, a Departmental Committee was appointed by the Board of Trade to consider what changes were necessary in the existing law relating to the carrying on of the business of insurance, in the light of statutory provisions relating to compulsory insurance against third party risks; the main cause of the setting-up of the Committee being the failure of five companies transacting compulsory insurance business. It was at once clear from its report that the Committee considered that the invalidation of certain conditions in policies by the Road Traffic Acts of 1930 and 1934 against third parties did not go far enough. The Committee required a change of emphasis, in that it was recommended that instead of the invalidation of certain conditions in policies, all save a very few specified conditions should be made invalid against third parties. Secondly, in order to withstand the greater burdens thus imposed upon them, insurance companies were to be required to show a higher degree of solvency before being allowed to transact compulsory motor insurance business. And, lastly, a Central Fund was recommended, contributed to by all insurers in the United Kingdom, from which fund payments could be made to injured third parties who had obtained judgment against the tortfeasor (1) where the insurance policy had been avoided by the insurer for breach of condition or for misrepresentation, and (2) where there never had been an insurance policy in force to protect the motorist. The controllers of the Central Fund, it was suggested, should have the right of recovering any payments it might have been called upon to make from any person liable for the injury.

8. The war of 1939-1945 prevented these recommendations from being carried into effect. It was not until 1946 that by an agreement between the Minister of Transport and a new body called the Motor Insurers' Bureau, representative of all the insurers of the country and in control of a Central Fund, and by an agreement between Motor Insurers' Bureau and individual companies and insurers, that the recommendations were not only implemented, but carried a stage further (m). By the former agreement from July 1st, 1946, if judgment in respect of a liability, arising after this date,

(m) In 1946, too, the Assurance Companies Act was passed, which required ~~unassailable~~ financial stability of persons issuing motor insurance policies. See *post*, p. 227.

which is required to be covered by a policy of insurance under Part II of the Road Traffic Act, 1930, is obtained against any person in any court in Great Britain, then, whether or no that person is covered by a contract of insurance, if the judgment remains unsatisfied within seven days from the date when the judgment may be executed, the Motor Insurers' Bureau will pay both the judgment sum and the costs thereof to the third party. Three conditions only are imposed on the third party or his representatives. First, notice of the intention to bring proceedings against an uninsured person must be given to Motor Insurers' Bureau before or within 21 days of the issue of the writ. Secondly, all tortfeasors responsible for the injury or death of the third party must be sued. Thirdly, the judgment must be assigned to Motor Insurers' Bureau or its nominee.

By the second agreement (called the " Domestic Agreement ") individual insurance companies and insurers have undertaken heavy additional burdens. Whereas Motor Insurers' Bureau itself will be responsible for all judgments obtained against uninsured persons, yet where at the time of the accident which gave rise to the Road Traffic Act liability there was a policy providing insurance against that liability in respect of the vehicle arising out of the use of which the liability of the judgment debtor was incurred, then the insurer who issued that policy, irrespective of the fact that he may be entitled to avoid the policy *ab initio* for misrepresentation or nondisclosure, or to avoid liability in respect of that particular accident because of some breach of condition of the policy by the assured, and even though the judgment debtor was in unauthorised possession of the vehicle concerned, will satisfy the amount of the judgment and its costs on behalf of Motor Insurers' Bureau if the tortfeasor fails to do so. He can only avoid this burden if the policy before the date of the accident has lapsed by effluxion of time, has been cancelled by agreement or has ceased to operate by reason of a transfer in the interest of the assured in that vehicle, or because the insurer has obtained a declaration from the court that the policy is void. Should any insurer be unable owing to insolvency to satisfy the judgment, then Motor Insurers' Bureau will pay the sum due.

Although the Motor Insurers' Bureau or the insurers concerned will pay the just claim of injured third parties, their rights to recover the judgment debt from the " assured " or from any person responsible for the damage remain unimpaired by these agreements.

The two agreements have not the legal effect or force of a Statute, and the Road Traffic Acts and other Motor Insurance legislation remain unaffected by them.

9. These two agreements have effected a great change in motor insurance practice. From now on, except for his duty to inform Motor Insurers' Bureau of intended proceedings in cases where there is no insurance, the injured third party is concerned only to obtain his judgment against the motorist who did him harm. But the following points should be kept clear. First, the agreements only affect claims, apart from claims for causing or permitting a car to be driven uninsured, against Road Traffic Act liability, *i.e.*, the classes of risks against which section 36 (1) of the Road Traffic Act, 1930, require insurance. *Injuries to and death of voluntary passengers and damage to property are not covered by these agreements.* Secondly, the assured or the person responsible for the damage, if in fact he is not covered by the policy, will have to bear the burden of paying the judgment sum, if he can, at the suit of Motor Insurers' Bureau or the insurer concerned. The judgment obtained against him by the third party passes to Motor Insurers' Bureau or the insurer concerned by assignment, and they may execute it against him if they please. He can, of course, set up against them a claim

to be indemnified under any policy which purported to cover him at the time of the accident, but he will only obtain such an indemnity if he has complied with the terms of that policy. Almost always he will have warranted the truth of any statement he has made in the proposal form, which forms the basis of most contracts of insurance, and he is not protected by the Road Traffic Acts in any way from observing exactly each and every condition imposed by the policy. Any misstatement in the proposal, and any failure to observe the conditions of the policy may deprive him of his indemnity thereunder.

The heavy criminal penalties inflicted on offenders against the requirements of compulsory insurance in the Road Traffic Acts are retained, and indeed their severity may be increased. So that any person who intends to drive a motor vehicle in the future will be well advised to make more than ever sure that he is covered, while driving, by a valid contract of insurance. This result he can only be certain of achieving by obtaining a policy and, on its receipt, by reading and understanding its terms.

CHAPTER I

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PART I.—GENERAL PRINCIPLES OF THE LAW OF CONTRACT

Subject to certain special rules relating to what is called “uberrima fides,” the general rules of the Common Law of contract apply to motor insurance contracts (a). Without attempting either a discussion or even a summary of those rules, in view of the importance which they bear to the various topics which are discussed in later chapters of this work it is as well to remind the reader by way of preface of some of the broad legal principles upon which the existence, validity and enforceability of any contract depend.

1. A contract is formed by offer and acceptance (b).—Both the offer and the acceptance may be signified either in writing or by word of

(a) As to these special rules, see more fully chapters II and VII, *post*.

(b) 7 Halsbury's Laws, 2nd Edn. 83. See more particularly, in relation to motor insurance contracts, chapter VII, *post*, pp. 408 *et seq*.

mouth or by conduct (c). The offer must be definite and must be expressed in clear words or by unambiguous conduct (d). The acceptance must be an acceptance of the offer, of the whole of the offer and of nothing but the offer (e). An offer can be revoked, but not after it has been accepted (f). Since a contract is concluded at the moment of acceptance of the offer acceptance cannot be revoked (g). Neither an offer nor an acceptance is effective as such until it is communicated by some means to the person to whom it was made (h).

The offer in a contract of motor insurance is usually made by means of a document called the "proposal form," which is made and completed by the person desirous of effecting insurance. The acceptance of this offer by the company is usually, but not always, communicated to the assured in writing. This may take the form of an ordinary letter, the issue of a cover note (i) or the issue of a policy (j). The acceptance but not the offer in an insurance contract may be made by conduct, as by the acceptance of the money paid in respect of the premium or by a receipt acknowledging that payment.

2. Contracts are of two kinds—simple contracts and contracts under seal.—Every simple contract is invalid unless it is supported by consideration (k). A contract under seal is one which is embodied in a formal document called a deed, to which the parties append their signatures and seals before completing it. A deed "imports" or takes the place of consideration (l).

Simple contracts may be made either in writing or by word of mouth or by conduct, or partly in one such way and partly another. A few simple contracts, such as Bills of Exchange or Promissory Notes (m) or contracts of Marine Insurance (n), are required to be made in writing by English law. Apart from these exceptional types and contracts which require to be evidenced by a note or memorandum in writing (o) under the Statute of

(c) *Op. cit.* 83, 84, 87, 88.

(d) *Op. cit.* 83, 84, and cases cited there.

(e) *Op. cit.* 80, 90. *Harvey v. Facey*, [1893] A. C. 552.

(f) *Offord v. Davies* (1862), 12 C. B. (N.S.) 748; *Dickinson v. Dodds* (1876), 2 Ch. D. 463.

(g) *Dunlop v. Higgins* (1848), 1 H. L. Cas. 381.

(h) 7 Halsbury's Laws, 2nd Edn. 85, 87. *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484; affirmed, [1893] 1 Q. B. 256. See *Ocean Accident and Guarantee Corporation, Ltd. v. Cole*, [1932] 2 K. B. 100. But an offer can be accepted retrospectively, so that the contractual relation is deemed to subsist in respect of a period before actual acceptance.

(i) But see chapter VII, *post*, p. 417, as to whether a cover note for a lesser period is not in law a counter-offer made by the proposed insurers. Policies of insurance renewable yearly constitute each year a new contract with respect to which the assured's proposal, being a new offer, must make disclosure of any changes in the material facts (*Stokell v. Heywood*, [1897] 1 Ch. 459; *Re Wilson and Scottish Insurance Corporation*, [1920] 2 Ch. 28).

(j) But if the policy issued is at variance with the terms of the proposal, there being no valid acceptance by the insurers, the proposed assured is not bound by the purported acceptance (*South-East Lancashire Insurance Co., Ltd. v. Croisdale* (1931), 40 Ll. L. R. 22). Where, however, there is an inconsistency between the policy and the proposal form and the assured has paid premiums, the latter's terms prevail (*Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399).

(k) 7 Halsbury's Laws, 2nd Edn., 136, and cases there cited.

(l) 10 Halsbury's Laws, 2nd Edn. 163-6, and specially note (d) on p. 164.

(m) Bills of Exchange Act, 1882, ss. 3, 83 (2 Halsbury's Statutes 36, 76).

(n) Marine Insurance Act, 1906, (9 Halsbury's Statutes 851).

(o) See fully 7 Halsbury's Laws, 2nd Edn. 104-32, as to both the types of contract in relation to which such a requirement is legally necessary and as to the necessary particulars to be incorporated in such note or memorandum.

Frauds (*p*), the Sale of Goods Act (*q*) or the Law of Property Act (*r*), any simple contract is valid and enforceable (*s*) whatever the form in which it is made, provided it is supported by consideration.

3. A simple contract must be supported by consideration (*t*).—Motor insurance contracts are invariably simple contracts (*i.e.* not under seal). Consideration means that no person can enforce a contract unless he has suffered or undertaken to suffer some detriment or disadvantage under or by virtue of it (*t*). In a motor insurance contract the detriment or disadvantage which is undertaken by the insurer is the risk of having to fulfil the indemnity which is provided by the policy against the events which it insures (*u*); and the detriment or disadvantage which the assured undertakes is the payment of the premium or the promise thereof. The latter detriment or disadvantage is undertaken by the assured in exchange for the insurer's undertaking to indemnify him against the occurrence of the specified risks.

4. Consideration must move from the plaintiff.—This means that only a person who by the contract suffers or undertakes to suffer some detriment can seek to enforce any rights under that contract (*v*). Since a party seeking to enforce a contract must show that he has given consideration in the sense already defined, a party who merely undertakes some detriment which he is already by law or subsisting agreement obliged to undertake in favour of the other party to such agreement will not be able to enforce his rights arising under such fresh agreement. Thus it has long been established law that an agreement to pay or actual payment of part of a subsisting debt which is undisputed is no consideration to support an agreement to discharge the balance of such debt (*x*).

5. The parties to the contract must be at one in their agreement (*y*).—This means that a contract is not binding in law unless there

(*p*) Statute of Frauds, 1677, s. 4 (3 Halsbury's Statutes 583). This enumerates certain classes of contracts requiring to be "evidenced" by a note or memorandum in writing. Contracts of guarantee and contracts "not to be performed within one year of the making thereof" are amongst the types enumerated. While contracts of insurance are in practice invariably in writing and the point is therefore academic, it should be noted that an insurance contract other than a guarantee insurance is not a guarantee inasmuch as it creates Common Law rights and liabilities only between the assured and the insurer (where a contract of guarantee gives rise to Common Law rights and liabilities between three parties, the creditor, the debtor and the guarantor). Nor is an insurance contract one which is not to be performed within one year from the making thereof in any case where the risk might possibly occur within one year and a day from the date of its making. Further as to distinction between insurance and guarantee, see chapter II, p. 71, *post*.

(*q*) The Sale of Goods Act, 1893, s. 4 (17 Halsbury's Statutes 613). A contract for the sale of goods of the value of £10 or more is not enforceable unless one of four conditions, one being the presence of a written note or memorandum, is complied with.

(*r*) Law of Property Act, 1925, s. 40 (15 Halsbury's Statutes 216).

(*s*) Failure to comply with the three statutes mentioned does not make a contract void or invalid, it merely prevents an action being brought to enforce such contract.

(*t*) 7 Halsbury's Laws, 2nd Edn. 137. This proposition is also expressed in the statement that "consideration consists in a detriment to the promisee." This means that no one can enforce a promise made to him unless he has given some consideration with respect thereto (*Currie v. Misa* (1875), L. R. 10 Exch. 153; *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*, [1915] A. C. 847).

(*u*) 7 Halsbury's Laws, 2nd Edn. 141, *e.g.* *Collins v. Godefroy* (1831), 1 B. & Ad. 950 (attendance of witness on subpoena); *Mallalieu v. Hodgson* (1851), 16 Q. B. 689 (bills taken up by party already liable thereon).

(*v*) *Tweedle v. Atkinson* (1861), 1 B. & S. 393.

(*x*) 7 Halsbury's Laws, 2nd Edn. 141-2, 235-6, and cases there cited.

(*y*) If the parties are not really at one, then there can be no agreement because "consensus ad idem," the fundamental element of a contract, is lacking.

is in fact real agreement between the parties. If either is mistaken as to the identity of the other, where that is material to the contract (z), or as to the subject matter of the contract (a), or as to the nature of the transaction into which they are entering (b), the contract is not binding. But these types of mistake in order to invalidate the contract must be mutual (c). The mistake of one party only does not affect the contract unless such mistake has been induced by or is known to the other party who takes advantage of it (d).

6. A contract obtained by misrepresentation is voidable (e).— This means that where one party induces another to enter into a contract by making a false representation of a material fact that other party may, if he wishes, repudiate the contract. If such a false representation was attended by the following circumstances :

- (i) that the person making the representation either knew that it was false, or did not know it to be true, or made it recklessly without caring whether it were true or false (f) ;
- (ii) that it concerns a material matter of fact, and is not a mere expression of opinion (g) ;
- (iii) that it was made with the intention of inducing the other party to enter into the contract (h) ;
- (iv) that the other party was so induced by the representation to enter into the contract, to his detriment (i) ;

then it amounts to fraud. In addition to being a ground upon which the party who has been induced by it to enter into a contract can repudiate that contract, or resist an action against him based on that contract, fraud is also a tort (j). If the person against whom the tort was committed can prove that it has caused him damage he can, apart from the contract, recover such damage in an action therefor (k).

When a misrepresentation is made in such circumstances that the first of the necessary ingredients of fraud is not present it amounts to an innocent misrepresentation (l), which will in certain circumstances give to the party

(z) 23 Halsbury's Laws, 2nd Edn. 132, 133 : *Cundy v. Lindsay* (1878), 3 App. Cas. 459 ; cf. *Phillips v. Brooks, Ltd.*, [1919] 2 K. B. 243.

(a) 23 Halsbury's Laws, 2nd Edn. 133 ; 7 Halsbury's Laws, 2nd Edn. 95, 96 : *Scott v. Coulson*, [1903] 2 Ch. 249 (contract of life insurance).

(b) 7 Halsbury's Laws, 2nd Edn. 97.

(c) 7, 23 Halsbury's Laws, 2nd Edn. 95-6, 134.

(d) 23 Halsbury's Laws, 2nd Edn. 134, and see *Smith v. Hughes* (1871), L. R. 6 Q. B. 597 ; *Scriven Brothers & Co. v. Hindley & Co.*, [1913] 3 K. B. 564.

(e) 23 Halsbury's Laws, 2nd Edn. 98.

(f) *Op. cit.* 40. See also *Derry v. Peek* (1889), 14 App. Cas. 337 ; per Lord HERSHELL : " Fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless whether it be true or false."

(g) 23 Halsbury's Laws, 2nd Edn. 47. Not only must the representation constitute a statement of fact, but it must also be a representation as to a *material* fact, in that its tendency or natural and probable result is to induce the person to whom it is made to act upon it ; it must, i.e., be a material factor in his mind.

(h) *Op. cit.*, 48.

(i) *Op. cit.*, 58.

(j) *Op. cit.* 81.

(k) Assuming, of course, that the conditions set out above are satisfied. A representation may be made by words, by writing or by conduct (e.g. mere silence in such circumstances that *suppressio veri* becomes *suggestio falsi*).

(l) As a general rule no claim for damages can be based upon an innocent misrepresentation, but there are some Common Law, e.g. breach by an agent of his warranty of authority (*Collen v. Wright* (1857), 8 E. & B. 647), and statutory, e.g. Companies Act, 1948, s. 43, exceptions to this rule.

thereby deceived the right to repudiate the contract into which it has induced him to enter (m) or to claim the formal rescission thereof in a court of law (n). These remedies will only, however, be available where, in addition to the presence of all save the first of the necessary ingredients of fraud, repudiation is made or rescission is claimed promptly and before it is too late to restore the parties to the contract to their former position (o) and before the rights of any third party have been compromised (p).

7. The object of the contract and the manner of its performance must be lawful.—The direct or indirect object of a contract must not infringe the provisions of any statute, must not violate any rule of the Common Law (q), and must not offend against the principles of public policy (r). Even if the object of the contract is in these respects lawful, neither the methods provided by the contract for the attainment of its objects (r) nor the consideration for the contract (s) must involve the commission of any unlawful act. As no action can be brought for the purpose of enforcing an illegal contract either directly or indirectly (t), money paid or goods delivered in pursuance of such contract cannot be recovered where the illegal object has been carried out or the contract has been substantially performed (u). In such a case the parties are deemed to be *in pari delicto* and unless one can succeed in exculpating himself from the illegality by proving the fraud of the other party he cannot claim any relief with respect thereto (w).

8. No third party has any rights under a contract (x).—This means that only the parties to a contract can claim to enforce it. The rules by which the assignment of rights arising under contracts is permitted (y) or by which rights and liabilities under contracts devolve by agreement, called Novation (z), or by operation of law on death or bankruptcy (a) upon third parties strangers to the original contract, are apparent

(m) 23 Halsbury's Laws, 2nd Edn. 78, 117.

(n) *Op. cit.* 96. The question how far this right of rescission is lost in the case of executed contracts where the misrepresentation is not fraudulent is still open (*Spence v. Crawford*, [1939] 3 All E. R. 271).

(o) This is expressed in the phrase "restitutio in integrum." "But that does not mean that rescission will be refused wherever it would result in a loss to the party against whom it is claimed; the phrase means no more than that rescission will not be granted to one who has prejudiced the position of the other party by delay in exercising his right to repudiate the contract." See *Armstrong v. Jackson*, [1917] 2 K. B. 822; 20 Halsbury's Laws, 2nd Edn. 750.

(p) 23 Halsbury's Laws, 2nd Edn. 112.

(q) For a discussion of legality of motor insurance policies to indemnify the assured in respect of the consequences of his criminal acts, see chapter II, *post*, p. 107, and see *Tinline v. White Cross Insurance*, [1921] 3 K. B. 327; *James v. British General Insurance Co.*, [1927] 2 K. B. 311; cf. *Haseldine v. Hosken*, [1933] 1 K. B. 822.

(r) 7 Halsbury's Laws, 2nd Edn. 147-8. See *Gedge v. Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214; *Royal Exchange Assurance Corporation v. Sjöforsakrings Akt. Vega*, [1902] 2 K. B. 384; *Haseldine v. Hosken*, [1933] 1 K. B. 822; *Beresford v. Royal Insurance Co., Ltd.*, [1938] A. C. 586; [1938] 2 All E. R. 602.

(s) 7 Halsbury's Laws, 2nd Edn. 49-50.

(t) 7 Halsbury's Laws, 2nd Edn. 49-50.

(u) 7 Halsbury's Laws, 2nd Edn. 173-4. *Re National Benefit Assurance Co., Ltd.*, [1931] 1 Ch. 46.

(w) 7 Halsbury's Laws, 2nd Edn. 175-6. Also see *Refuge Assurance Co., Ltd. v. Kettlewell*, [1909] A. C. 243, and *Hughes v. Liverpool Victoria Legal Friendly Society*, [1916] 2 K. B. 482. In these two cases premiums paid on illegal insurances were held recoverable, proved fraud of the agent preventing the parties from being *in pari delicto*. Cf. *Harse v. Pearl Life Assurance Co.*, [1904] 1 K. B. 558.

(x) 7 Halsbury's Laws, 2nd Edn. 79. See Lord HALDANE in *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*, [1915] A. C. 847, at p. 853.

(y) 7 Halsbury's Laws, 2nd Edn. 302 *et seq.*

(z) *Op. cit.* 314.

(a) *Op. cit.* 311, 312.

rather than real exceptions to this principle. All these instances result in the substitution of a fresh person, in whole or part, for one of the parties to the old agreement. Legislation affecting motor insurance is exceptional in enabling strangers not parties to a contract of insurance in certain circumstances to claim rights under such contract (b).

9. A contract remains subsisting until it is discharged.—Contracts may be discharged in a variety of ways which may be conveniently summarised as by agreement, by performance, by breach, by impossibility of performance or by operation of law.

(i) A contract is discharged by agreement when it comes to an end by operation of its own terms (c) or when the parties mutually waive their respective rights and obligations thereunder (d) or when the parties enter into a new agreement in discharge of a subsisting contract (e).

(ii) The performance of the obligations arising under a contract by the parties in the time and manner agreed upon discharges a contract (f), as does attempted performance, called tender, by one party which is frustrated by the act of the other (g).

(iii) Where a party to a contract renounces his obligations thereunder either before (h) or during the time for their performance (i), or where by his own act he puts it out of his power and makes it impossible to carry out his obligations (j), then the other party is discharged from the contract by breach (k). Discharge by breach also takes place when a party to the contract fails either wholly or substantially to perform what he has promised (l).

(iv) Whereas initial impossibility (m), i.e. impossibility of performance existing at the time when an agreement is made, as where goods which have already been lost at sea are sold (n), prevents the coming into existence of a valid contract, impossibility arising subsequently, even though without the fault of either party, does not affect the contract or the rights of the parties thereto unless an intervening event or change of circumstances takes place so fundamental as to be regarded by the law as striking at the root of the contract and as entirely beyond what was

(b) The Third Parties (Rights against Insurers) Act, 1930 (23 Halsbury's Statutes 12); the Road Traffic Acts, 1930 and 1934 (23, 27 Halsbury's Statutes 607, 534). But see also the Workmen's Compensation Act, 1925, s. 7 (11 Halsbury's Statutes 533), and the Companies Act, 1948, s. 319.

(c) 7 Halsbury's Laws, 2nd Edn. 181-6.

(d) *Op. cit.* 204-5.

(e) *Op. cit.* 202.

(f) *Op. cit.* 187-96. See also *Pennill v. Harborne* (1848), 11 Q. B. 368; *Doe d. Muston v. Gladwin* (1845), 6 Q. B. 953; *Havens v. Middleton* (1853), 10 Hare, 641; *Parry v. Great Ship Co.* (1863), 4 B. & S. 556, as to contracts to insure, *Verelst's Administratrix v. Motor Union Insurance Co., Ltd.*, [1925] 2 K. B. 137, as to time of performance of motor insurance contract terms: see chapter VIII, *post*.

(g) 7 Halsbury's Laws, 2nd Edn. 197-201.

(h) *Op. cit.* 227. *Hochster v. De La Tour* (1853), 2 E. & B. 678.

(i) 7 Halsbury's Laws, 2nd Edn. 203. *Cort v. Ambergate, &c., Rail. Co.* (1851), 17 Q. B. 127.

(j) *Omnium d'Enterprises v. Sutherland*, [1919] 1 K. B. 618; *Ogdens, Ltd. v. Nelson*, [1905] A. C. 109.

(k) It is necessary in every case that such conduct by one party should be treated as a discharge by the other, since unless the other party treats the contract as discharged the contract will subsist despite the unilateral acts of one of the parties thereto.

(l) 7 Halsbury's Laws, 2nd Edn. 229, 230, notes (g) and (h). See chapter VIII, *post*.

(m) *Op. cit.* 208, note (a).

(n) *Ibid.* See also *Couturier v. Hastie* (1856), 5 H. L. Cas. 673.

contemplated by the parties when they entered into the agreement (o). Unless the parties, therefore, foresee and expressly provide against an event which may make the performance of their bargain impossible, the rule is that they will be held to their respective obligations if such an event occurs (p). To this general rule a class of apparent exceptions has been created in a series of judicial decisions, the result of which is that where subsequent impossibility arises in certain particular circumstances, as by change of law (q), death or illness of a party (r), or destruction of the basis of the contract (s), the parties will be discharged from liabilities accruing *after* the impossibility has arisen (t). The basis of these exceptions is that in certain circumstances the Courts will imply a term effecting discharge in such peculiar circumstances into the contract between the parties (u). The Law Reform (Frustrated Contracts) Act, 1943 (v), has now altered the common law rules (w) on the effect of frustration. By s. 2 (5), however, this Act does not operate to affect contracts of insurance.

(v) Operation of law discharges a contract in the following circumstances: where a written contract is intentionally altered by one party without the consent of the other (x), or by anyone while it is in that party's possession (x); when a bankrupt obtains his discharge he is discharged from all debts provable in the bankruptcy (xx).

10. A breach of contract always gives the injured party a right of action for damages (y).—Unless a party who has been injured by a breach allows his rights with respect to such breach to become statute barred by the passing of time (z), or agrees for consideration to waive such rights (a), he is entitled to sue the party in default for damages for breach of contract. In certain cases where damages would be inadequate to compensate the party for the loss which the breach has or will inflict upon him, the injured party may apply for a decree of specific performance, or

(o) *Re Arthur, Arthur v. Wynne* (1880), 14 Ch. D. 603; *Matthey v. Curling*, [1922] 2 A. C. 180; 7 Halsbury's Laws, 2nd Edn. 209, note (d). *Cricklewood Property and Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*, [1945] A. C. 221; [1945] 1 All E. R. 252.

(p) 7 Halsbury's Laws, 2nd Edn. 209, 210, and notes thereon.

(q) *Op. cit.* 218, 219.

(r) *Op. cit.* 217, notes (f) and (g), and cases therein cited.

(s) *Op. cit.* 213-15, and cases therein cited.

(t) *Op. cit.* 214, note (p). It is important to note that legal rights which have already accrued under the contract will not be affected.

(u) 7 Halsbury's Laws, 2nd Edn. 213-16, *passim*.

(v) 6 & 7 Geo. 6, c. 40.

(w) See *Cricklewood Property and Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.*, [1945] A. C. 221; [1945] 1 All E. R. 252; *Joseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corporation, Ltd.*, [1942] A. C. 154; [1941] 2 All E. R. 165; *Denny, Mott and Dickson, Ltd. v. Fraser (James B.) & Co., Ltd.*, [1944] A. C. 265; [1944] 1 All E. R. 678; *Eyre v. Johnson*, [1946] K. B. 481; [1946] 1 All E. R. 719; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A. C. 32; [1942] 2 All E. R. 122; *Pelepah Valley (Johore) Rubber Estates, Ltd. v. Sungei Besi Mines, Ltd.* (1944), 170 L. T. 338.

(x) 7 Halsbury's Laws, 2nd Edn. 205.

(xx) *Op. cit.* 226-7. As to effect of bankruptcy and liquidation upon the insolvent person's rights against insurers, see chapter III, *post*.

(y) *Op. cit.* 231.

(z) *Op. cit.* 259, and see more fully vol. 20, pp. 591 *et seq.*

(a) As, for example, by Accord and Satisfaction or by Release, both of which constitute new agreements whereby the injured party agrees for a consideration to waive his rights of action. 7 Halsbury's Laws, 2nd Edn. 234-44. And see *ibid.*, pp. 141-2, 235-6.

for an injunction to restrain the breach in question (b). These two remedies are not obtainable as of right, like damages, but are within the discretion of the Court and will not be granted unless the Court is satisfied that all the facts and circumstances of any particular case justify their being granted to the injured party (b).

Damages, on the other hand, are obtainable as of right by the injured party. The principle upon which damages are assessed in actions for breach of contract is that such sum is awarded as will compensate, as far as money can do it, the injured party for the loss and damage which he has sustained through the natural and ordinary consequences of the breach in question (c). In actions for breach of contract damages are compensatory, not punitive (d). Further, damages are limited to the loss inflicted on the injured party as the natural and ordinary consequence of the breach, and such loss as is due to special circumstances will not be recoverable as damages unless those special circumstances were within the contemplation of both parties to the contract at the time when it was entered into (e).

PART 2.—PRINCIPLES OF THE LAW OF ARBITRATION (f)

1. **General.**—The majority of motor insurance contracts contain arbitration clauses, *i.e.* clauses in which the assured and the insurers mutually agree that disputes between them arising under the policy shall be submitted for decision to an arbitrator. For this reason it has been considered necessary briefly to outline the principles which govern the validity, consequences and operation of arbitration clauses in contracts. The effect and application of the arbitration clause normally contained in an insurance policy is discussed more fully in chapter VIII.

Although a reference to arbitration can arise under the order of a Court (g) or by virtue of the provision of some statute (h), such references do not as a rule affect motor insurance contracts. It is with the third type of reference, the reference to arbitration by consent of the parties, that motor insurance contracts are particularly concerned. Inasmuch as a motor insurance contract is invariably in writing and all the terms thereof can as a rule be found incorporated in the actual policy, it will be with written agreements to submit disputes to arbitration that these introductory notes will be concerned. It is sufficient to say that an oral agreement to refer disputes to arbitration is valid at Common Law, although until an arbitrator has actually been appointed such agreement cannot be enforced (i). Written agreements to refer disputes to arbitration are governed by the provisions

(b) See fully 31 Halsbury's Laws, 2nd Edn. 325 *et seq.* and vol. 18, pp. 1 *et seq.* It may be noted here that a contract of personal service will never be made the subject of a decree of Specific Performance.

(c) 10 Halsbury's Laws, 2nd Edn. 93-4, 121. *Hadley v. Baxendale* (1854), 9 Exch. 341.

(d) There are some exceptional cases where damages are assessed upon the basis of punishing the party in default for his breach independently of the loss actually sustained by the injured party. The best known of these is the action for breach of promise of marriage. 10 Halsbury's Laws, 2nd Edn. 87-8.

(e) *Op. cit.* 97-102, and cases there cited. It is sometimes stated that this type of damages cannot be recovered unless the party in default had expressly agreed to compensate the injured party for additional loss arising out of these special circumstances, but this appears to go beyond the authorities.

(f) See 1 Halsbury's Laws, 2nd Edn. 619 *et seq.* See Russett on Arbitration, 13th Edn. *passim*. See more fully, in relation to Motor Insurance, chapter VIII, *post*.

(g) 1 Halsbury's Laws, 2nd Edn. 620, 682-4.

(h) *Op. cit.* 621, 685.

(i) *Op. cit.* 622, 623.

of the Arbitration Acts, 1889 and 1934, save in so far as their operation is expressly or necessarily by implication excluded by the agreement itself (*j*).

2. The submission.—Within the meaning of the Arbitration Acts the submission is the written agreement (or part of a longer written agreement) whereby the parties thereto undertake to submit their present or future differences to arbitration (*k*). Once entered into, a submission cannot be revoked unless by mutual consent or by the order of the Court (*l*). The submission is a valid one even though no arbitrator is named or designated therein (*m*). Leave to revoke a submission will not readily be granted (*n*). Generally leave will not be granted unless misconduct can be shown on the part of the arbitrator, or it appears that he is acting outside his jurisdiction, or is for some other reason clearly unfitted to act. Thus, if the arbitrator shows that he has obviously made up his mind before both sides are heard (*o*), or if there is good reason shown that he is directing himself wrongly in law (*p*), the submission may be revoked. But it will not be revoked merely because one of the parties has charged the arbitrator with fraud and the arbitrator may therefore be assumed to be prejudiced against him (*q*). If a charge of fraud is brought against a party to a submission, the Court may give leave to revoke the submission so far as may be necessary for the decision of that issue (*r*).

3. Scope of the submission.—Where the submission is part of a longer written agreement it will customarily bind the parties to submit all disputes arising between them under the agreement to the decision of an arbitrator. The parties cannot legally agree entirely to oust the jurisdiction of the Court over the agreement, and if they purport in their submission to do so such submission will be held bad, and will not be supported by the Court, on the ground that it is contrary to public policy (*s*). The basis of arbitration is in the agreement between the parties to choose a non-judicial tribunal to decide their disputes, but the principles of public policy upheld by the Courts prevent such agreement from altogether excluding their jurisdiction over the dispute referred (*t*). Hence it comes about that, in order to be valid and upheld by the Courts, arbitration clauses in motor insurance contracts are usually made in the so-called *Scott v. Avery* (*u*) form, the effect of which is to make arbitration upon a dispute a condition precedent to the right to bring an action in the Courts with respect thereto (*v*).

(*j*) Arbitration Act, 1889, ss. 2, 25, 27, Schedule I (1 Halsbury's Statutes 453, 465, 466). Arbitration Act, 1934 (27 Halsbury's Statutes 27). See chapter VIII, *post*, pp. 611 *et seq.*

(*k*) Arbitration Act, 1889, s. 27. *London Sack and Bag Co., Ltd. v. Dixon and Lugton, Ltd.*, [1943] 2 All E. R. 703.

(*l*) Arbitration Act, 1889, s. 1.

(*m*) *Ibid.*, s. 27, Schedule 1. See *Clements v. County of Devon Insurance Committee*, [1918] 1 K. B. 94.

(*n*) *Re Palmer & Co. and Hosken & Co.*, [1898] 1 Q. B. 131.

(*o*) *Jackson v. Barry Rail. Co.*, [1893] 1 Ch. 238.

(*p*) *Per LOPES, L. J.*, in *James v. James and Bendall* (1889), 23 Q. B. D. 12, 16.

(*q*) *Belcher v. Roedean School Site and Buildings, Ltd.* (1901), 85 L. T. 468.

(*r*) Arbitration Act, 1934, s. 14 (2) (27 Halsbury's Statutes 34). *Permax v. Royal Exchange* (1939), 64 Ll. L. R. 145.

(*s*) *Edwards v. Aberayron Mutual Ship Insurance Society* (1876), 1 Q. B. D. 563; Russell, 13th Edn., pp. 71-75, and see cases on insurance contracts therein collected at p. 109. 1 Halsbury's Laws, 2nd Edn. 628-9.

(*t*) *Ibid.* See more fully chapter VIII, *post*, pp. 611 *et seq.* on these points.

(*u*) (1856), 5 H. L. Cas. 811; see also cases cited in 1 Halsbury's Laws, 2nd Edn. 629, notes (*d*) and (*e*).

(*v*) *Ibid.* When a *Scott v. Avery* clause is contained in a contract of insurance the right of action which may be exercised after an award has been made is barred after six years from the time of the breach of the contract—Arbitration Act, 1934, s. 16,

4. Stay of action.—The qualified exclusion of the jurisdiction of the Courts which the parties are able to effect through agreeing to a *Scott v. Avery* (w) clause is reconciled with the broad principles of public policy by means of the power to stay proceedings vested in the Courts by virtue of the Arbitration Acts (x). When proceedings are commenced in Court (y) in respect of any matter agreed to be referred to arbitration by the party who has commenced the proceedings, the Court has power to stay such proceedings until an arbitration has taken place. The power to order a stay is discretionary (z). No stay will be ordered unless the defendant to the proceedings applies for it, and upon such application he will have to show that the dispute is covered by the arbitration clause, that he is ready and willing to submit the dispute to arbitration as agreed, and that he has not taken any positive step in the Court proceedings (a). In order to show that the dispute is covered by the arbitration clause the party applying for the stay must show that such clause or the agreement of which it is a part is still binding and effective in law (b). That is to say, where the question is whether the contract is void for illegality, or, being voidable, was avoided *ab initio* because induced by fraud or misrepresentation, or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction (c), and, as a rule, in such circumstances it will not. But where the contract contains a provision that in certain events it is not to be enforceable (e.g. a provision that any mis-statement or suppression in the proposal or declaration on which a policy of insurance is based should render the policy null and void), a claim by the insurer in reliance on that clause is an affirmation of the existence and validity of the contract, and the arbitration clause is therefore valid and subsisting (d).

(27 Halsbury's Statutes 34), reversing the decision in *Board of Trade v. Cayzer, Irvine & Co.*, [1927] A. C. 610.

(w) *Supra*, notes (k) and (l).

(x) Section 4. 1 Halsbury's Laws, 2nd Edn. 637-43. Formerly where an award was made a condition precedent the Courts would invariably grant a stay (see *post*, chapter VII), but now by s. 3 (4) of the 1934 Act they have power to dispense the condition.

(y) This applies to the bringing of a counterclaim (*Chappell v. North*, [1891] 2 Q. B. 252).

(z) 1 Halsbury's Laws, 2nd Edn. 642. Russell, 13th Edn., pp. 95-107.

(a) A positive step is something in the nature of an application to the Court, e.g. for leave to administer interrogatories (*Chappell v. North*, [1891] 2 Q. B. 252), for a stay pending security for costs (*Adams v. Catley* (1802), 66 L. T. 687; *Ochs v. Ochs Brothers*, [1909] 2 Ch. 121), or even attendance before a Master on the hearing of a summons, though no order is made (*Ives and Barker v. Willans*, [1804] 2 Ch. 478. But see *Pitchers, Ltd. v. Plaza (Queensbury), Ltd.*, [1940] 1 All E. R. 151). But it does not include correspondence between solicitors.

A County Court has jurisdiction to stay proceedings, and a party takes a step in the proceedings there if he appears at the trial by his solicitor and also for a non-suit on the ground that the action should have been referred to arbitration (*Dickens v. Spence*, [1908], *Times*, 13th April). 1 Halsbury's Laws, 2nd Edn. 638-40. Russell, *loc. cit.*, and p. 84. He is not bound to take active steps to proceed with the arbitration. See also *Moore v. Povey* (1940), 56 T. L. R. 564.

(b) See *Jureidini v. National British and Irish Millers Insurance Co., Ltd.*, [1915] A. C. 499; *Furey v. Eagle Star and British Dominions Insurance Co.* (1922), 56 I. L. T. 109. But see *Golding v. London and Edinburgh Insurance* (1932), 43 Ll. L. R. 487; *Stevens & Sons v. Timber and General Mutual Accident Insurance Association* (1933), 45 Ll. L. R. 43; *Freshwater v. Western Australian Assurance Co., Ltd.*, [1933] 1 K. B. 515; *Jones v. Birch Brothers, Ltd.*, [1933] 2 K. B. 597; and *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (1934), 49 Ll. L. R. 231; *Heyman v. Darwins, Ltd.*, [1942] A. C. 356; [1942] 1 All E. R. 337; *Woolf v. Collis Removal Service*, [1948] K. B. 11; [1947] 2 All E. R. 260.

(c) *Toller v. Law Accident Insurance Society, Ltd.* [1936] 2 All E. R. 952; *Heyman v. Darwins, Ltd.* (*supra*).

(d) *Woodall v. Pearl Assurance Co.*, [1919] 1 K. B. 593; *Heyman v. Darwins Ltd.*, [1942] A. C. 356; [1942] 1 All E. R. 337.

Where the conditions for a stay are satisfied, then, as a rule, the Court will order proceedings to be stayed, thus enforcing the submission to arbitration (e), but the Court can now (f) in any case refuse to order the stay (g), and in practice will often do so when the party applying is making charges of fraud or misconduct against the other party (h). The fact that an important question of law is likely to arise on which the arbitrator will probably consult the Court is a ground for refusing a stay (i), but it is not conclusive (k).

5. The Arbitrator.

(i) *Appointment*.—The parties to a submission may appoint as arbitrator any person whom they please, his competence being their own affair. Such a person is often designated in the submission by name or by description (l), or the reference may be to two or more arbitrators with or without an umpire or a power to appoint one. If no other mode of reference is provided, or if no arbitrator is specified, the reference will be to a simple arbitrator (m).

If the reference is to two arbitrators, the two must appoint an umpire immediately after they are themselves appointed (n), unless a contrary intention is expressed in the agreement. In commercial arbitrations, when the arbitrators differ and an umpire is called upon to act, the arbitrators no longer act in a judicial capacity and may advocate the cause of the party appointing them, and they may give evidence on behalf of their own cause (o).

Where the submission provides that the reference shall be to a single arbitrator, and the parties do not, after differences have arisen, concur in the appointment of an arbitrator, or if an appointed arbitrator refuses to act, or is incapable of acting, or dies, any party may serve the other with a written notice to appoint an arbitrator in turn seven clear days after the service of the notice.

If this notice is not complied with inside the stated time, the Court may, on application by the party who gave the notice, appoint an arbitrator with the same powers as if he had been appointed by the parties, unless the parties have agreed otherwise (p).

If one party fails to appoint an arbitrator under the agreement, or by way of substitution for an arbitrator whose appointment has failed to take effect by death or incapacity, then the other party, having served the notice

(e) *Dennehy v. Bellamy*, [1938] 2 All E. R. 262; 60 Ll. L. R. 269; and even where the plaintiff, being a poor person, indirectly suffered hardship by being unable to receive the benefit of the Poor Persons Rules (*Smith v. Pearl Assurance Co., Ltd.*, [1939] 1 All E. R. 95; 63 Ll. L. R. 1), see *post* p. 154.

(f) By s. 3 (4) of the Arbitration Act, 1934 (27 Halsbury's Statutes 30). Formerly this was doubtful. The practical results of this change are considered later where they arise and generally in chapter VIII.

(g) See note (a) above. Russell, 13th Edn., pp. 104-5.

(h) 1 Halsbury's Laws, 2nd Edn. 641. Russell, 13th Edn., pp. 109-11. See *Minifie v. Railway Passengers' Assurance Co.* (1881), 44 L. T. 552. But see chapter VIII and chapter IX, *post*. *Permaux v. Royal Exchange* (1939), 64 Ll. L. R. 145.

(i) *Clough v. County Live Stock Insurance Association, Ltd.* (1916), 85 L. J. K. B. 1185. *Montagu v. Provident Assurance Association* (1935), 51 Ll. L. R. 153.

(k) *Lock v. Army, Navy and General Assurance Association, Ltd.* (1915), 31 T. L. R. 297.

(l) The appointment may be set aside on the grounds of partiality (Arbitration Act, 1934, s. 14 (1) (27 Halsbury's Statutes 33)).

(m) Arbitration Act, 1889, ss. 2, 5, First Schedule (1 Halsbury's Statutes 453, 455, 466).

(n) Arbitration Act, 1934, s. 5 (27 Halsbury's Statutes 30). *Iossifoglou v. Coumantaros*, [1941] 1 K. B. 396.

(o) *Bourgeois v. Weddell & Co.*, [1924] 1 K. B. 539; *Vigers Brothers v. Allen* (1937), 58 Ll. L. R. 187.

(p) Arbitration Act, 1889, s. 5 (1 Halsbury's Statutes 455).

referred to above, may after seven clear days appoint his own arbitrator to act alone, and his award will be binding on both parties. The Court has power to set aside such an appointment (g).

(ii) *Powers and Duties.*

Powers.—The arbitrators or umpire have power :

(1) To administer oaths to the parties and witnesses appearing before them. Witnesses may be summoned by subpoena, and can be compelled to produce all books and documents in their possession, subject to the rules of evidence (r).

(2) To state any question of law arising in the course of the reference, or to state an award or any part of an award, in the form of a special case for the opinion of the Court (s).

(3) To make an interim award (t).

(4) To order specific performance of any contract not relating to land (u).

(5) To correct in an award any clerical mistake or error arising from any accidental slip or omission (v).

Duties.

(1) The main duty is to make an award upon the dispute, and upon the whole of the dispute submitted for decision. The award must not relate to matters outside those contained in the submission (w).

(2) The arbitrator must conduct the proceedings in a judicial manner (x), must preserve his impartiality (y) and must not misconduct himself (z). He must make his award within three months of his entering upon the reference, or within a properly extended period (a).

(3) He may not proceed with the hearing in the absence of one of the parties unless every reasonable opportunity has been given to him to attend, and in any case should give peremptory warning to the party in default that if he again fails to attend, the case will be heard in his absence (b).

(4) With regard to evidence, considerable latitude is allowed to arbitrators, so long as the general principles of justice are observed (c), but an arbitrator may not receive mere hearsay evidence which cannot be tested by cross-examination (d). Thus, he may not hear evidence from one party in the absence of the other (e), or hear evidence from witnesses in the absence of the parties (f). He may not call a witness

(g) Arbitration Act, 1889, s. 6 (*Vigers Brothers v. Mayer* (1938), 62 Ll. L. R. 35; *Rubin v. Smith (W.) & Co.* (1939), 64 Ll. L. R. 7).

(r) Arbitration Act, 1889, s. 18 and First Schedule (1 Halsbury's Statutes 462, 466).

(s) Arbitration Act, 1934, s. 9 (27 Halsbury's Statutes 32).

(t) Arbitration Act, 1934, s. 7.

(u) Arbitration Act, 1934, s. 7 (27 Halsbury's Statutes 31).

(v) Arbitration Act, 1889, s. 7 (1 Halsbury's Statutes 457).

(w) *Vigers Brothers v. Mayer* (1938), 62 Ll. L. R. 35; *Rubin v. Smith (W.) & Co.* (1939), 64 Ll. L. R. 7.

(x) 1 Halsbury's Laws, 2nd Edn. 652.

(y) Russell, 13th Edn., pp. 37-38.

(z) Arbitration Act, 1889, s. 11. 1 Halsbury's Laws, 2nd Edn. 677-81.

(a) Arbitration Act, 1889, s. 9 and Schedule I, *op. cit.* 654-6.

(b) *Gladwin v. Chilcote* (1841), 9 Dowl. 550.

(c) *Andrews v. Mitchell*, [1905] A. C. 78.

(d) *Re Keighley, Maxsted & Co. and Durant & Co.*, [1893] 1 Q. B. 405.

(e) *Ramsden (W.) & Co. v. Jacobs*, [1922] 1 K. B. 640.

(f) *Royal Commission on Sugar Supply v. Kwih Hoo Tong Trading Society* (1922), 38 T. L. R. 684.

without the consent of the parties (g), or prevent either party from calling all his witnesses (h).

(5) The arbitrator may entrust to a more skilled person the duty of framing his award in proper language (i), but he may not delegate the duty of making a decision to any other person, even to a co-arbitrator with technical knowledge, for the parties who have selected him are entitled to have his decision (j).

(6) His discretion to deal with costs must be exercised judicially, though he may award a lump sum, instead of ordering costs to be taxed in the normal way (k).

(iii) *Misconduct of Arbitrator*.—Misconduct of the arbitrator has under the Arbitration Acts a highly technical meaning, and may be a ground for either removal of the arbitrator by the Court (kk) or revoking a submission by the Court (l) or applying to set aside his award (m). The arbitrator may be removed by the Court where he is clearly unfitted for his task, or where he has failed to use all reasonable dispatch in entering in and proceeding with the reference and making an award (n).

He may also be removed for behaviour which implies moral blame, such as corruptly receiving gifts or hospitality (o), or fixing an excessive fee for himself in assessing the costs (p). These examples of misconduct may alternatively be made grounds for setting aside the award. A broad distinction is generally made between misconduct which implies some moral blame and irregularity. The remedy for the former is the setting aside of the award: for the latter, remission to the arbitrator for the irregularity to be remedied. Irregularities may be waived by the parties, but not breaches of natural justice.

6. Points of law arising in an arbitration.—Inasmuch as arbitration is a common method for the decision of important commercial disputes and that arbitrators are not always persons with legal knowledge or qualifications, it frequently happens that the parties to a reference, while perfectly willing to allow the questions of fact to be decided by the arbitrator, desire that any questions of law should be decided by those best fitted to deal with them, i.e. by the Courts. For this reason, as well as from the broad principles of public policy (q) which prevent the jurisdiction of the Court from being ousted even by agreement between the parties, the Arbitration Acts provide two methods whereby the decision of the Courts upon points of law arising in an arbitration may be obtained (r), and the Act of 1934 gives a new power.

(g) *Re Enoch and Zaretsky, Bock & Co.*, [1910] 1 K B 327.

(h) *Phipps v Ingram* (1835), 3 Dowl 669.

(i) *Baker v. Colterill* (1849), 7 Dow & L. 20

(j) *Little v. Newton* (1841), 2 Man. & G 351

(k) Arbitration Act, 1889, First Schedule (1 Halsbury's Statutes 466). *Stotesbury v Turner*, [1943] K. B. 370; *Rosen (P.) & Co., Ltd. v. Dowley and Selby*, [1943] 2 All E. R. 172.

(kk) Arbitration Act, 1889, s. 11 (1) (1 Halsbury's Statutes 459).

(l) Arbitration Act, 1889, s. 11 (1).

(m) Arbitration Act, 1889, s. 11 (2).

(n) Arbitration Act, 1934, s. 6 (27 Halsbury's Statutes 31)

(o) *Re Hopper* (1867), L. R. 2 Q. B. 367. But not on mere suspicion of corruption (*Crossley v. Clay* (1848), 5 C. B. 581).

(p) *Re Prebble and Robinson*, [1892] 2 Q. B. 602.

(q) *Idem*, p. 10.

(r) Arbitration Act, 1934, s. 9 (27 Halsbury's Statutes 32), substituted for ss. 7 and 19 of the 1889 Act.

(i) *Stating a special case for the opinion of the Court (s).*—A party to proceedings the subject of a reference may at any time during the reference and before the award apply to the arbitrator to state a special case for the opinion of the Court upon any question of law arising in the arbitration. If the arbitrator declines to do so, the party applying may go to the Court and apply for an order to compel the arbitrator to state such a case. The Court will then in its discretion order the case to be stated, provided that the question is material to the matter in dispute (t). A clause in a submission by which the right of the parties to apply for a special case is excluded is invalid and unenforceable as being against public policy (u).

(ii) *Stating an award in the form of a special case (v).*—The arbitrator may, in his discretion, state his award or part thereof in the form of a special case for the opinion of the Court. The Court can order an arbitrator to do this should he decline (w). Where the arbitrator follows this course he first sets out his findings on the facts in dispute and then the questions of law which have arisen and upon which the views of the Court are desired (x).

(iii) *Interim award.*—By the Act of 1934 the arbitrator is given power to make an interim award (y).

7. Enforcement of the award (z).—As a submission governed by the Arbitration Act has the effect of an order of the Court (a), a summary method has been provided for the enforcement of such an award (b) which has rendered obsolete the old Common Law means of enforcement of an award by bringing a new action based upon it (c). The method provided is to proceed by way of summons before a Master of the High Court for leave to enforce the award as a judgment (d). When such is obtained the award takes effect as a judgment and may be entered and enforced as such.

8. Attacking an award.—Once the arbitrator has made his award he is *functus officio* (e) and cannot vary or alter it except under the special power which he enjoys by virtue of the Arbitration Act to correct clerical

(s) Arbitration Act, 1934, s. 9 (27 Halsbury's Statutes 32) replaces s. 19 of the 1889 Act, which is repealed, without substantial change.

(t) *Seem*: see note (s), *supra*. Russell, 13th Edn., p. 277.

(u) See *Re Reinhold and Hansloh* (1896), 12 T. L. R. 422; *Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K. B. 478.

(v) Arbitration Act, 1889, s. 7 (b) (1 Halsbury's Statutes 457), which made this discretionary, is repealed by the 1934 Act, s. 9 of which makes this method enforceable by the Court. 1 Halsbury's Laws, 2nd Edn. 660-1. Russell, 13th Edn., pp. 284-9.

(w) *Re Montgomery, Jones & Co. and Liebenthal & Co.* (1898), 78 L. T. 406.

(x) 1 Halsbury's Laws, 2nd Edn. 660-1, and see Russell, *loc. cit.*

(y) By s. 7. This is of little practical importance in motor insurance.

(z) Arbitration Act, 1889, s. 12 (1 Halsbury's Statutes 461); Arbitration Act, 1934, s. 10 (27 Halsbury's Statutes 32).

(a) *Ibid.*, s. 1.

(b) *Ibid.*, s. 12. Russell, 13th Edn., pp. 237-45.

(c) 1 Halsbury's Laws, 2nd Edn. 671. Russell, *loc. cit.*, pp. 244-51. The method of action is still necessary to enforce some awards obtained abroad. But the scope of these has been much diminished by the effect of Arbitration (Foreign Awards) Act, 1930 (23 Halsbury's Statutes 4), under which the bulk of foreign awards in commercial disputes become enforceable in the same manner as English awards. There is also the method of attachment (1 Halsbury's Laws, 2nd Edn. 670-1), which, however, is inapplicable to awards for the payment of money and which is rarely relevant to awards under insurance contract submissions.

(d) See note (b), *supra*. See also Arbitration Act, 1934, s. 10 (27 Halsbury's Statutes 32).

(e) 1 Halsbury's Laws, 2nd Edn. 665-6. Russell, 13th Edn., p. 163.

errors or mistakes (*f*). The Court, however, has powers to remit or set aside an award, and it is by reference to these powers that the parties to a submission may in certain circumstances seek to attack or upset an award (*g*). Either of these powers can be set in motion by application to the Court, which will not, however, give any relief unless a very strong case is made out for remission or setting aside (*h*). The Court may remit an award for reconsideration where there is a patent defect such as an ambiguity in the award, or where the arbitrator has made an admitted mistake, or where fresh evidence has been obtained since the award (*i*). An award will not be set aside unless it has been procured by improper means, such as deception of the arbitrator, or the arbitrator has seriously misconducted himself (*j*). The principle which is always borne in mind in the exercise of this jurisdiction is that parties who have agreed in the submission to have their disputes decided by arbitration are bound by their choice, and the result of the arbitration is binding upon them unless they can show good reason why it should not be (*k*).

PART 3.—PRINCIPLES AFFECTING LIABILITY FROM THE USE OF MOTOR VEHICLES

I.—LIABILITIES FOR WRONGFUL ACTS

Before a person can be made liable to pay compensation for injuries and damage which have been caused by his actions it is necessary that the person damaged or injured should be able to establish that he has some cause of action against the party responsible. Causes of action are, broadly speaking, of two types, the first consisting of actions for wrongs which were known to the Common Law, and the second being actions for breaches of duties laid down by statutes.

(A) *Common Law Torts*

1. Negligence.

The great majority of running-down actions are brought under this head. It is necessary, therefore, to consider in some detail this comparatively modern tort.

The recognition of negligence as a separate and specific tort in certain well-known cases (*l*) involves comprehension of an objective negligent act. Carelessness of mind may or may not exist as a concept, but since the proof of it by evidence in a Court of law is impossible, negligence can only be defined in relation to specific acts or omissions.

In relation to highway wrongs in particular, an objective standard of behaviour has been laid down irrespective of the subjective qualities of the

(*f*) Arbitration Act, 1889, s. 7 (1 Halsbury's Statutes 457).

(*g*) *Ibid.*, ss. 10, 11.

(*h*) *Ibid.*, ss. 10, 11. See 1 Halsbury's Laws, 2nd Edn. 674–81. Russell, 13th Edn., pp. 144–71, 206–7, and cases therein cited.

(*i*) See note (*h*), *supra*, and 1 Halsbury's Laws, 2nd Edn. 675–6. *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590.

(*j*) See note (*h*) above and 1 Halsbury's Laws, 2nd Edn. 677–81. See Arbitration Act, 1934 (27 Halsbury's Statutes 27), s. 14 (*a*), for additional powers of Court in connection with misconduct.

(*k*) See note (*h*) above. See *Gowar v. Hales*, [1928] 1 K. B. 191, and the remarks of SCRUTTON, L.J., at p. 199, and *Heyman v. Darwines*, [1942] A. C. 356; [1942] 1 All E. R. 337.

(*l*) See Salmond on Torts, 10th Edn., p. 428.

individual wrongdoer (*m*). In general, negligence consists in this objective sense in

- " the omission to do something which a reasonable man, guided upon those
- " considerations which regulate the conduct of human affairs, would do or
- " doing something which a reasonable or prudent man would not do " (*n*).

Negligence consists of a breach of duty to take care. A cause of action for negligence cannot arise unless damage has resulted to a person from the breach by another of a legal duty owed by him to the person injured (*o*).

It is seen that in order to succeed in his action for negligence the plaintiff must prove three things : first, that the defendant had in the circumstances a duty to take care, and that that duty was owed by him to the plaintiff ; secondly, that there was in this instance a breach of that duty : and thirdly that, as a result of that breach, damage was suffered by the plaintiff to his person or to his property. Each one of these essentials to the cause of action is considered in turn.

(i) *The Duty of Care*.—There is no negligence unless there is in the particular case a legal duty to take care, and this duty must be one which is owed to the plaintiff in particular. The mere fact that a man is injured by another's act in itself gives no cause of action : if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is not infringing a legal right : if the act is inadvertent, again no case of actionable negligence will arise unless the duty to be careful exists (*p*).

Although it is usually easier to see whether a duty of care exists in the circumstances of a particular road accident than in other cases, it is not possible to lay down any short definition of the class of persons to whom the duty is owed.

Lord ATKIN in *Donoghue v. Stevenson* (*q*) gives useful guidance in these words :

- " Acts or omissions which any moral code would censure cannot in a
- " practical world be treated so as to give a right to every person injured by
- " them a right to relief. In this way, rules of law arise which limit the range
- " of complainants and the extent of their remedy. The rule that you are
- " to love your neighbour as yourself becomes in law ' You must not injure
- " ' your neighbour ' , and the lawyer's question ' Who is my neighbour ? ' "
- " receives a restricted reply. You must take reasonable care to avoid acts
- " or omissions which you can reasonably foresee would be likely to injure
- " your neighbour. Who, then, in law, is my neighbour ? The answer seems
- " to be persons who are so closely and directly affected by my act that I
- " ought reasonably to have them in contemplation as being so affected when
- " I am directing my mind to the acts or omissions which are called in
- " question " (*r*).

(*m*) E.g. by the Highway Code.

(*n*) *Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 781, *per* Baron ALDERSON, at p. 784.

(*o*) *Thomas v. Quartermaine* (1887), 18 Q. B. D. 685 ; *Heaven v. Pender* (1883), 11 Q. B. D. 503 ; *Lochgelly Iron and Coal Co., Ltd. v. M' Mullan*, [1934] A. C. 1, *per* Lord WRIGHT, at p. 25 ; *Donoghue v. Stevenson*, [1932] A. C. 562. *per* Lord ATKIN, at pp. 579-80.

(*p*) *Per* Lord WRIGHT in *Grant v. Australian Knitting Mills, Ltd.*, [1936] A. C. 85, at p. 103 : *cf.* *Farrugia v. Great Western Rail. Co.*, [1947] 2 All E. R. 565.

(*q*) [1932] A. C. 562, at pp. 579-80.

(*r*) This statement, which, like all statements on negligence, cannot be regarded as a comprehensive definition, was used to define the duty of care in two special cases, that of a man who causes another to drive a motor vehicle in a dangerous condition (*Malfrout v. Noxal, Ltd.* (1935), 51 T. L. R. 551), and of a man injured in performing a moral duty of saving a child's life from a runaway horse (*Haynes v. Harwood*, [1934] 2 K. B. 240). And see *Herschtal v. Stewart and Arden, Ltd.*, [1940] 1 K. B. 155 ; [1939] 4 All E. R. 123.

It is clear that in a practical world there must be some limitation of the class of a motorist's "neighbours" in this sense. On the other hand, once that class is defined it does not follow that care which they are entitled to expect from the motorist is constant. Thus to drive through a roadway crowded with pedestrians at 30 miles per hour is not a reasonable thing to do, and indeed it would clearly be within the contemplation of a motorist that such a speed would be likely to injure persons. But to drive at a speed of 60 m.p.h. on an arterial road may well be a proper user of the road—indeed the arterial roads are designed for these higher speeds—and to injure a pedestrian on such a road who suddenly and without warning runs in front of a car being driven at that speed is clearly not an injury against which the normal motorist is required to guard. The railway companies, by analogy, have suffered accidents to their trains which could have been avoided had the trains been travelling at a much slower rate. But the practical loss to the country of a slowing down of the trains cannot be accepted, and the speeds at which trains are made to travel are not regarded in themselves as dangerous in the circumstances, and in themselves evidence of negligence.

The duty of care required of a motorist (*s*) is defined by the Courts and its extent will depend entirely upon the circumstances in which the injury or damage was suffered (*ss*). Among the relevant circumstances will be considered the nature of the thing causing the damage (*t*), the place of the accident (*u*), the physical conditions prevailing at the time (*v*), the skill and conduct of the person in default (*w*) and the conduct of third parties (*x*).

Since the standard of care required of all users of the highway is objective, it follows that in the determination whether a duty of care exists or no, no regard will be had to peculiar characteristics or infirmities of the person injured which the driver could not reasonably have been expected to notice and guard against.

"A blind or deaf man who crosses the traffic on a busy street cannot
"complain if he is run over by a careful driver who does not know of and
"could not be expected to observe and guard against the man's
"infirmity" (*y*).

Once, however, the breach of the duty to take care has been established, the fact that owing to his personal idiosyncracies the injured party has suffered damage much greater than could reasonably be expected is a matter that must be disregarded in assessing the compensation payable.

But in assessing the extent of the duty of care to other road users the "foreseeability" test is normally applied. This principle is bounded by the range of normal expectancy and reasonable foresight, and the mere

(*s*) The term "motorist" is used to describe the person responsible in law, who may be the driver, owner, hirer, or other operator.

(*ss*) Breach of the Highway Code does not of itself create liability, but may be cogent evidence of negligence. See s. 45 (4) of the Road Traffic Act, 1930 (23 Halsbury's Statutes 636); *Swadling v. Cooper*, [1931] A. C. 1; *Tidy v. Battman*, [1934] 1 K. B. 319; *Daborn v. Bath Tramways Motor Co., Ltd. and Trevor Smithy*, [1946] 2 All E. R. 333.
(*t*) *Scott v. Shepherd* (1773), 2 Wm. Bl. 892; *Vaughan v. Menlove* (1837), 3 Bing. (N.C.) 468; *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392; *Dominion Natural Gas Co. v. Collins and Perkins*, [1909] A. C. 640; *Wing v. London General Omnibus Co.*, [1909] 2 K. B. 652.

(*u*) *Degg v. Midland Rail. Co.* (1857), 1 H. & N. 773; *Le Lievre v. Gould*, [1893] 1 Q. B. 491.

(*v*) *Penny v. Wimbledon Urban Council*, [1899] 2 Q. B. 72; *Morrison v. Sheffield Corporation*, [1917] 2 K. B. 866.

(*w*) *Kimber v. Gas, Light and Coke Co.*, [1918] 1 K. B. 439.

(*x*) *British Columbia Electric Rail. Co., Ltd. v. Loach*, [1916] 1 A. C. 719. Cf. *Cobb v. Great Western Rail. Co.*, [1894] A. C. 419; *Ruoff v. Long & Co.*, [1916] 1 K. B. 148.

(*y*) *Hay (or Bourhill) v. Young*, [1943] A. C. 92, at pp. 109-10, per Lord Wright.

accidental and unknown presence of a person in the same street as, and somewhere within earshot of, the occurring of an accident in mid-carriageway does not *per se* create any relationship of duty raising liability. Where a woman heard the noise of an accident 50 yards away but did not see it, and was not in the driver's line of vision, it was held that the driver owed no duty to her since he could not be held to have reasonably foreseen that she, placed as she was, could be affected by his negligent act (z). The Court of Appeal in *Owens v. Liverpool Corporation* (a) affirmed a jury's award of damages to some mourners who saw a hearse containing the relative's body overturned by a negligently driven car and suffered mental shock thereby, but it was made clear that the existence of a duty of care in such a case was to be doubted, and in *Hay (or Bourhill) v. Young* (z) the existence of a duty of care to such persons was expressly disapproved.

While the driver of a motor vehicle is entitled to assume, as a rule, that other users of the highway are capable of complying with the standard of common sense required of them, he has a special duty of care towards children who are not old enough to appreciate the dangers which beset them (b).

In two cases the duty of care required of a motorist has been derived from different sources, and defined in a different series of cases. Where passengers are carried gratuitously, the driver of the vehicle is under a duty to exercise reasonable skill and care to avoid doing them injury (c), but a person who asks for and is given a gratuitous ride takes the vehicle as he finds it, and is only entitled to warning of a danger of which the driver is aware, or of which he ought to be aware (d).

Secondly, where passengers are carried by a "common carrier," there is a duty laid on the carrier to take reasonable care to carry them safely (e). The extent of this duty may be limited by the terms of the contract between passengers and carrier (f), but if there is no such limitation the duty is a high one. A carriage must be supplied for the carriage of passengers as fit as normal skill and care can make it, and if the accident is due to the breakdown of the carriage, or to some mechanical fault therein, the onus is on the carrier to show that the breakdown could not have been prevented by the exercise of that care or skill (g). The carrier must adopt the best known apparatus, kept in perfect order, and worked without negligence by the men employed. A breach of these obligations will render him liable in negligence. But if he performs them, he will not be liable for an accident to his passengers which cannot in a business sense be prevented by any known means (h). He does not, however, unlike a common carrier of goods (i), warrant the safety of

(z) *Hay (or Bourhill) v. Young*, [1943] A. C. 92, (H. L.) (Sc.). See also *Turner v. Bean's Express, Ltd.*, [1946] 1 All E. R. 202, where employers were held to be under no duty to foresee that their driver would allow an unauthorised passenger to travel in their van, and therefore owed that trespassing passenger no duty of care.

(a) [1939] 1 K. B. 394; [1938] 4 All E. R. 727.

(b) See the succeeding section on Contributory Negligence.

(c) *Harris v. Perry & Co.*, [1903] 2 K. B. 219; *Samson v. Aitchison*, [1912] A. C. 844; *Pratt v. Patrick*, [1924] 1 K. B. 488; *Hallwell v. Venables* (1930), 99 L. J. K. B. 352; *Lewys v. Burnett and Dunbar*, [1945] 2 All E. R. 555.

(d) *Haseldine v. Daw & Son, Ltd.*, [1941] 2 K. B. 343; [1941] 3 All E. R. 156; *Kelly v. Metropolitan Rail. Co.*, [1895] 1 Q. B. 994; *Fosbrooke-Hobbes v. Airwork, Ltd. and British-American Air Services, Ltd.*, [1937] 1 All E. R. 108.

(e) *Radley v. London Passenger Transport Board*, [1942] 1 All E. R. 433; *Brookes v. London Passenger Transport Board*, [1947] 1 All E. R. 506.

(f) See section on Concurrence of Breach of Contract and Tort, *post*, p. 66.

(g) *Hyman v. Nye* (1881), 6 Q. B. D. 685, at pp. 687-8, *per* LINDLEY, J. Cf. *White v. Steadman*, [1913] 3 K. B. 340; *Barkway v. South Wales Transport Corporation*, [1948] 2 All E. R. 460, C. A.

(h) *Newberry v. Bristol Tramways and Carriage Co., Ltd.* (1912), 107 L. T. 801.

(i) *Coggs v. Bernard* (1703), 2 Ld. Raym. 909.

his passengers, and in the absence of negligence as defined above he will not be liable (j).

Lastly, in recent years persons injured by a motor vehicle on the road have sometimes sought to obtain damages from the manufacturer or repairer of that vehicle, on the ground that the accident was caused by a defect in the mechanism of the vehicle for which the manufacturer or repairer was in law responsible. Such actions have so far failed when the plaintiff has alleged that the manufacturer was guilty of a breach of statutory duty (jj). Nevertheless the manufacturer or repairer may be liable in an action for negligence where it is shown that the accident was caused by a defect of the mechanism for which he was responsible (k), and of which the motorist could not have been aware and which he had no duty to remedy. The duty of care in the manufacturer or repairer towards such injured third parties may exist where such conditions arise and where, too, it is shown that the manufacturer or repairer can be said to foresee that there would be no reasonable probability of the motorist, or any other person, conducting such an intermediate examination of the vehicle that the existence of the defect would become apparent to him, and should therefore be remedied (kk).

(ii) *The Standard of Care*.—It is the duty of the Court to assess in any particular case whether on the facts the required standard of careful driving has been observed. It is not sufficient that the defendant has acted in good faith to the best of his judgment and belief, and has used as much care as he himself believed to be required of him in the circumstances. The question in every case is not whether the defendant, however honestly, thought his conduct sufficiently careful, but whether in fact it attained to the standard of due care required by the law (l). Nor are different degrees of negligence recognised. If the duty of care is found to exist, and that it has been broken, it matters not that there has only been a slight dereliction of duty. Indeed, however gross the carelessness of the driver, if he owes no legal duty to the injured third party, he is not liable to him (m). The sole standard required of the motorist is the care that would be shown by a reasonable man of fair or average skill and experience of driving the type of vehicle concerned.

In recent years various Acts and regulations governing the conduct of traffic on the highway have been enacted, traffic lights and pedestrian crossings have been introduced, and the construction and use of motor vehicles has been defined and limited (n). These Acts and regulations do

(j) *Readhead v. Midland Rail. Co.* (1860), L. R. 4 Q. B. 370.

(jj) *Badham v. Lambs, Ltd.*, [1946] K. B. 45; [1945] 1 All E. R. 295. In this case it was decided that a breach of the Motor Vehicles (Construction and Use) Regulations, r. 41, did not give rise in itself to a civil action. See *post*, p. 35.

(k) In the sense that he caused it, or was under a duty to remedy it, and could foresee that such a defect in the vehicle would be likely to cause an accident.

(kk) *Malfrut v. Noxall* (1935), 51 T. L. R. 551; *Haseldine v. Daw & Son, Ltd.*, [1941] 2 K. B. 343; [1941] 3 All E. R. 156; *Hay (or Bourhill) v. Young*, [1943] A. C. 92; [1942] 2 All E. R. 396 (H. L.) (Sc.); cf. *Donoghue v. Stevenson*, [1932] A. C. 562; *Grant v. Australian Knitting Mills, Ltd.*, [1936] A. C. 85; *Stennell v. Hancock and Peters*, [1939] 2 All E. R. 578; *Herschall v. Stewart and Arden, Ltd.*, [1940] 1 K. B. 155; [1939] 4 All E. R. 123.

(l) *Vaughan v. Menlove* (1837), 3 Bing (N.C.) 468.

(m) *Haseldine v. Daw & Son, Ltd.*, [1941] 2 K. B. 343, at p. 369, *per* CLAUSON, L.J.; *Hay (or Bourhill) v. Young*, [1943] A. C. 92; [1942] 2 All E. R. 396 (H. L.) (Sc.).

(n) Highway Code (1946 Edn.). Road Traffic Act, 1930, ss. 10–15, s. 28 (23 Halsbury's Statutes 619–622, 632). Road Vehicles Lighting Regulations, 1936 (S. R. & O., No. 392). Motor Vehicles (Construction and Use) Regulations, 1947 (S. R. & O., No. 61). Traffic Signs (Size, Colour and Type) Provisional Regulations, 1933 *et seq.* Pedestrian Crossing Places (Traffic) Regulations, 1941 (S. R. & O., No. 397), as amended by Road Vehicles (Pedestrian Crossing Places) Order (No. 2) 1942 (S. R. & O., 1942, No. 854).

not in themselves provide any standard, and it would be a hopeless task to try to give examples of the standard of care required of road users. The almost stereotyped particulars of negligence normally pleaded in a plaintiff's statement of claim—driving at an excessive speed, failing to keep a proper lookout, failing to give any warning of approach or of turning, failing to have the vehicle under proper control, driving on the wrong side of the road—are all general in their wording, and it is on the facts, and the facts alone, of each particular accident that the negligence of the persons concerned is established. It should never be forgotten that a principle of law cannot be deduced from the special facts of previous running down cases. For instance, the "rule" that a motorist must drive at night "within his lights," *i.e.* that he should be able to pull up to a stop should anything suddenly appear in the range of the headlamps, is no rule, and if a driver at night runs into an object or a person because he could not pull up after he first saw the obstacle, then the facts must be examined to see whether in truth he was negligent, and an injured plaintiff may well fail to prove that allegation (o).

(iii) *The Proof of Negligence*.—It is for the plaintiff to prove that the defendant was guilty of negligence and that that negligence was the cause of his injuries or damage. The sort of damage for which compensation may be recovered is considered in a later section (p). Here it is necessary to point out that the defendant's negligent act which caused the damage must be proved in evidence as a reasonable probability and beyond mere conjecture (q). The difficulty of providing sufficient evidence for this purpose is not always apparent (r). For instance, a passenger standing on the step of an omnibus preparatory to alighting is thrown into the road when the omnibus brakes violently, owing to the sudden appearance of a second vehicle which "cuts in" ahead of the omnibus. The case seems simple. The plaintiff passenger sues the omnibus driver or his master, and the driver of the second car. One or both of them is clearly negligent. But if the driver of the second vehicle does not stop, but disappears unidentified? The plaintiff has only the one recourse against the omnibus driver, who declares that the second driver is the sole cause of the accident. It may be that the bus driver did only what he was forced to do in the circumstances and that therefore the onus of proof of negligence against that driver will not be discharged by the plaintiff (s). The weight of evidence required of the plaintiff must be such that reasonable men, leaving out of account any evidence produced by the defendant to the contrary, might come to the conclusion that the accident was caused by the defendant's negligence. This conclusion must be based on proper legal inference rather than on pure conjecture. If this conclusion cannot be reached on the evidence adduced,

(o) *Swadling v. Cooper*, [1931] A. C. 1; *Tidy v. Baltman*, [1934] 1 K. B. 319; *Cowan v. Robertson*, [1941] S. C. 502; *Franklin v. Bristol Tramways and Carriage Co., Ltd.*, [1941] 1 K. B. 255; [1941] 1 All E. R. 188; *Sparks v. Ask (Edward), Ltd.*, [1943] K. B. 223; [1943] 1 All E. R. 1; *Morris v. Luton Corporation*, [1946] K. B. 114; [1946] 1 All E. R. 1.

(p) *Post*, p. 60.

(q) *Jones v. Great Western Rail. Co.* (1930), 144 L. T. 194.

(r) In cases of fatal accidents, it is sometimes possible to obtain a written statement from a witness of the accident who later dies. The provisions of the Evidence Act, 1938 (s. 1), may make this document evidence at trial though such statements made by drivers to police witnesses in anticipation of proceedings being taken, are normally excluded by the Act, s. 1 (3). See *Bullock v. Borrett*, [1939] 1 All E. R. 505, and *Robinson v. Stern*, [1939] 2 K. B. 290; [1939] 2 All E. R. 683. In certain instances, too, interrogations may be administered to obtain admissions (*Griebart v. Morris*, [1920] 1 K. B. 659).

(s) Under the terms of the M.I.B. agreements (see chapter VI, *post*) the plaintiff is under a duty to bring in as defendants all those who are responsible for the damage caused.

the Court may well refuse to continue the trial, and must do so if it thinks that no reasonable jury (*t*) could think that negligence had been proved (*u*).

The distinction between the function of the judge and jury in this respect is defined in *Metropolitan Rail. Co. v. Jackson* (*v*): it is the function of the judge to rule whether on the evidence of the plaintiff alone the negligence of the defendant *may be* inferred. It is for the Court, having heard all the evidence on both sides, to say whether this negligence *ought to be* inferred.

(iv) *Inevitable Accident. Act of God.*—The onus of proof thus resting on the plaintiff is not discharged if it is shown that the defendant acted as a reasonable man, and that the accident happened in such a way that no reasonable man could foresee it. If therefore it appears that the defendant's vehicle skidded on a greasy road through no fault of his own, and that he could do nothing to avoid the consequences which followed, the injury resulting will be held to be due to inevitable or unavoidable accident (*w*).

This result is an illustration of the general principle that although a motor vehicle is a danger if not properly controlled, and a high standard of care is required of the motorist, yet for that very reason the perils of travelling on the roads are well known to all users of them to exist, and some risk is involved in using them at all. In the absence of negligence, therefore, it is reasonable that the defendant should be freed from blame and liability. In another example, where the braking or steering system of the car suddenly fails owing to a flaw in a metal part, and no reasonable inspection of the system would have revealed that defect, the motorist can claim immunity from damage resulting from his failure to pull the car to a standstill in time or to direct its course properly. It may be that he and anyone else who permits the vehicle to be used on the road may be guilty of a breach of statutory duty (*x*), but in the absence of negligence, and negligence in this context means the failure to take reasonable precautions (*y*), he will not be liable in a civil action for the consequences of that defect. To revert to the skidding car, however, if he causes that skid by a sudden application of brakes (*z*), or if he has, after the skid has started, a reasonable opportunity to bring the car under control and fails to do so, then his lack of skill and care may well result in his being found guilty of negligence (*a*). In most cases of a skidding car, however, it will be necessary as a matter of proof that the defendant should call evidence as to the origin of the skid, and it will then be for the jury to decide whether, on the evidence adduced, the skid was started by

(*t*) It is unlikely that juries will ever be employed again to try motor accident claims, save in most exceptional cases, but the judge must function as a jury, and by legal fiction acting as judge must give directions to himself as if he were a jury.

(*u*) Where a submission that there is no case to answer is made by counsel for the defendant, the judge may not concur in that submission unless counsel for the defendant rests on his submission and calls no evidence (*Laurie v. Raglan Building Co., Ltd.*, [1942] 1 K. B. 152; [1941] 3 All E. R. 332; *Yuill v. Yuill*, [1945] P. 15; [1945] 1 All E. R. 183).

(*v*) (1877), 3 App. Cas. 193, *per* Lord Cairns. But see Brett, J., in *Bridges v. North London Rail. Co.* (1874), L. R. 7 H. L. 213, at pp. 233–6.

(*w*) *Wing v. London General Omnibus Co.*, [1909] 2 K. B. 652.

(*x*) Motor Vehicles (Construction and Use) Regulations, 1947 (S. R. & O., No. 670), Reg. 68. The wording of these regulations is such that the impossibility of discovering the defect by all normal methods is no defence, but will, of course, be taken into account in the assessment of the penalty. It should be noted that a conviction under these regulations is not necessarily evidence of negligence in a civil action. Cf. *Clark v. Brims*, [1947] K. B. 497; [1947] 1 All E. R. 242.

(*y*) Inability to replace a suspected part of the mechanism of the car owing to shortage of materials would seem to be no excuse.

(*z*) *Liffen v. Watson* (1939), 161 L. T. 351; but see *Halliwell v. Venables* (1930), 99 L. J. K. B. 352.

(*a*) *Hinton v. Gilchrist* (1930), *Times*, 8th March.

circumstances outside the control of the defendant, and could not have been stopped by the exercise of reasonable skill and care on his part (b). In many if not most cases a skid will not excuse an accident. It may be caused by bad driving, or too great a speed, and the onus is on the defendant to prove that the skid was not brought about by one of these causes (c). Of the same species as the defence of inevitable accident, but rarer because of its definition, the plea of Act of God may sometimes enable the defendant to escape liability for an act which would otherwise appear negligent. The definition of an Act of God was given in *Nugent v. Smith* (d) as follows:

"The defendant is not liable for any accident as to which he can show
"that it is due to natural causes directly and exclusively without human
"intervention and that it could not have been prevented by any amount
"of foresight and pains and care reasonably to have been expected of him" (e).

So lightning striking a car, rendering it uncontrollable, would be a good example of an Act of God (f).

(v) *Res Ipsa Loquitur*.—In certain cases it might constitute hardship on a plaintiff were he required to establish exactly how the breach of a duty of care had occurred. Such a case arises when, for example, a motor car left stationary in a street suddenly starts to move by itself (g), or when a motor vehicle mounts the footway (h). In this class of case the injured party is relieved from the responsibility of proving the exact form of the breach of duty. He will satisfy the requirement of proof resting upon him if he proves the duty resting upon the defendant, the damage resulting from a breach of that duty, and the circumstances but not the manner in which the duty was broken (i). These cases are known as those to which the doctrine of *res ipsa loquitur* applies, and in them the burden of explaining the causes of the accident is placed upon the defendant and of showing that it occurred without fault on his part (k).

"There must be reasonable evidence of negligence, but where the thing
"is shown to be under the management of the defendant or his servants and
"the accident is such as in the ordinary course of things does not happen if
"those who have the management use proper care, it affords reasonable
"evidence, in the absence of explanation by the defendant, that the accident
"arose through want of care" (l).

(b) *Hunter v. Wright*, [1938] 2 All E. R. 621.

(c) *Browne v. De Luxe Car Services*, [1941] 1 K. B. 549; [1941] 1 All E. R. 383 where the cause of the skid was found to be the highly polished surface of the road: but see *Laurie v. Raglan Building Co., Ltd.*, [1942] 1 K. B. 152; [1941] 3 All E. R. 332.

(d) (1876), 1 C. P. D. 423, at p. 444.

(e) This definition was carried further by COCKBURN, C.J., in the same case, as being "occasioned by the elementary forces of nature unconnected with the agency of man."

(f) See also *Ryan v. Youngs*, [1938] 1 All E. R. 522, where the driver of a lorry suddenly died from a heart disease which could not have been discovered by medical inspection. The lorry ran on and injured the plaintiff.

(g) *Martin v. Stanborough* (1924), 41 T. L. R. 1; *Parker v. Miller* (1926), 42 T. L. R. 408; *Maguire v. Crouch*, [1941] 1 K. B. 108.

(h) *Wing v. London General Omnibus Co.*, [1900] 2 K. B. 652; *McGowan v. Stott* (1923), 143 L. T. 217; *Ellor v. Selfridge & Co., Ltd.* (1930), 46 T. L. R. 236; *Hinton v. Gilchrist* (1930), *Times*, 8th March.

(i) *Byrne v. Boadle* (1863), 2 H. & C. 722; *Scott v. London Dock Co.* (1865), 3 H. & C. 596; *Kearney v. London and Brighton Rail. Co.* (1871), L. R. 6 Q. B. 759; *Gee v. Metropolitan Rail. Co.* (1873), L. R. 8 Q. B. 161.

(k) *Cole v. De Trafford* (No. 2), [1918] 2 K. B. 523. This burden is not coequal with the onus placed on the plaintiff in any civil court of proving his case; but if the defendant calls no evidence and the jury considers that the balance of probabilities lies in the plaintiff's favour, the case may be found proved against the defendant. See *Salmond on Torts*, 10th Edn., pp. 444-5.

(l) *Scott v. London Dock Co.* (1865), 3 H. & C. 596, at p. 601.

Thus where a pony and van, left wholly unattended, dash into the plaintiffs' shop window adjoining a highway, there is a *prima facie* case of negligence against the owner of the pony (*m*). Where part of a lorry sweeps across the pavement, the facts raise a *prima facie* case of negligence, as does the mounting of its wheels onto the pavement (*n*). No vehicle has a right so to manœuvre itself that parts of it project over the pavement to the injury of pedestrians lawfully there (*o*). A small car which turned over and slid along the road on a dry night and injured a passenger was held to be within the principle.

The very fact of a collision between two motor vehicles will usually raise an inference of negligence against one or both defendants when sued by an innocent passenger or an injured passer-by. This application of the rule must be applied with caution, for it is necessary that the plaintiff in such circumstances should prove a *prima facie* case of negligence against one or both defendants, though he is not bound to show the proportion of blame borne by each (*p*).

In an Irish case, a girl on a bicycle was killed by a lorry which was said to have swerved to its offside and into the girl to avoid two small boys who had run into the road.

A statement to this effect had been made by the driver of the lorry, and formed the major part of the evidence on behalf of the plaintiff, who was the dead girl's father. The trial judge held that the plaintiff had not discharged the onus upon him. On appeal, it was held that in the absence of proper explanation by the defendants, there was a *prima facie* case of negligence against them, and that the case should go back for retrial (*q*). Other cases in which the principle has been applied are ones in which a dog ran about the street with a loose lead (*r*), and where an omnibus brushed against branches of an overhanging tree (*s*).

2. Contributory Negligence.

(i) *General*.—Notwithstanding that a plaintiff is able to prove that the defendant has been negligent, it frequently happens that the plaintiff has been careless of his own safety, and that such carelessness has been partly responsible for the accident (*t*). Where this occurs, the plaintiff is said to be guilty of contributory negligence (*u*). Mere knowledge by the plaintiff of the danger which has resulted from the defendant's negligent act does not necessarily involve him in contributory negligence, for the defendant cannot

(*m*) *Gayler and Pope, Ltd. v. Davies (B.) & Sons, Ltd.*, [1924] 2 K. B. 75.

(*n*) *Ellor v. Selfridge & Co., Ltd.* (1930), 46 T. L. R. 236.

(*o*) *Laurie v. Raglan Building Co., Ltd.*, [1942] 1 K. B. 152; [1941] 3 All E. R. 332. The onus of disproving negligence placed on the defendant will not be displaced merely by proof of a skid, unless the defendant can satisfy the court that the skid was not due to his want of care (*Hunter v. Wright*, [1938] 2 All E. R. 621; *Browne v. De Luxe Car Services*, [1941] 1 K. B. 549, at p. 552; [1941] 1 All E. R. 383, at p. 384).

(*p*) *Hummerstone v. Leary*, [1921] 2 K. B. 664.

(*q*) *McBride v. Stitt*, [1944] N. I. 7.

(*r*) *Pitcher v. Martin*, [1937] 3 All E. R. 918.

(*s*) *Radley v. London Passenger Transport Board*, [1942] 1 All E. R. 433.

(*t*) *Butterfield v. Forrester* (1809), 11 East, 60; *Sharpe v. Southern Rail. Co.*, [1925] 2 K. B. 311; *Swadling v. Cooper*, [1931] A. C. 1.

(*u*) *Radley v. London and North Western Rail. Co.* (1876), 1 App. Cas. 754. The question of contributory negligence, strictly speaking, does not arise unless and until it be proved that both the plaintiff and the defendant were negligent and that the accident was due to the combined negligence of both. Where the accident was due to the negligence of the plaintiff solely, then, although the defendant may have been negligent, no case of contributory negligence arises as the defendant's negligence has nothing to do with the accident.

establish such negligence in the plaintiff unless he can show from the conduct of the plaintiff in all the circumstances, including those arising from the defendant's negligence, that he acted as no reasonable man would have done (v).

The law on this subject has undergone a radical alteration as a result of the passing of the Law Reform (Contributory Negligence) Act, 1945 (w). Before this Act came into operation, a plaintiff who was guilty of contributory negligence was as a rule debarred from receiving any compensation at all for his injuries.

In determining what is contributory negligence, the same principles apply as in determining what is the negligence of the defendant, with this important difference, that the plaintiff need not be shown to have a duty of care towards the defendant. It is sufficient if he is shown to have been careless of his own safety, negligent as regards himself, and thereby caused or contributed to the injury which he suffered (a).

To attempt a definition of the word "cause" in this context based either on the principles of logic or on the facts of decided cases would be idle. As Lord WRIGHT said in *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport* (b) :

" This choice of the real or efficient cause from out of the whole complex
" of the facts must be made by applying common sense standards. Causation
" is to be understood as the man in the street, and not as either the scientist
" or the metaphysician would understand it."

Secondly, as the Courts over and over again have warned, the special facts of one case are not to be used so that a principle of law is extracted from them which may be applied to other and succeeding cases. The behaviour of both parties must therefore be examined in each case, and if both acted unreasonably, and by lack of reasonable care were responsible for the accident, then the defendant will be guilty of negligence and the plaintiff of contributory negligence. Pedestrians as well as motorists must use care in their use of the highway, and though they have a right to walk on the road and are entitled to the exercise of reasonable care on the part of persons driving vehicles upon it, they must keep as proper a lookout as motorists. There is, however, no duty laid on any user of the highway to anticipate that another road user will be negligent, and to avoid the effects of that negligence by anticipation (c).

(v) The plaintiff may still be guiltless of negligence owing to the so-called doctrine of the "agony of the moment." Where a person is placed in imminent personal danger by the wrongful act of the defendant, it is sufficient if he uses such care as may reasonably be expected of him in the circumstances. The same doctrine has been applied where danger is involved by the defendant's act to a third party. In such cases a plaintiff is not negligent if he commits some act involving or contributing toward injury to himself, as long as he exercises reasonable self-control and judgment in the difficult position in which the defendant has by his wrongful act placed him (*Jones v. Boyce* (1816), 1 Stark. 493; *Brandon v. Osborne, Garrett & Co.*, [1924] 1 K. B. 548; *The Rannefiell* (1944), 77 Ll. L. R. 163).

(w) 38 Halsbury's Statutes 356.

(a) *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175, at p. 181; *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1940] A. C. 152, at p. 164, per Lord ATKIN; *Hutchinson v. London and North Eastern Rail. Co.*, [1942] 1 K. B. 481, at p. 485; [1942] 1 All E. R. 330, at p. 334, per Lord GREENE, M.R. The negligence must have been a cause of the injury (*Lomas v. Jones (M.) & Son*, [1944] K. B. 4, at p. 7; [1943] 2 All E. R. 548, at p. 549, per GODDARD, L.J.).

(b) [1942] A. C. 691, at p. 706.

(c) *Grayson (H. & C.) v. Ellerman Line, Ltd.*, [1920] A. C. 466; *Compania Mexicana de Petroleo El Aguila v. Essex Transport and Trading Co., Ltd.* (1929), 141 L. T. 106, at p. 115, per RUSSELL, L.J. This however must not be taken too far. Having the "right of way" does not entitle a driver to cross a junction without looking.

(ii) *Last Opportunity Rule*.—In a long line of cases (d) decided before the Contributory Negligence Act, 1945, it has been held that where both the parties were guilty of negligence, but after the first had been negligent, the second by the exercise of reasonable care could have avoided him or the results of that negligence, then the second party is wholly to blame for the accident. In the case of *British Columbia Electric Rail. Co., Ltd. v. Loach* (e), this rule was extended to cover circumstances where both parties were guilty of negligence contributing to the accident, but one party by his negligence had put out of his own power the opportunity to avoid the consequences of the other party's negligence. The Privy Council held that the last opportunity which the former would have had but for his own negligence is equivalent in law to one which he in fact had. But whereas the time factor is a fair test in many cases, in that normally a person who has the last chance in time to avoid an accident and fails to take it will be held responsible for the causing of the accident, it is not an invariably decisive test.

The Law Revision Committee stated in their report: "In truth there is no such rule (as the last opportunity)—the question as in all questions of liability for a tortious act is not who had the last opportunity of avoiding the mischief but whose act caused the wrong (f). The test is, what was the effective and predominant cause; not that which is latest in time, but predominant in effectiveness" (g).

(iii) *The Admiralty Rule*.—In the Admiralty Courts, collisions at sea are governed by the rule set out in s. 1 (1) of the Maritime Conventions Act, 1911 (h). The judge in apportioning the blame between the vessels concerned in the collision has to decide the degree in which each vessel was in fault. The old Common Law rule that the degree of negligence of a tortfeasor is not to be taken into account in assessing the cause of an accident is preserved by subs. (2) of the proviso, that no vessel is liable for any loss or damage to which her fault has not contributed. "Inoperative negligence," therefore, is disregarded. The "last opportunity" rule is still applied to collisions at sea, so that where both parties are in fault, but one has a substantial chance to avoid the other's negligence and fails to take it, or where one party by his negligence has put it out of his power to avoid the consequences of the other's negligence, then the contribution rule does not apply (i). Section 1 (1) of the Maritime Conventions Act, 1911, only applies when at Common Law neither party could recover anything from the other.

(d) *Davies v. Mann* (1842), 10 M. & W. 546; *Radley v. London and North Western Rail. Co.* (1876), 1 App. Cas. 754; *Admiralty Comrs. v. S.S. Volute*, [1922] 1 A. C. 129; *Swadling v. Cooper*, [1931] A. C. 1; *Tidy v. Battman*, [1934] 1 K. B. 319.

(e) [1916] A. C. 719.

(f) Cmd 6032, p. 16.

(g) *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport*, [1942] A. C. 691; [1942] 2 All E. R. 6; *Duncan v. Cammell Laird & Co., Ltd.*, [1944] 2 All E. R. 159, n., per GODDARD, L.J.

(h) 18 Halsbury's Statutes 485. "Where by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.

Provided that

(1) if having regard to all the circumstances of the case it is not possible to establish different degrees of fault, the liability shall be apportioned equally and

(2) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed."

(i) *Anglo-Newfoundland Development Co., Ltd. v. Pacific Steam Navigation Co.*, [1924] A. C. 406; *The Vectis*, [1929] P. 204; *The Eurymedon*, [1938] P. 41; [1938] 1 All E. R. 122; *Norwegian Shipping and Trading Mission v. Behenna* (1943), 169 L. T. 191.

(iv) *The Law Reform (Contributory Negligence) Act, 1945*.—In 1944 the Law Revision Committee recommended that the Admiralty rule in contributory negligence should be adopted in all cases at Common Law (j). The wording of the resulting Contributory Negligence Act differs, however, in certain respects from s. 1 (1) of the Maritime Conventions Act, 1911. By s. 1 (1) of the 1945 Act (k):

“Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such an extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.”

The words of this section follow in substance the words of s. 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935 (l), which enabled one tortfeasor to recover contribution from another tortfeasor if that other were jointly or severally liable in respect of the same damage. Under the 1935 Act, where an innocent plaintiff (e.g. a passenger in a vehicle involved in collision with another) sues the drivers of both vehicles involved, the Court has the task, if the liability of both drivers is proved, to assess the proportion of responsibility for the damage to be borne by each defendant. Cases decided under s. 6 (2) of the 1935 Act and under the Admiralty rule are relevant in deciding the effect of s. 1 (1) of the Contributory Negligence Act, 1945. But collisions at sea are not to be equated in all respects with collisions between motor vehicles. At sea, distances are much greater, speeds are much lower, and an order to increase or decrease speed and helm orders take much longer to become effective, and equally take longer to be remedied if proved wrong. It is not true, therefore, to say that a collision at sea is analogous to a collision on the highway in slow motion, and that as a time analysis of a collision at sea will show clearly who is responsible for the damage such a time analysis may be applied to a road accident.

It is to be noticed, however, that the last opportunity rule has not often been applied to shipping cases since the Maritime Conventions Act, 1911, was passed (ll).

In *Ingram v. United Automobile Service, Ltd.* (m), a case decided under the Joint Tortfeasors Act, 1935, DU PARCQ, J., as he then was, gave a useful description of the method normally used by the Court in assessing the proportion of blame to be borne by the several persons responsible for damage in an accident:

“In this case the judge seems to me to have applied exactly the right principle of law. If one reads his judgment, it is quite apparent how he would have summed up to a jury if he had been trying the case with a jury. The first question would have been whether there was any negligence on the part of the driver of the lorry, and as to that the question would have been for the jury whether a reasonable person would have apprehended that if he left the lorry where in fact it was left, in all the circumstances of the case, he would be adding materially to the ordinary risks of the road. . . . The remaining question would have been whether the

(j) Cmd. 6032.

(k) 38 Halsbury's Statutes 357.

(l) 28 Halsbury's Statutes 474. See p. 46, *post*, on Contribution between Joint Tortfeasors.

(ll) But cf. *Admiralty Comrs. v. North of Scotland Steam Navigation Co., Ltd.*, [1947] 2 All E. R. 350.

(m) [1943] K. B. 612; [1943] 2 All E. R. 71. In this case, an injured passenger in an omnibus sued the owners of the omnibus and the owners of a lorry after an accident in which the omnibus, to avoid the lorry which had been left in a dangerous position, swerved across an icy road and struck a bridge.

"accident which in fact happened was in part due to that act of negligence. The answer 'yes' must be given unless it can be said that the risk which was created by the presence of the lorry was, so to speak, only an irrelevant risk and one not connected with the accident. It is quite true that the accident would not have happened unless there had been negligence on the part of the omnibus driver, but it is wrong to say that the people who left the lorry in a dangerous position are necessarily free from liability. It is just when two people are negligent, perhaps in different degrees, and the negligence of both substantially contributes to the happening of an accident, that both of them should be liable to the plaintiff. . . . The law says (of each tortfeasor) : You were negligent in some respect, and if your negligence in part caused the accident, then in part (n) you must pay, and between you you must pay the injured party the whole of the damage."

Whereas the judge in Admiralty cases has to decide the liability of the parties in proportion to the degree in which each vessel was in fault, the jury in running down actions, where both plaintiff and defendant have caused the damage by their joint fault, has to divide the damages to such extent as he thinks just and equitable having regard to the claimant's share in the responsibility for the damage. "Fault" in the 1945 Act is defined as negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort, or would, apart from the Act, give rise to the defence of contributory negligence (o).

In practice, the use of this new phrase "share in the responsibility for the damage" will not, it is submitted, entitle the Court to consider under the 1945 Act the *degree* of negligence of the parties. Where a negligent act has contributed to the causing of the damage—and no other negligent act is to be taken into account—the Court has to decide to what extent and in what proportion it caused that damage. The question is admittedly one of considerable difficulty, and the Court's discretion is to a large extent unfettered by the duty to do what is just and equitable between the parties. The exercise of this discretion will not be interfered with on appeal except where it is clearly shown that the judge has misapprehended a vital fact, or there is some error of law or of fact in his judgment, or he has misinterpreted the rule of the road (p).

The following rules may thus be stated where both parties are in fault :

A. Liability.

1. If one of the parties actually observes the negligent act of the other party, he is solely responsible if he fails to exercise reasonable care towards that other party, and thereby causes damage to him (q).

(n) Note it was not said "for that part you must pay." But it is submitted that this is the state of the law. In *Collins v. Hertfordshire County Council*, [1947] K. B. 598; [1947] 1 All E. R. 633; HILBERY, J., interpreted the phrase "responsibility for the damage" in s. 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935, as forcing him to the conclusion that contribution fell to be apportioned according to the relative effect of the acts of the tortfeasors in causing the damage. HALLETT, J., however, in *Weaver v. Commercial Process Co., Ltd.* (1947), 63 T. L. R. 466, held that apportionment was to be ascertained on the basis of the relative degrees of negligence, i.e. the culpability of the tortfeasors. It is submitted that this latter interpretation imports into the law of negligence a penal element which has been conspicuously lacking, before, and that the words of the statute do not justify such an innovation. But the point has not yet been finally decided. Cf. also SCOTT, L. J., in *Croston v. Vaughan*, [1938] 1 K. B. 540; [1937] 4 All E. R. 249, and *Hale v. Hants and Dorset Motor Services, Ltd.*, [1947], 2 All E. R. 628.

(o) Section 4 (38 Halsbury's Statutes 360).

(p) *Ingram v. United Automobile Service, Ltd.*, [1943] K. B. 612; [1943] 2 All E. R. 71; *British Fams (Owners) v. Macgregor (Owners), The Macgregor*, [1943] A. C. 197; [1943] 1 All E. R. 33.

(q) *Davies v. Mann* (1842), 10 M. & W. 546.

2. This also applies where one party is not in fact aware of the other's negligence if he could in fact by reasonable care, have avoided the damage (r). In these instances although both parties are negligent only the negligence of one of them actually caused the damage.

3. If the negligence of both parties continues right up to the moment of collision, each party is to blame for the damage, provided that it is the result of continued negligence of both (s).

B. Apportionment of Blame.

1. Where both parties have been found guilty of negligence contributing to the accident, the Court, in deciding the proportion of responsibility for the accident to be attributed to each party, must take into account not the degree of negligence of either party, but the degree of causation of their respective breaches of duty (t).

2. If, having regard to all the circumstances of the case, it is not possible to establish different degrees of responsibility for the damage, the parties shall be found equally to blame (u).

The test of liability always being the effective and predominant cause and not that negligence which is latest in time (v), the last opportunity rule will not often be applied in future (w).

It should be noted that it is no longer strictly necessary in most cases to plead contributory negligence, as the Court has power to apportion the responsibility if it is found on enquiry that both parties are to blame (x).

(v) Costs.—Where both parties are found to blame, whether in equal or unequal proportions, the costs awarded are wholly in the discretion of the judge. There is no rule that in collision cases where the blame is unequally divided between the two vessels that the costs should be divided in the same proportion (y).

In actions at Common Law, it has been stated by the Court of Appeal (z) that it is undesirable to have a double taxation, and that as far as possible the Court in exercising discretion as to costs where success is gained by both parties should order, not a double taxation, but what is thought to be the probable result in money on the set-off of costs, by giving one party an

(r) *British Columbia Electric Rail. Co., Ltd. v. Loach*, [1916] 1 A. C. 719.

(s) *The Eurymedon*, [1938] P. 41; [1938] 1 All E. R. 122.

(t) *Smith v. Bray* (1939), 56 T. L. R. 200. See also note (n), p. 28, *ante*.

(u) *Croston v. Vaughan*, [1938] 1 K. B. 540; [1937] 4 All E. R. 249.

(v) *Yorkshire Dale S.S. Co., Ltd. v. Minister of War Transport*, [1942] A. C. 691; [1942] 2 All E. R. 6.

(w) Since it is no longer a defence in the great majority of running-down actions, the negligence of both parties is normally so nearly contemporaneous as to exclude the rule.

(x) *The Mimosa* (1944), 77 Ll. L. R. 217.

(y) *The Salabangka*, [1943] P. 13; *The Cymbeline* (1941), 70 Ll. L. R. 246; *The Haarfrage* (1939), 64 Ll. L. R. 69; *The Port Nicholson* (1939), 62 Ll. L. R. 92, at p. 100. It should be noted that even where the plaintiff recovers against one defendant and fails against another, there is no absolute rule that the unsuccessful defendant must pay the costs of the plaintiff and of the successful defendant under the principle laid down in *Bullock v. London General Omnibus Co.*, [1907] 1 K. B. 264, and in R. S. C., Ord. XVI, r. 7. In *Hong v. Brown (A. & R.), Ltd.*, [1948] 1 All E. R. 185, the Court of Appeal reiterated that an award of costs in such a case was still in the discretion of the judge, and even though the plaintiff acted reasonably in joining the successful defendant as a party, a "Bullock" order should not necessarily be made where it was not reasonable that the unsuccessful defendant should be penalised.

(z) *Cinema Press, Ltd. v. Pictures and Pleasures, Ltd.*, [1945] K. B. 356; [1945] 1 All E. R. 440.

order for taxation on a proportional basis. Thus in *Jay (William A.) & Sons v. Veevers, Ltd.* (a), where the plaintiff was found two-thirds, and the defendant one-third to blame, the plaintiff was awarded no costs, and the defendants were given one-quarter of the costs of the claim, counterclaim and the taxation costs (aa). *

(vi) *Contributory Negligence of Children*.—A child will not be found to be guilty of contributory negligence if it shows as much care as one of its age could reasonably be expected to show. This is an exception to the rule that negligence is an objective matter (b). It will not, of course, be able to recover damages for injuries caused by behaviour which gave a careful motorist no opportunity to avoid the accident, for in such a case it will not be able to prove the liability of the defendant. Where, however, the defendant has been guilty of negligence, it will be no answer for him to say that the child caused the accident by showing a want of care which an older or more experienced road user would have avoided. This principle is well shown in "allurement" cases, where the defendant negligently leaves a vehicle or thing in a dangerous place or condition, and the vehicle or thing was likely to attract children to play on it or near it (c).

3. Defences to a claim of negligence.

(i) *Volenti non fit injuria*.—An act which would otherwise give rise to liability affords no cause of action to a plaintiff who has expressly or by implication consented to it. In motor accident cases, the only application of this rule is where the consent is to undergo the risk of the infliction of damage. Consent may be either express or implied from words or conduct. In either case it must be real and voluntary. Many of the cases in which the defence is set up are cases of master and servant, and the Courts have always been reluctant to find that a servant has consented to run a risk incidental to his employment, as the servant can rarely be said to have consented freely and voluntarily. In *Bowater v. Rowley Regis Corporation* (d), the plaintiff, a corporation employee, was ordered to take out a horse which was known to be restive. The plaintiff protested, but eventually carried out the order. The horse bolted, and the plaintiff was injured. The defence of *volenti non fit injuria* was pleaded, but was rejected by the Court of Appeal on the ground that there was no true consent. In view of recent decisions, it is less necessary than before to emphasise that the maxim is *volenti* not *scienti non fit injuria*. Knowledge is not the same as consent, and even if the plaintiff undertakes the risk with his eyes open, it must still be shown that he consented voluntarily (e).

Apart from the cases of master and servant, the distinction between real and unreal consent is shown in the following cases. A horse drawing a van bolted along the highway, and eventually came to a stop in a field. The horse was still restive, and when the driver called for assistance, the plaintiff, a neighbouring householder, came and held the horse's head, but was injured when the horse plunged. It was held that he could not recover for his injuries (f).

In the second case, a two-horse van was left unattended in the street,

(a) [1946] 1 All E. R. 646.

(aa) The discretion of the judge in dealing with the award of costs is still wholly unfettered.

(b) See as to this, *ante*, p. 16.

(c) *Lynch v. Nurdin* (1841), 1 Q. B. 29 (unattended horse and cart in the street); *Rawsthorne v. Otley*, [1937] 3 All E. R. 902 (tip-up lorry in a school playground); *Culkin v. McFie & Sons, Ltd.*, [1939] 3 All E. R. 613 (sugar leaking from a sack on a lorry); *Donovan v. Unson Carriage Co., Ltd.*, [1933] 2 K. B. 71 (unattended lorry in a street).

(d) [1944] K. B. 476; [1944] 1 All E. R. 465.

(e) *Smith v. Baker & Sons*, [1891] A. C. 325.

(f) *Cutler v. United Dairies (London), Ltd.*, [1933] 2 K. B. 297.

and the horses bolted. A police constable, seeing that a woman and some children were in danger of being run over, tried to pull up the horses, and was injured. He was held to be under a moral duty to try and prevent injury, and that he had not freely consented to undertake the risk (*g*).

Though a person may consent to the risk of a dangerous situation caused by the prior negligence of the defendant, it is doubtful whether he can ever be said to consent to the defendant's subsequent negligence. The point arose in a case where a passenger agreed to travel in a car driven by the defendant, who was clearly under the influence of drink. The defence of *volenti* failed, as the judge held that the plaintiff, by entering the car with knowledge that through drink the defendant had materially reduced his capacity for driving safely, did not by implication consent to, or absolve the driver from liability for, any subsequent negligence on his part whereby he might suffer harm (*h*).

The special application of the defence of *volenti* in the form of the defence of common employment is considered later (*i*).

(ii) *Statutory authority*.—A plaintiff may be debarred from his common law remedy in damages if the act of which he complains, though otherwise tortious, is authorised by statute. In this connection, a distinction must be drawn between an absolute authority, where the legislature authorises an act notwithstanding that it may infringe a private right, and a permissive or qualified authority, where the legislature authorises an act provided that no private rights are thereby infringed. In many cases the doing of the act will necessarily create a nuisance (*k*), and in these cases there is no liability in the absence of negligence, provided that the power was exercised reasonably. Where, for instance, a local authority under statutory powers erected a barrier along the pavement edge in front of a block of shops and offices, thereby interfering with the plaintiff's right of access to the carriage-way of the street, as the erection of this barrier was not an unreasonable use of the local authority's powers, the plaintiffs could not complain (*l*). Whether a statutory authority is absolute or permissive is a question of construction, depending on the wording of the relevant statute. It will generally be construed as absolute if it not only authorises but expressly directs the doing of a specific act. If thereby a nuisance is necessarily created, the statute will be construed as authorising not only the act itself, but all its necessary consequences (*m*). But the legislature will never be deemed to have authorised negligence in the doing of any act, and accordingly, whether the authority be absolute or permissive, it affords no protection if the act is carried out negligently.

4. Nuisance.

(i) *General*.—Private nuisance consists in the indirect interference with the property and amenities of another. Public nuisance, which Stephen defined in his Digest of Criminal Law as :

" an act not warranted by law, or an omission to discharge a legal duty,
 " which act or omission obstructs or causes inconvenience or damage to the
 " public in the exercise of rights common to all His Majesty's subjects,"

(*g*) *Haynes v. Harwood*, [1935] 1 K. B. 146.

(*h*) *Dann v. Hamilton*, [1939] 1 K. B. 509; [1939] 1 All E. R. 59.

(*i*) See p. 48, *post*.

(*k*) See succeeding section.

(*l*) *Dormer v. Newcastle-upon-Tyne Corporation*, [1940] 2 K. B. 204; [1940] 2 All E. R. 521; *Whiting v. Middlesex County Council and Harrow Urban District Council*, [1948] K. B. 162; [1947] 2 All E. R. 758; *Fisher v. Ruislip-Northwood Urban District Council*, [1945] K. B. 584; [1945] 2 All E. R. 458.

(*m*) *Lagan Navigation Co. v. Lambeg Bleaching, Dyeing and Finishing Co.*, [1927] A. C. 226.

is a misdemeanour indictable at the suit of the Attorney-General on behalf of the public as a whole. Private nuisance, which is of two kinds, the wrongful disturbance of a servitude attaching to land, or the act of wrongfully allowing the escape of deleterious things such as smoke, fumes and noise into another's land, is actionable *per se* at the suit of him who has a proprietary interest in the injured property. Such a class of case only rarely comes within the purview of the insurer of motor vehicles, and could only arise where the injury is occasioned by a motor vehicle which at the time was standing or being used on or near private property.

Examples of public nuisance, on the other hand, frequently arise on the highway where there is a wrongful interference with the use and amenities of the highway. Such interference, in order to give rise to a cause of action, must cause damage to the individual plaintiff of a kind different from and of a degree greater than the damage suffered by the members of the public as a whole (n).

Thus, unlawful obstruction or danger to the highway, which is the essence of public nuisance, is actionable at the suit of a private individual only on the proof of special damage. It should be remembered that negligence, where nuisance is charged, need not be proved against the defendant, though insofar as the wrongful interference with the use of the highway is also a breach of the duty of care required by all road users, the two allegations of nuisance and negligence are usually pleaded together against the defendant (nn).

While the common cause of action arising out of motor accidents is negligence, the question of nuisance is important, and has arisen in a number of motor car cases. The authorities establish that a nuisance is constituted when a vehicle is taken or driven upon the highway in such a manner that its presence or passage necessarily constitutes a source of danger or unreasonable obstruction (o) to the public (p). When the presence or passage of a vehicle upon the highway results in damage to another person, then unless the party responsible can rely upon statutory authority for the nuisance (q) an action for damages will lie. It is established that neither the mere use of a motor car for passage along the highway (r) nor the use of a vehicle in fact dangerous through latent defect constitutes a nuisance (s). In both these cases the user of the highway is lawful, and any danger which may thus arise is merely incidental to lawful user and not therefore a nuisance.

The true test of liability for nuisance in respect of damage arising from the presence or passage of a motor vehicle can be formulated in the words: "Is the vehicle of such a nature that its presence or use upon the highway necessarily involved danger?" (t). The lawful user of

(n) *Winterbottom v. Derby (Lord)* (1867), L. R. 2 Exch. 316; *Benjamin v. Storr* (1874), L. R. 9 C. P. 400; *Vanderpant v. Mayfair Hotel Co., Ltd.*, [1930] 1 Ch. 138; *Tarry v. Ashton* (1876), 1 Q. B. D. 314; *Maitland v. Raisbeck and Hewitt (R. T. & J.), Ltd.*, [1944] K. B. 689; [1944] 2 All E. R. 272; *Hale v. Hants and Dorset Motor Services, Ltd.*, [1947] 2 All E. R. 628.

(nn) Cf. *Ingram v. United Automobile Service, Ltd.*, ante p. 27, and Para. 42 of the Highway Code, which requests motorists not to leave their cars stationary in a dangerous position on the road.

(o) *Harper v. Haden (G. N.) & Sons*, [1933] Ch. 298.

(p) *Wing v. London General Omnibus Co.*, [1909] 2 K. B. 652.

(q) *Vaughan v. Taff Vale Rail. Co.* (1860), 5 H. & N. 679; *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588; cf. *Whiting v. Middlesex County Council and Harrow Urban District Council*, [1948] K. B. 162; [1947] 2 All E. R. 758.

(r) *Wing v. London General Omnibus Co.*, [1909] 2 K. B. 652, and see cases involving skidding in section on Negligence above.

(s) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539; on appeal, [1923] 2 K. B. 832. But see *Monk v. Warbey* (1933), 50 T. L. R. 263; on appeal (1934), 50 Ll. L. R. 33.

(t) This question is formulated from the principles enunciated in *Tarry v. Ashton*

the highway, although it may involve liability for negligence, does not involve liability for nuisance. Thus although dangers are involved in the ordinary and lawful user of the highway by vehicles, these dangers do not suffice to constitute such use a nuisance unless the known nature or condition of the vehicle is such as necessarily to aggravate them (*u*). When a vehicle is or should be known to be dangerous to the public by its appearance or condition it must not be taken upon the highway. If it is taken and its presence or use results in damage, then the person responsible will be liable for nuisance. Thus it has been held that to take an unmanageable vehicle upon the highway (*v*), or a vehicle of such a nature or appearance as to cause fear to horses (*w*), or to take a vehicle which necessarily involves the escape of dangerous things liable to cause damage, such as sparks, may be a nuisance (*a*).

Merely to leave a vehicle not in itself dangerous upon the highway will not as a rule amount to nuisance. But where a dangerous vehicle is left unattended then its presence may in any given case constitute a nuisance (*b*). The authorities upon nuisance in motor car cases are by no means clear, but the above is the result of their consideration. Cases involving negligence must of course be considered quite apart, although in some respects they may resemble cases for nuisance; for example, leaving a horse and cart unattended or a motor car unbraked, while as a rule not amounting to nuisance, may give rise to liability for negligence and may be an offence against s. 50 of the Road Traffic Act, 1930 (*c*). A similar difficulty arises in cases of using horses known to be of vicious propensity upon the highway. In certain cases this may amount to nuisance, but since the use of an ordinary horse is a perfectly lawful user of the highway it is usually necessary for a person injured through an accident caused by the horse to prove that the horse's owner or driver has been negligent in failing to take due care in driving or controlling it upon the highway (*d*) (*e*).

(1876), 1 Q. B. D. 314, as they have been applied to later cases of nuisance to the highway particularly involving the use of vehicles; and see *Donovan v. Union Cartage Co., Ltd.*, [1933] 2 K. B. 71, and *Maitland v. Raisbeck and Hewitt (R. T. & J.) Ltd.*, [1944] K. B. 689; [1944] 2 All E. R. 272.

(*u*) *Wing v. London General Omnibus Co.*, [1909] 2 K. B. 652; and cf. *Parker v. London General Omnibus Co., Ltd.* (1909), 25 T. L. R. 429; on appeal, 26 T. L. R. 18; *Gibbons v. Vanguard Motor Bus Co., Ltd.* (1908), 25 T. L. R. 13; *Philips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539; on appeal, [1923] 2 K. B. 832; *Maitland v. Raisbeck and Hewitt (R. T. & J.) Ltd.*, [1944] K. B. 689; [1944] 2 All E. R. 272.

(*v*) *Wing v. London General Omnibus Co.*, *supra*.

(*w*) *Harris v. Mobbs* (1878), 3 Ex. D. 268; *Brown v. Eastern and Midlands Rail. Co.* (1889), 22 Q. B. D. 391.

(*a*) *Powell v. Fall* (1880), 5 Q. B. D. 597.

(*b*) *Donovan v. Union Cartage Co., Ltd.*, [1933] 2 K. B. 71; cf. *Fardon v. Harcourt-Rivington* (1932), 48 T. L. R. 215, and *Musgrove v. Pandelis*, [1919] 2 K. B. 43; *Maitland v. Raisbeck and Hewitt (R. T. & J.) Ltd.*, [1944] K. B. 689; [1944] 2 All E. R. 272.

(*c*) *Lynch v. Nurdin* (1841), 1 Q. B. 29; *Martin v. Stanborough* (1924), 41 T. L. R. 1; *Parker v. Miller* (1926), 42 T. L. R. 408; *Ruoff v. Long*, [1916] 1 K. B. 148; *Hambrook v. Stokes Brothers*, [1925] 1 K. B. 141; *Engelhart v. Farrant & Co.*, [1897] 1 Q. B. 240; *McDowall v. Great Western Rail. Co.*, [1903] 2 K. B. 331.

(*d*) *Gayler and Pope, Ltd. v. Davies (B.) & Son, Ltd.*, [1924] 2 K. B. 75.

(*e*) Other possible examples caused by using a motor vehicle on the highway are: (i) using a vehicle so large as to cause an obstruction; (ii) using a car so constructed as necessarily to cause danger or damage, e.g. two-wheeled motor car or one propelled by an air screw or rocket explosions; (iii) using a vehicle so hideous or unusual in appearance as to frighten horses, cf. *Farrant v. Barnes* (1862), 11 C. B. (N.S.) 553; (iv) carrying dangerous goods, such as explosives; (v) using a car on the road for purposes other than passage, e.g. to live in; (vi) using a car of which the tyres are without treads on a wet road, or a car with defective steering (*Hutchins v. Maunders* (1920), 37 T. L. R. 72). In certain cases where damage is caused (e.g. to telegraph poles) by or during user of the highway, there may be a statutory liability without proof of negligence. See *Postmaster-General v. Beck and Pollitser*, [1924] 2 K. B. 308.

(ii) *Liability for the escape of dangerous things (f).*—A person who accumulates dangerous things is liable if their escape inflicts damage upon other persons unless he can prove that their escape was due to acts of God (g), or the act of a stranger (h), or unless he can justify his accumulation by reference to statutory authority (i). This principle of liability for the escape of dangerous things is an absolute one, that is to say, it does not depend upon the intention or upon degree of care which is exercised by the person responsible for their accumulation (k). The doctrine which is known as the rule in *Rylands v. Fletcher* (l) applies only to things which are dangerous in themselves and not to things which are naturally upon a person's land (m). This doctrine, although frequently referred to, has little importance in motor car cases (n). There is, however, a branch of law closely akin to the *Rylands v. Fletcher* principle which is of more practical importance in motor car cases, that is liability for the spread of fire. By statute (o) there is no liability for fires arising out of fire accidentally beginning upon a person's property, but if a fire either commences through negligence (p) or through the presence of a dangerous thing (q) or if its spread is due to negligence, although initially the fire was accidental, there is a liability resting upon the person responsible for any damage sustained through the spread of the fire (r). Moreover, the owner of a vehicle may be responsible, under this doctrine, for any injury inflicted on a passing pedestrian by a wild or vicious animal carried in the vehicle (s).

(iii) *Animals.*—Attempts have been made at various times to bring damage caused by the escape of animals on to the highway within one of the branches of the rule in *Rylands v. Fletcher*. This clearly cannot be justified, except in the case of the damage inflicted by a beast of known vicious propensity.

(f) *Fletcher v. Rylands* (1866), L. R. 1 Exch. 265, affirmed *sub nom Rylands v. Fletcher* (1868), L. R. 3 H. L. 330. See also *Midwood & Co. v. Manchester Corporation*, [1905] 2 K. B. 597; *Read v. Lyons (J) & Co., Ltd.*, [1947] A. C. 156, [1946] 2 All E. R. 471.

(g) *Greenock Corporation v. Caledonian Rail Co.*, [1917] A. C. 556; *Great Western Rail. Co. v. Mostyn (Owners), The Mostyn*, [1928] A. C. 57; *Nichols v. Marsland* (1875), L. R. 10 Exch. 255.

(h) *Richards v. Lothian*, [1913] A. C. 263.

(i) *Green v. Chelsea Waterworks Co.* (1894), 70 L. T. 547; *Charing Cross, West End and City Electricity Supply Co. v. London Hydraulic Power Co.*, [1914] 3 K. B. 772; *Manchester Corporation v. Farnworth*, [1930] A. C. 171.

(k) *Att.-Gen. v. Cory Brothers & Co.*, [1921] 1 A. C. 521, and see Salmond on Torts, 8th Edn., pp. 595-9.

(l) (1866), L. R. 1 Exch. 265; affirmed (1868), L. R. 3 H. L. 330.

(m) *Giles v. Walker* (1890), 24 Q. B. D. 656; *Stearn v. Prentice Brothers, Ltd.*, [1919] 1 K. B. 394; *Pontardawe Rural Council v. Moore-Gwyn*, [1929] 1 Ch. 656.

(n) An attempt was made to persuade the legislature to apply the principle of *Rylands v. Fletcher* to the use of motor vehicles on the road. It has been argued with some logic that were the Common Law properly applied the principle would in any case apply to the use of vehicles on the highway. See an article by Sir Alan Herbert in *Punch*, Nov. 13, 1929. Cp. *Hutchins v. Maunder* (1920), 37 T. L. R. 72.

(o) Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 75), s. 86.

(p) *Filliter v. Phippard* (1847), 11 Q. B. 347; *Black v. Christchurch Finance Co.*, [1894] A. C. 48; *Century Insurance Co. Ltd. v. Northern Ireland Road Transport Board*, [1942] A. C. 509; [1942] 1 All E. R. 491.

(q) *Musgrove v. Pandelis*, [1919] 2 K. B. 43. In this case the defendant's motor car caught fire accidentally in his garage over which the plaintiff occupied rooms which were destroyed by the fire. The defendant was held liable upon the ground that a motor car with a tank full of petrol was a mischievous thing, for the consequences of which the defendant was liable. See also *Midwood & Co. v. Manchester Corporation*, [1905] 2 K. B. 597; *Northwestern Utilities, Ltd. v. London Guarantee and Accident Co.*, [1936] A. C. 108.

(r) *Job Edwards, Ltd. v. Birmingham Navigations*, [1924] 1 K. B. 341.

(s) See *Pardon v. Harcourt-Rivington* (1932), 48 T. L. R. 215; *Sycamore v. Ley* (1932), 147 L. T. 342.

The principles with regard to escaping cattle on the highway were stated in *Brackenborough v. Spalding Urban District Council* (t), where it was laid down that the occupier of a field bordering the highway is not liable if one of his cattle escapes through a defective fence on to the public highway, and causes injury to lawful users of the highway. This rule is subject, apparently (u), to the curious exception that where efforts have been made to tether the animal on land adjoining the highway, and owing to the negligent method used, it escapes, the owner will be liable. Where animals are brought on to the highway, however, it will be sufficient for the owner to prove that he took all steps to control them which are reasonable having regard to the nature of that type of animal (v).

(iv) *Trespass*.—Apart from the interesting though academic question (w) whether every injury or damage caused by a motor vehicle is not a trespass actionable without proof of negligence, the owner or driver of a vehicle may be liable for trespass to land if he drives it on another's land without permission, and in such a case exemplary damages may be awarded (x).

(B) Liability under Statutory Provisions

1. General.—*Prima facie* the breach of a duty imposed by a statute which gives rise to damage to an individual is a tort which has now come to be known as "statutory negligence" (y). Many statutes impose duties upon persons and classes of persons to do acts or take precautions for the safety of the persons and property of others. These duties imposed by statutes are of two main categories, *i.e.* :

(i) those which confer a specific benefit upon the individual towards whom the statutory duty is owed and giving him a remedy for the breach of such duty, and

(ii) those which impose no such specific liability and confer no such benefit (z).

While this classification is useful when the matter is considered as one of principle, yet in practice, particularly in relation to motor cases, the classification is displaced by more useful consideration of the question of statutory duties under the following two heads :

2. Statutory duties between master and servant.—At Common Law the employer of a servant was liable to him for injuries received by him through the negligence of the employer himself (a) or through the employer's failure to provide competent fellow servants or efficient and safe plant (b). Unless the servant could bring the facts of his

(t) [1942] A. C. 310; [1942] 1 All E. R. 34; see also *Searle v. Wallbank*, [1947] A. C. 341; [1947] 1 All E. R. 12.

(u) *Deen v. Davies*, [1935] 2 K. B. 282; *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K. B. 370.

(v) *Aldham v. United Dairies (London), Ltd.*, [1940] 1 K. B. 507; [1939] 4 All E. R. 522; *Higgins v. Searle* (1909), 100 L. T. 280.

(w) See Salmond on Torts, 10th Edn., pp. 5 *et seq.*

(x) *I.e.* damages for the injury to the landowner's feelings or to punish the trespasser or both.

(y) *Lochelly Iron and Coal Co., Ltd. v. M'Mullan*, [1934] A. C. 1; cp. *Monk v. Warbey* (1933), 50 T. L. R. 263; on appeal (1934), 50 Ll. L. R. 33 (C. A.).

(z) See the judgments in *Lochelly's Case* and the cases cited below in this section.

(a) *Tarrant v. Webb* (1856), 18 C. B. 797; *Butler (or Black) v. Fife Coal Co., Ltd.*, [1912] A. C. 149.

(b) See *Laubach v. Co-optimists Entertainment Syndicate, Ltd.* (1926), 43 T. L. R. 30; *Fanton v. Denville*, [1932] 2 K. B. 309; see, however, the effect of s. 2 (1) of the Law Reform (Personal Injuries) Act, 1948.

case within one of these three types he was left without a remedy even though his injury was due to the negligence of a fellow servant. Although in principle an employer is liable for the wrongful acts committed by his servants within the scope of their authority (c) nevertheless owing to the application of the legal maxim *volenti non fit injuria* he was excused from this liability if the consequence of his servant's wrongful, i.e. negligent or wilful, act was merely the infliction of injuries upon a fellow servant. This doctrine was known as the doctrine of common employment and operated to prevent servants from exercising any remedy against their employer where they had been injured by the act of a fellow servant engaged in the same employment as they themselves (d). The defence also applied where the plaintiff was a "loaned" workman (e), so long as the temporary master's servant who caused the injury was a fellow servant of the plaintiff within the meaning of the rule (f).

The defence was severely limited in recent years by decisions that the liability of the employer remained where he had delegated the duty of providing safe plant to a subordinate, who failed to carry out this duty (g). Further limitations were imposed by the narrow interpretation placed on the phrase "common employment" (h).

The operation of the doctrine of common employment was considerably cut down by the effect of the Industrial Injuries Act (i), which repeals and replaces the Workmen's Compensation Acts (1897 to 1925), and the Employers' Liability Act, 1880 (k). By this latter Act, injuries due to certain limited types of negligence committed by fellow servants and to certain types of defective plant might give rise to an action for damages if the action was commenced within six months from the accident, or within twelve months in the case of a fatal accident. The Act was hardly ever

(c) *Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526; *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716; *Jefferson v. Derbyshire Farmers, Ltd.*, [1921] 2 K. B. 281; *Poland v. Parr (John) & Sons*, [1927] 1 K. B. 236. See *post*, p. 48.

(d) *Priestley v. Fowler* (1837), 3 M. & W. 1; *Hutchinson v. York, Newcastle and Berwick Rail. Co.*, (1850), 5 Exch. 343; *Fanton v. Denville*, [1932] 2 K. B. 309; *Lancaster v. London Passenger Transport Board*, [1946] 2 All E. R. 612.

(e) *Lambert v. Constable and Hart, Ltd.* (1940), 63 L. T. 194; *Dowd v. Boase & Co., Ltd.*, [1945] K. B. 301; [1945] 1 All E. R. 605; *Clinker v. Stevens* (1945), 78 Ll. L. R. 501; *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool), Ltd.*, [1947] A. C. 1; [1946] 2 All E. R. 345; *Century Insurance Co. v. Northern Ireland Road Transport Board*, [1942] A. C. 509; [1942] 1 All E. R. 491; *Chowdhary v. Gillot*, [1947] 2 All E. R. 541.

(f) *Nicholas v. Sparkes (F. J.) & Son* (1943), [1945] K. B. 309, n.; *McFarlane v. Coggins and Griffith (Liverpool), Ltd.*, [1945] K. B. 301; [1945] 1 All E. R. 605.

(g) *Wilsons and Clyde Coal Co., Ltd. v. English*, [1938] A. C. 57; [1937] 3 All E. R. 628; *Speed v. Swift (Thomas) & Co.*, [1943] K. B. 557; [1943] 1 All E. R. 539; *Colfar v. Coggins and Griffith (Liverpool), Ltd.*, [1945] A. C. 197; [1945] 1 All E. R. 326. *Shearer v. Harland and Wolff*, [1947] N. I. 102; *Franklin v. Bristol Aeroplane Co.* (unreported (H. L.)).

(h) *Pollock v. Burt (Charles), Ltd.*, [1941] 1 K. B. 121; [1940] 4 All E. R. 264; *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] A. C. 215; [1939] 1 All E. R. 637; *Holdman v. Hamlyn*, [1943] K. B. 664; [1943] 2 All E. R. 137; *Colman v. Croft (Isaac) & Sons*, [1947] K. B. 95; [1946] 2 All E. R. 401; *Lancaster v. London Passenger Transport Board*, [1946] 2 All E. R. 612; *Graham (or Muller) v. Glasgow Corporation*, [1947] A. C. 368; [1947] 1 All E. R. 1; *Fitzgerald v. Great Northern Rail. Co.*, [1947] N. I. 1; *Glasgow Corporation v. Bruce (or Neilson)*, [1948] A. C. 79; [1947] 2 All E. R. 346; *Dorrington v. London Passenger Transport Board*, [1947] 2 All E. R. 84; *Barrington v. Kent Rivers Catchment Board*, [1947] 2 All E. R. 782.

(i) 9 & 10 Geo. 6, c. 62.

(k) 43 & 44 Vict., c. 42.

used, and has now been repealed (*kk*).

By the National Insurance (Industrial Injuries) Act (*l*), rights to compensation from state funds are conferred, independently of any question of negligence whatsoever, upon workmen injured by accident arising out of or in the course of their employment. Where a workman is injured or killed in a motor accident it is obvious therefore that he may have a remedy by way of compensation under this Act at the same time as a remedy by way of action against the person to whose negligence the accident was attributable. The Committee on Alternative Remedies recommended in their Report (*ll*) that in spite of this right to statutory compensation, workmen should retain their right of action against their employers for damages for personal injuries, but that the doctrine of common employment should be abolished. They also recommended that the defence of *volenti non fit injuria* should remain unchanged. Their recommendations were incorporated in the Law Reform (Personal Injuries) Act 1948, s. 1 (*kk*), and the defence of common employment is at long last dead.

Other Statutory Provisions.—Duties for the protection and safety of various classes of employees are imposed upon employers by various statutes, of which the most important are the Factory Act (*m*) and the Coal Mines Act, 1911 (*n*). Where an employer is in breach of the provisions of these Acts conferring protection upon his employees and an employee is thereby injured (*e.g.* by the failure to fence dangerous machinery) the employee has a remedy by way of action for damages against the employer for breach of the statutory duty (in respect of which the employer would also as a rule be liable to a fine on prosecution) (*o*). To a claim based upon the breach of such statutory duty, so-called "statutory negligence," neither common employment nor, as a rule, *volenti non fit injuria* is an answer (*p*).

3. Statutory duties in connection with the user of the highway by motor vehicles.—Duties with respect to the user of the highway by and the condition of motor vehicles are imposed upon the owners and users of motor vehicles under a series of enactments (*q*). The bulk of these duties is now contained in the Road Traffic Acts (*r*) and the Regulations made by the Minister of Transport thereunder, in which the rules governing the licensing, condition and driving of motor vehicles are now principally to be found. Inasmuch as these Acts and regulations impose certain important duties, *inter alia*, the duty not to drive or permit a car to be driven unless it is covered by the requisite form of third party insurance (*s*), important questions may arise as to whether there exist remedies by way of civil (as well as criminal)

(*kk*) By s. 1 (1) of the Law Reform (Personal Injuries) Act, 1948 (11 & 12 Geo. 6, c. 41). This section of the Act comes into force on the same day as the National Insurance (Industrial Injuries) Act, 1946, namely July 5, 1948.

(*l*) 9 & 10 Geo. 6, c. 62.

(*ll*) Cmd. 6860, July, 1946.

(*m*) See the consolidating Factories Act of 1937.

(*n*) 12 Halsbury's Statutes 82.

(*o*) *Groves v. Wimborne (Lord)*, [1898] 2 Q. B. 402; *Britannic Merthyr Coal Co., Ltd. v. David*, [1910] A. C. 74.

(*p*) *Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 K. B. 669; *Lochgelly Iron and Coal Co., Ltd. v. M'Mullan*, [1934] A. C. 1. See now the Law Reform (Personal Injuries) Act, 1948, note (*kk*), *supra*.

(*q*) The Locomotives Acts, 1861 and 1865 (19 Halsbury's Statutes 54, 59); the Locomotives on Highways Act, 1896 (19 Halsbury's Statutes 64); the Motor Cars Act, 1903 (19 Halsbury's Statutes 75).

(*r*) Road Traffic Act, 1930 (23 Halsbury's Statutes 607), and S. R. & O. thereunder, 1930 to 1947, *passim*.

(*s*) Road Traffic Act, 1930, s. 35.

proceedings for the breach of such duties. In the bulk of cases where a breach of the statute or of rules under the Highway Code or Minister's Regulations (*t*), e.g. leaving a car in a dangerous position (*u*), failing to signal, driving on the wrong side of the road, exceeding the speed limit where it is applicable, etc., leads directly or indirectly to an accident in which injuries are sustained, the injured party will have his remedy in the Common Law action for damages for negligence or nuisance. Cases, however, occur where a breach of a statutory duty gives rise, directly or indirectly, to no such action. The question then arises as to whether a party thus injured has any remedy by civil action against the party in breach.

As this point has become of importance under the legislation relating to motor insurance (*a*) it is germane to consider it in some detail.

Certain broad principles can be gleaned from the authorities upon "statutory negligence" (*b*). These may be formulated in a series of tests:

(i) *For whose benefit is the duty imposed?*—Where the duty is imposed for the benefit of the public at large it is unlikely that any member of the public who is injured by breach will have a cause of action (*c*). Where, however, the duty is imposed for the benefit or protection of a class or classes of persons, *prima facie* a member of the class protected or benefited who is injured by a breach of the duty has a cause of action (*d*).

(ii) *What does the statute itself provide by way of remedy?*—As a rule breaches of statutory duties are visited with penalties by way of fine or other sanction under the terms of the statutes from which they arise. Where this is so and the duty is one imposed for the benefit of the public generally this is almost conclusive against the right of an injured individual to claim damages (*e*). Where, however, the duty is imposed by the statute for the benefit and protection of a class of persons, then the provision of a penalty by way of fine in the statute by no means concludes the matter (*f*). In fact, in such case a member of the protected class who is injured through a breach of the statutory duty will have a remedy by way of an action for damages therefor (*f*), quite apart from the fine, unless the statute in question either provides for the allocation of the fine imposed in whole or part to persons injured by the breach (*g*) or provides a special remedy for such persons (*h*).

(f) See *ante*, p. 17.

(u) Section 50 of the Road Traffic Act, 1930.

(a) Third Parties (Rights against Insurers) Act, 1930 (23 Halsbury's Statutes 12); Road Traffic Act, 1930 (23 Halsbury's Statutes 607); Road Traffic Act, 1934 (27 Halsbury's Statutes 534).

(b) *Groves v. Wimborne* (Lord), [1898] 2 Q. B. 402; *Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 K. B. 669; *Lochgelly Iron and Coal Co., Ltd. v. M'Mullan*, [1934] A. C. 1; *Lewis v. Denyé*, [1940] A. C. 921; [1940] 3 All E. R. 299; *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A. C. 152; [1939] 3 All E. R. 722; *Yelland v. Powell Duffryn Associated Collieries, Ltd.*, [1941] 1 K. B. 154; [1941] 1 All E. R. 278; *Makin (J. & J.), Ltd. v. London and North Eastern Rail. Co.*, [1943] K. B. 497; [1943] 1 All E. R. 645; *Potts (or Riddell) v. Reid*, [1943] A. C. 1; [1942] 2 All E. R. 161.

(c) *Atkinson v. Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. D. 441; *Clark v. Brims*, [1947] K. B. 497; [1947] 1 A. E. R. 242; *Badham v. Lambs*, [1946] K. B. 45; [1945] 2 All E. R. 295.

(d) See note (b) above, and *per Lord WARRINGTON* in *Lochgelly Iron and Coal Co., Ltd. v. M'Mullan*, [1934] A. C. 1, at p. 13. Cp. *Monk v. Warbey* (1933), 50 T. L. R. 263; on appeal (1934), 50 Ll. L. R. 33 (C. A.).

(e) *Atkinson v. Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. D. 441.

(f) *Groves v. Wimborne* (Lord), [1898] 2 Q. B. 402; *Lochgelly Iron and Coal Co., Ltd. v. M'Mullan*, [1934] A. C. 1.

(g) *Vallance v. Falle* (1884), 13 Q. B. D. 109.

(h) *Witham Outfall Board v. Boston Corporation* (1926), 136 L. T. 756. And see the authorities cited in notes above.

(iii) *Is the damage sustained by the injured party such as the statutory duty contemplated?*—Where a statutory duty is imposed in order to safeguard against a certain type of loss or damage, the injured party will have no claim for damages for breach of that duty unless he has suffered that type of damage against which the duty was intended to be a protection (i).

The principles stated above are applicable to most cases of breach of statutory duties provided that the paramount consideration, the intention of the legislature as it appears in the statute, is borne in mind. Again, confusion has arisen in some cases owing to the primary principle of civil liability, that the damage sustained must be caused by the breach complained of, being overlooked (j).

The case of *Phillips v. Britannia Hygienic Laundry Co.* (k) raised the question as to whether a cause of action could be based upon a breach of an existing regulation forbidding, under a penalty, the taking out and use on the road of a vehicle in an unfit condition. Upon a review of the authorities it was held, applying the principles set out above, that no such action would lie, upon the grounds that the duty was one imposed for the benefit of the public generally, that its breach was visited with the imposition of a fine and that therefore it was not such a statutory provision as could be relied upon in order to ground an action. This case was, however, considered by the Court of Appeal in the case of *Monk v. Warbey* (l), the decision in which is examined in detail later.

4. Statutory liability for damage.—Certain statutes impose a liability for damage caused by the use of a vehicle on the road, irrespective of any question of negligence (m).

5. Contributory negligence in actions for breach of statutory duty.—It is a question of construction whether a provision in a statute that a certain thing must be done means that it is to be done in all events, or only that the person on whom the duty is imposed is to use due care and diligence in endeavouring to perform it (n). The former type of statutory duty is known as an absolute statutory duty, the latter a qualified statutory duty, and in actions brought for breach of the latter class of duty it is now clear that the ordinary rules of contributory negligence as discussed above may

(i) *Gorris v. Scott* (1874), L. R. 9 Exch. 125.

(j) Cf. *Daniels v. Vaux*, [1938] 2 K. B. 203; [1938] 2 All E. R. 271. This consideration should particularly be kept in mind in considering cases in which a claim is based upon an alleged breach of statutory duty under the Road Traffic Acts. See *post*, chapter IV, for full discussion of cases arising under these Acts.

(k) [1923] 1 K. B. 539; affirmed, [1923] 2 K. B. 832.

(l) [1935] 1 K. B. 75. In this case the plaintiff had been injured by the negligent driving of a person to whom the defendant had lent his car. The defendant's insurance did not cover risk of third party liability so incurred. The plaintiff claimed damages for breach of an alleged statutory duty arising under section 35 of the Road Traffic Act in that the defendant had permitted his car to be used by the person in default without such user being covered by the necessary policy of insurance under the Road Traffic Act.

(m) See *post*, chapter VIII, and see *Postmaster-General v. Beck and Pollitzer*, [1924] 2 K. B. 308. See *Lighting and Watching Act*, 1833, s. 56 (8 Halsbury's Statutes 1208), and *Burgess v. Morris* (1897), 77 L. T. 97; *Highway Act*, 1835, s. 72 (9 Halsbury's Statutes 86), and *Tunncliffe v. Pickup*, [1939] 3 All E. R. 297; *Gasworks Clauses Act*, 1847, s. 20 (8 Halsbury's Statutes 1223); *City of London Sewer Acts*, 1848, s. 118, and 1851, s. 37; *Metropolis Management Act*, 1855, s. 207 (11 Halsbury's Statutes 936); *Telegraph Act*, 1878, s. 8 (19 Halsbury's Statutes 267); *Electric Lighting Clauses Act*, 1899, Sched., s. 20 (7 Halsbury's Statutes 720); *London Government Act*, 1939, s. 181 (3).

(n) *Greenwood v. Central Service Co., Ltd.*, [1940] 2 K. B. 447, at p. 461.

be applied (o). It should be noted that the Contributory Negligence Act, 1945, does not apply to industrial cases.

The question was raised in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (p), whether under any circumstances the negligence of the plaintiff could affect the liability of the defendant, where the defendant was admittedly in breach of an absolute statutory duty. It was decided that on the authority of *Lochgelly Iron and Coal Co., Ltd. v. M'Mullan* (q) the contributory negligence of the plaintiff, in its proper sense, could not be pleaded as a defence, but that where it could be shown that the real cause of the accident was the plaintiff's own negligence, then, although the defendant may have been in breach of his duty under the statute, the injury to the plaintiff did not flow from that breach, and the action must fail.

It was pointed out in *Caswell's* case that in industrial cases of this nature the employer must show a high degree of negligence on the part of the workman before it could truly be said that the workman was responsible for the accident.

A particular application of these principles is shown by the cases relating to the actions for breach of the statutory duty imposed on motorists by the Pedestrian Crossing Places (Traffic) Regulations, 1941 (r). By these regulations, in effect, a pedestrian is given the right of way, when once on the crossing, to pass in front of approaching motor vehicles, and has no duty to observe the advance of motor vehicles upon him. In *Bailey v. Geddes* (s), the extent of this right was expressed in wide terms, so wide that the duty of a motorist to give way to pedestrians on crossings appeared to be absolute, so that, whatever the conduct of the pedestrian, he could always recover for the injuries received by collision with a motor vehicle, so long as he was when hit upon the crossing itself. The effect of this ruling would have been to slow down traffic at these crossings almost to a standstill, and it was so argued in *Sparks v. Ash (Edward), Ltd.* (t). But in *Chisholm v. London Passenger Transport Board* (u), the right of the pedestrian was shown to exist only if he stepped on to the crossing justifiably, for the advantages of the Regulations were given to him only when he was on the crossing, and not while he was still on the footway or on a refuge in the middle of the road (v). While the duty of the motorist is to approach the crossing at such a reasonable speed that he can stop before reaching the crossing so as to allow pedestrians already in his path to cross, the pedestrian has this duty, not to step from the footway in front of approaching vehicles who are at that time of close that no diligence on the part of the motorist would avoid an accident. If the pedestrian breaks his duty in this respect he may himself be said to be the sole cause of the accident, and indeed the motorist, if he is proceeding at a reasonable speed, may not be guilty of a breach of statutory duty at all (w). Even when on the crossing the pedestrian, it is submitted, has a duty to proceed with reasonable despatch, and if for instance he suddenly stops to light a cigarette it is suggested on the authority of *Sparks v. Ash (Edward), Ltd.* (t), that he would be considered to be solely responsible for any accident resulting therefrom. The duty of a motorist, however, to avoid accidents at level crossings is a very high one (u).

(o) *Lochgelly Iron and Coal Co., Ltd. v. M'Mullan*, [1934] A. C. 1.

(p) [1940] A. C. 152; [1939] 3 All E. R. 722.

(q) [1934] A. C. 1.

(r) S. R. & O. 1941, No. 397, as amended by Road Vehicles (Pedestrian Crossing Places) Order (No. 2), S. R. & O. 1942, No. 854.

(s) [1938] 1 K. B. 156; [1937] 3 All E. R. 671.

(t) [1943] K. B. 223; [1943] 1 All E. R. 1. See also Regulation 7, S. R. & O. 1941, No. 397.

(u) *Upson v. London Passenger Transport Board*, [1947] K. B. 930; [1947] 2 All E. R. 509; *Stimson v. Pitt*, [1947] K. B. 668.

6. Liability for non-repair of roads.—It not infrequently happens that an accident occurs on the highway owing to interference with the actual structure of the highway by excavation, or by faulty repair of the road. Here the liability of the authority entrusted with the duty of altering the structure of the roadway is called in question, and these general rules apply.

In general, no action will lie by an individual against any local authority entrusted with the statutory duty of keeping the highway in repair, so long as the dangerous condition arising from the failure to keep the road in proper repair arises from nonfeasance (*x*). The local authority is responsible in damages for any misfeasance whereby the highway is rendered dangerous.

There are severe limits of this rule which protects the highway authority by virtue of its succession to the duties of the surveyor of the highway, for the rule itself has little to commend it in the way of justice. Thus, the local authority will not be protected if in failing to remove the dangerous condition in the road, it is acting in the capacity of sanitary authority under the Public Health Acts, and not as repairers of the highway (*y*). The rule does not extend to save other authorities who are given statutory authority to alter the structure of the road for some other purpose than repair. Thus dock companies, tramway corporations, telegraph authorities and the like are not exempt from liability if they create a public nuisance by interrupting the continuity of the highway (*z*). Secondly, the rule does not protect the repairing highway authority in cases where the danger or obstruction is caused by active misfeasance, *e.g.*, the making of an excavation in the road (*a*). Thirdly, the duty of the repairers of the highway is to restore the road to the condition in which it was before the repairs became necessary, and if subsidence occurs, even after a considerable lapse of time, subsidence being a natural and foreseeable consequence of the repairs, then the local authority will be found liable (*b*). *A fortiori*, where the repairs incidentally create an immediately dangerous condition, the liability will attach (*c*). Where unlighted obstructions are placed in the highway, except where the enabling statute excludes the duty of taking care, there is a duty imposed to see that reasonable steps are taken to maintain the works in a safe condition: and in the absence of street lighting, *prima facie* the obstacle itself must be properly lit. This duty is part of the law of negligence (*d*). The duty laid on highway authorities to execute proper repairs cannot be resolved by delegating the work to a properly chosen independent contractor, for such work, if improperly executed, will be in itself a danger to the public (*e*).

The rule, in spite of its limitations, still has application, and where an

(u) [1939] 1 K. B. 426; [1938] 4 All E. R. 850.

(v) *Wilkinson v. Chetham-Strode*, [1940] 1 K. B. 309.

(w) *Knight v. Sampson*, [1938] 3 All E. R. 309.

(x) *Russell v. Men of Devon* (1788), 2 Term Rep. 667; *Guilfoyle v. Port of London Authority*, [1932] 1 K. B. 330, at p. 344, *per* HUMPHREYS, J.

(y) *Thompson v. Brighton Corporation*, [1894] 1 Q. B. 332; *Conelly v. West Ham Corporation* (1946), 176 L. T. 52.

(z) *Skilton v. Epsom and Ewell Urban District Council*, [1937] 1 K. B. 112; *Simon v. Islington Borough Council*, [1943] K. B. 188; [1943] 1 All E. R. 41; *Manchester Corporation v. Markland*, [1936] A. C. 360.

(a) *McClelland v. Manchester Corporation*, [1912] 1 K. B. 118.

(b) *Pictou Municipality v. Geldert*, [1893] A. C. 524; *Swain v. Southern Rail. Co.*, [1939] 2 K. B. 560; [1939] 2 All E. R. 794.

(c) *Newsome v. Darton Urban District Council*, [1938] 3 All E. R. 93.

(d) *Drake v. Bedfordshire County Council*, [1944] 1 K. B. 620; [1944] 1 All E. R. 633; *Whiting v. Middlesex County Council and Harrow Urban District Council*, [1948] K. B. 162; [1947] 2 All E. R. 758.

(e) *Fisher v. Ruislip-Northwood Urban District Council and Middlesex County Council*, [1945] K. B. 584; [1945] 2 All E. R. 458.

accident occurs simply through the failure of the highway authority to carry out any repairs at all, the injured user of the road has no remedy (*f*).

II.—PARTIES.

1. The Crown.—Before the Crown Proceedings Act, 1947 (*g*), was passed, there was no remedy against the Crown for a tort. Where the rights of a subject were violated, it was possible in certain cases, though not in tort, to obtain redress by means of a petition of right. This remedy was available for the recovery of damages for breach of contract or for the specific restitution of property wrongfully detained, but it could only be brought by fiat of the Attorney-General. In practice, this immunity of the Crown, and its irresponsibility for the acts of its servants and agents was mitigated by a procedure by which, if a successful action were brought against the Crown's servant, the Crown did in fact pay the damages and costs awarded as a result of the servant's tort. An independent person was appointed as arbitrator by the Lord Chancellor in the years between 1942 and 1946 to decide in doubtful cases whether the Crown would have been liable for the servant's wrongdoing, on the principle of vicarious liability (*h*). An alternative practice of "nominating" a defendant for the purpose of an action to decide the Crown's liability, broke down, however, when the House of Lords decided in *Adams v. Naylor* (*i*), which was followed by the Court of Appeal in *Royster v. Cavey* (*k*), that where the person nominated by the Crown as defendant in the action in tort could not be said in law truly to be responsible for the damage, the Crown's immunity must persist. Thus, where a Crown servant in charge of a Government factory was admitted by a legal fiction in the defence to be the occupier of the factory so as to be responsible for the injury caused to another Crown servant who was working therein, the admission was not accepted, and the action, based as it was on hypothetical fact, was held to fail against him.

The personal liability of Crown servants remained, though the rule of employers' liability was not applicable to them so as to make them responsible for the acts of other public officials who were subordinate to them, unless the senior official had expressly authorised the tortfeasor to commit the wrong.

This anomalous state of affairs has now been abolished by the Crown Proceedings Act, 1947 (*g*). The Act effects two main changes, the first in substantive law, the second in procedure. First, by Part I of the Act the Crown is made liable in tort in all cases in which, if it were a private person of full age and capacity, it would be liable. Thus, by s. 2 (1) the Crown becomes liable, as is a normal employer, for the tortious acts of its servants when those acts are committed in the course of the servants' employment, though enactments limiting the liability of any department of the Government enure to the benefit of the Crown in proceedings brought under the 1947 Act against the servants of that department (s. 2 (4)). The servant of the Crown must have been at the material time appointed by the Crown and paid out of public monies (s. 2 (6)). The law of contributory negligence

(*f*) *Penny v. Wimbledon Urban Council*, [1899] 2 Q. B. 72; *Hardaker v. Idle U.D.C.*, [1896] 1 Q. B. 335; *Gray v. Pullen* (1864), 5 B. & S. 970; *Chappell v. Dagenham Corporation* (1948), 92 Sol. Jo. 362.

(*g*) 10 & 11 Geo. 6, c. 44. The Act came into operation on January 1, 1948, but is retrospective as regards causes of action arising on and after February 13, 1947. Further, the Court has a discretionary power to allow joinder of the Crown as a party in any action commenced but not determined by January 1, 1948, where justice would be met by so doing (s. 12).

(*h*) If he was in charge of government vehicles, the Crown had to be satisfied that at the time of any accident the servant was discharging government duty.

(*i*) [1946] A. C. 543; [1946] 2 All E. R. 241.

(*k*) [1947] K. B. 204; [1946] 2 All E. R. 642.

applies in these new proceedings against the Crown (s. 4). By s. 10, members of the armed forces while on duty are released from legal liability in tort for the death of or personal injury to another member of the armed forces, provided that that other person is also on duty or is on any land or premises used for the purposes of the armed forces: but a private citizen who is a joint tortfeasor with a member of the armed forces who is thus protected may obtain a reduction of the damages for which he is found liable if he can show that he would have obtained contribution from that member of the armed forces had it not been for the provisions of this section.

Secondly, by Part II of the Act, petitions of right are abolished, and all proceedings by or against the Crown must be brought in accordance with the rules of Court (s. 13) or with the County Court Rules (s. 15). The Crown will sue or be sued in the name of the appropriate Government department or in the name of the Attorney-General (s. 17). Service will be accepted by the solicitor nominated for each department, or by the Treasury solicitor.

In Part IV of the Act, the Court is empowered for the first time to order the Crown to give discovery, subject to the rule protecting Crown documents in those cases where, on the principles laid down in *Duncan v. Cammell Laird & Co., Ltd.* (1), there is an overriding public interest which requires that they shall not be produced, and of the existence of this interest the statement of the appropriate Minister must be accepted without question by the Court (s. 28).

The Act applies to England and Scotland (s. 49) and makes provision for the extension of the Act by Order in Council to Northern Ireland (s. 50).

The mere fact that persons are entrusted by law with public functions does not necessarily make them public servants and servants of the Crown.

The Public Authorities Protection Act, 1893, and the Limitation Act, 1939, discussed below, limit the time within which proceedings against the Crown under this Act may be commenced to one year from the date of the tort (2).

2. Public authorities.—By the Limitation Act, 1939 (3), and the Public Authorities Protection Act, 1893 (4), special restrictions are placed on the time within which actions may be commenced against public authorities, and on the conduct of such an action. By s. 21 (1) of the Limitation Act, 1939 (5), no action shall be brought against any person for any act done in

(1) [1942] A. C. 624; [1942] 1 All E. R. 587.

(2) A number of Nationalisation Acts at the present time contain special provisions with regard to the limitation of actions against the servants of the Authorities set up by those Acts for torts committed by those servants in the course of their employment. For instance, s. 49 of the Coal Industry Nationalisation Act, 1946 reduces the limitation period from six to three years and excludes the effect of s. 21 of the Limitation Act, 1939. Similar provisions are contained in the Electricity Act, 1947, the New Towns Act, 1946, the Ministry of Civil Aviation Act, 1945 and the Transport Act, 1947.

(3) 2 & 3 Geo. 6, c. 21. The Limitation Act, 1939, s. 21 (1), only applies to actions to which the Public Authorities Protection Act applies. It has not been finally decided whether, in a case where a public authority is brought in as third party by a defendant in a claim for contribution, the statutory provision starts to operate in favour of the public authority from the date of the negligent act, or from the subsequent date when the liability of the co-tortfeasor is established at the trial of the action. In *Merlihan v. Pope (A. C.)*, Ltd. and *Hibbert*, [1946] K. B. 166; [1945] 2 All E. R. 449, BIRKETT, J., held that as the third party notice had not been served on the public authority within one year of the date of the accident, the claim for contribution was statute-barred; whereas CASSELLS, J., in *Hordern Richmond, Ltd. v. Duncan*, [1947] K. B. 545; [1947] 1 All E. R. 427, held the latter of the two views stated above. In so far as the cause of action which gives rise to the third party proceedings is the liability of the third party to make contribution, which does not arise until the liability of the defendant has been ascertained, it is submitted that of two conflicting authorities, the decision in *Hordern Richmond, Ltd. v. Duncan* should be preferred.

(4) 56 & 57 Vict. c. 61.

pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority or in respect of any neglect or default in the execution of any such act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued. Where the act or default is a continuing one, no cause of action is deemed to have arisen until it has ceased. Thus where a subsidence in the roadway has occurred two years after the repair of the road by a local authority was executed, a cause of action arises when damage is caused thereby, and the writ may be issued within one year of the date of the accident.

In order to obtain the protection of the Public Authorities Protection Act (n), the authority concerned must be working for the benefit of the public. Corporations and other bodies, although they may be working in the public interest, do not come within the definition if by their transactions private profit is made for their shareholders or members (o). Even where private profit is not made, as in the administration of a charitable trust, which is also in the public interest, the body concerned may not be a "public authority" (p).

In these days many other bodies than municipal corporations work for the public benefit, and in each case the facts must be investigated to discover whether the Act gives protection (q). The servants of the authority so protected, if they are working at the time under a direct mandate from the authority, are also protected (r). Any acts done in execution of a public duty are given the benefit of the Act. The act or omission which gave rise to the cause of action must be incidental to or part of the statutory obligation or public duty (s). In highway cases, apart from those in which authorities who are altering the structure of the roadway are concerned, the limitation will arise where vehicles which are driven by servants of a public authority are concerned in an accident (t).

Here the test will be whether the servant was acting in the execution of his orders (t), and secondly whether that order was in the execution of a public duty (u).

By s. 22 of the Limitation Act, 1939, in the case of plaintiffs who were under a disability when the cause of action arose the period of limitation is six years from the date when the disability ceased or the plaintiff died, even though the period of limitation under s. 21 (1) has expired. There is an exception to this rule in the case of infants or lunatics who at the time that the cause of action arose were in the charge of an adult. Against these plaintiffs the limiting period is one year.

The Act extends to protect the authority against additional pleas of negligence, added after the original writ for one head of negligence was issued within the proper period (u).

Additional protection to the public authority is given by s. 1 (b), (c) and (d) of the Public Authorities Protection Act, 1893, by the absolute require-

(o) *Swain v. Southern Rail. Co.*, [1939] 2 K. B. 560; [1939] 2 All E. R. 794.

(p) *Woodward v. Hastings Corporation*, [1945] K. B. 174; [1944] 2 All E. R. 565; *Griffiths v. Smith*, [1941] A. C. 170; [1941] 1 All E. R. 66; *Greenwood v. Atherton*, [1939] 1 K. B. 388; [1938] 4 All E. R. 686.

(q) *Edwards v. Metropolitan Water Board*, [1922] 1 K. B. 291; *Jacoby v. Prison Comrs.*, [1940] 3 All E. R. 506; *Clarke v. Bethnal Green Borough Council*, [1939] 2 All E. R. 54.

(r) *Nelson v. Cookson*, [1940] 1 K. B. 100; [1939] 4 All E. R. 30.

(s) *Griffiths v. St. Clement's School*, [1939] 2 All E. R. 76; *Bradford Corporation v. Myers*, [1916] 1 A. C. 242.

(t) Examples are a postman driving a post-office van, a policeman driving a police-car.

(u) See note (ll), p. 43, *ante*.

(u) *Batling v. London Passenger Transport Board*, [1941] 1 All E. R. 228.

ment that a successful defendant in such actions shall be awarded costs as between solicitor and client (*v*).

3. Husband and wife.—The rights and liabilities of husband and wife between themselves in relation to tortious acts were radically altered by the Law Reform (Married Women and Joint Tortfeasors) Act, 1935 (*w*). Before that Act was passed, husband and wife were at Common Law deemed to be one person, and the husband was liable in damages for his wife's wrongful acts, except where the wrongful act was committed in connection with a contract with herself (*x*). By virtue of the Married Women's Property Act, 1882 (*y*), a married woman who possessed a separate estate of her own was liable personally, in addition to her husband, for her own torts. The "oneness" of the husband and wife at Common Law had a further consequence in that the husband was not entitled to sue his wife for any tort of any description (*z*), while the wife, although formerly under the same disability, anomalously enjoyed the right to sue her husband for wrongful acts committed in relation to her separate property (*a*). But for other wrongful acts, personal injuries by negligent driving for instance, the Common Law position still holds good to-day (*b*). So wide is the principle referred to in its application that marriage at once puts an end to any right of action, other than the excepted types, to which a woman was previously entitled against a man whom she subsequently marries (*c*).

By the Law Reform (Married Women and Tortfeasors) Act, 1935 (*w*), the husband is not, by reason only of being his wife's husband, liable in respect of any tort committed by her whether before or after the marriage, nor is he liable to be sued or made a party to any proceedings brought in respect of such a tort. But he will be liable if he has authorised his wife to commit the tortious act, on the general principles of vicarious liability (*d*), and a husband and wife may be jointly liable in respect of a tort as if they were not married (*e*).

The Act of 1935 did not, however, alter the aspects of the law of husband and wife that are more important in motor insurance cases. The old rule therefore still subsists that a husband may not sue a wife at all in tort, and a wife may not sue a husband in tort except in so far as the tortious act affected her separate property. Neither could nor can sue the other in an action for personal injuries caused by negligent driving.

On rare occasions it is possible for one spouse to sue the other if that other is driving as the servant or agent of a third person, but to be able to prove such an external relationship must necessarily be rare (*ee*).

Where a husband in consequence of an accident to his wife has lost her services, he may recover for any special expense to which he is put in replacing those services, and by way of general damages for their loss. Where the wife is killed, other considerations arise (*f*).

4. Infants.—Infancy is, in general, no defence to an action in tort.

(*v*) The wording of the subsections is mandatory. *Duncan v. Cammell Laird & Co., Ltd.*, [1944] 2 All E. R. 159, n.

(*w*) 28 Halsbury's Statutes 104.

(*x*) *Edwards v. Porter*, [1925] A. C. 1.

(*y*) 9 Halsbury's Statutes 374, as amended by the Married Women's Property Act, 1884 (9 Halsbury's Statutes 383).

(*z*) *Webster v. Webster*, [1916] 1 K. B. 714.

(*a*) Married Woman's Property Act, 1882, s. 12 (9 Halsbury's Statutes 379).

(*b*) *Tinkley v. Tinkley* (1909), 25 T. L. R. 264; *Ralston v. Ralston*, [1930] 2 K. B. 238.

(*c*) *Gottliffe v. Edelston*, [1930] 2 K. B. 378. At the time of going to press this case has been overruled. See *Curtis v. Wilcox*, [1948] 2 All E. R. 573, C. A.

(*d*) See *post*, p. 48.

(*e*) See *post* p. 46.

(*ee*) Cf. *Smith v. Moss*, [1940] 1 K. B. 424; [1940] 1 All E. R. 469.

(*f*) See *post*, p. 55.

Yet in an action based on negligence, the child has to be shown to have the necessary culpable intention, and it may well be that the child in question has not reached the years of discretion so that he was fully aware of the consequences of his act which an older man would have foreseen.

Where therefore a child commits what would in an adult be a negligent act, he is fully liable unless the Court takes the view that he was too young to realise that what he was doing was negligent, and this rule applies to allegations against him of contributory negligence (*g*). Where there is concurrence of a breach of contract and a tort, the infant will not be found liable in tort if the plaintiff, by framing his action in tort, has thereby attempted to enforce what is in substance merely a breach of contract (*h*).

An infant may sue in tort as may an adult, and may recover damages from his father in an action for negligence (*i*). Now that the doctrine of identification has been exploded, a child injured while in the care of a negligent adult is not debarred by that negligence from suing a third party (*k*).

It may be, however, that in motoring accidents the driver of the vehicle concerned may be able to show that he himself was not negligent in that he was entitled to assume that the guardian of the child would see that the rules of the road were observed. Thus where the guardian has failed in this duty, it is for the infant to show that, in spite of the negligent control over himself, the defendant motorist still caused the accident (*l*).

A father is not liable for the torts of his children as such, though he may be vicariously liable as master for the acts of his child as his servant, and this is so even though those acts were carried out gratuitously.

On the same principle, the father may sue in damages for the loss of services of his child, when that child has been injured by a third party, if he can show that the child did render him services the value of which can be assessed in terms of money (*m*), or was rendering him constructive services (*n*). An action on the case lies also at the father's suit for any medical expenses incurred necessarily by him in respect of injuries received by his children, and this is so even though the child is related to him illegitimately or in consequence of adoption, so long as the child is dependent upon him.

5. Joint tortfeasors.—Joint tortfeasors, that is, those persons who together incur responsibility in respect of the same wrongful act, whether by way of vicarious responsibility (*o*) or by way of common action in a wrongful activity (*p*), were at Common Law jointly and severally responsible for the whole of the damages sustained by the injured party (*q*). At Common Law, this gave the latter the right to choose whether he should seek to make

(*g*) See *ante*; *Lynch v. Nurdin* (1841), 1 Q. B. 29; *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101.

(*h*) See *p. 67, post*; *Leslie (R.), Ltd. v. Sheill*, [1914] 3 K. B. 607, at *p. 613*; *Sticks v. Wilson*, [1913] 2 K. B. 235, at *p. 246*. Salmond, 10th Edn., *p. 61*, note (*q*).

(*i*) *Young v. Rankin*, [1934] S. C. 499; [1934] Sc. L. T. 445.

(*k*) *Mills v. Armstrong, The Bernina* (1888), 13 App. Cas. 1; *Oliver v. Birmingham and Midland Motor Omnibus Co., Ltd.*, [1933] 1 K. B. 35.

(*l*) *Vide ante*, *p. 32*.

(*m*) *Hall v. Hollander* (1825), 4 B. & C. 660.

(*n*) Where the child is old enough to be capable of performing acts of service and is resident in the father's house, and is not engaged to serve some other person exclusively, the father will be held to have a good cause of action to recover for services which the child might have rendered to him, although in fact he never exercised the right to those services.

(*o*) As, for example, where the relationship of principal and agent or master and servant exists, both parties are liable in respect of the wrongful act committed by the servant or agent.

(*p*) *The Koursh*, [1924] P. 140; *Brooke v. Bool*, [1928] 2 K. B. 578; *Arneil v. Paterson*, [1931] A. C. 560.

(*q*) *Mitchell v. Tarbutt* (1794), 5 Term Rep. 649.

one or all of the joint wrongdoers liable in an action, but once he had obtained judgment against those sued he could not proceed against the others (r). However many joint wrongdoers were sued together only one verdict might be given and one sum of damages awarded, which sum the injured party might obtain in full from any one of the parties liable (s). Joint tortfeasors are to be distinguished from independent tortfeasors where separate tortious acts are responsible for the same damage (ss). Such independent tortfeasors may be joined as co-defendants in the one action where in the opinion of the Court it is convenient (t).

The position at Common Law was completely altered by the Law Reform (Married Women and Tortfeasors) Act, 1935 (u). Where a judgment obtained by any person injured as a result of a tort is not satisfied by the defendant, it is no longer a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage (v). The total sums recoverable under the judgments given by way of damages in successive actions in respect of an injury shall not exceed in the aggregate the damages awarded by the judgment first given, and the plaintiff is not entitled to costs in any of those actions except that in which judgment is first given, unless the Court is of opinion that there was reasonable ground for bringing the later action (w).

The old Common Law rule that there could be no contribution between joint tortfeasors known as the rule in *Merryweather v. Nixan* (x) has now been abolished by s. 6 (1) (c) of the 1935 Act. By this subsection any tortfeasor liable in respect of the damage to the plaintiff may recover contribution from any other tortfeasor who is, or would have been, if sued, liable whether jointly or otherwise, in respect of that damage. An exception is created where a co-tortfeasor is entitled to be indemnified by the person seeking contribution, so long as the agreement for indemnity is not for the commission of a crime (y).

The right to claim contribution is extended to all persons responsible for the damage, whether joint tortfeasors or no. This is important in running down actions, because in such cases the defendants are usually not joint tortfeasors but are guilty of separate acts of negligence which have combined to cause the same damage. The release of one joint wrongdoer will still, however, release all the other wrongdoers, and it is therefore important that the plaintiff should expressly retain, if he wishes to do so, his right to sue other wrongdoers if he enters into an agreement not to sue one particular wrongdoer (z).

In proceedings for contribution, the amount recoverable from any person is such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage (a). The subsection covers a complete indemnity (b) and also an exemption from liability at the other end of the scale.

The wording of this subsection was followed substantially in s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, whose meaning has already

(r) *Brinsmead v. Harrison* (1872), L. R. 7 C. P. 547.

(s) *Greenlands, Ltd. v. Wilmshurst and London Association for Protection of Trade*, [1913] 3 K. B. 507.

(ss) See note (p), p. 46, *ante*.

(t) Order 16, r. 4, R. S. C.

(u) 28 Halsbury's Statutes 104.

(v) *Ibid.*, s. 6 (1) (a) (28 Halsbury's Statutes 473).

(w) *Ibid.*, s. 6 (1) (b).

(x) (1799), 8 Term Rep. 186.

(y) *Ibid.*, s. 6 (1) (c) and s. 6 (4) (c).

(z) *Duck v. Mayeu*, [1892] 2 Q. B. 511, *per* A. L. SMITH, L. J., at p. 513; *Apley Estates Co. v. De Bernales*, [1946] 2 All E. R. 338; on appeal, [1947] Ch. 217; [1947] 1 All E. R. 213.

(a) *Ibid.*, s. 6 (2).

(b) *Ryan v. Fildes*, [1938] 3 All E. R. 517.

been discussed above with regard to contributory negligence (c). The principles on which the Court have acted in interpreting this subsection were considered there, and it is not proposed to add anything here save to say that the apportionment of damages by the Court (d) is unlike an ordinary finding of fact and involves an individual choice or exercise of discretion on the part of the Court; the finding of the trial judge will therefore not be interfered with on appeal, save in very exceptional circumstances, e.g. if the judge has misapprehended a vital fact or there is some error of law or fact in his judgment (e).

III.—PRINCIPLES OF VICARIOUS LIABILITY.

1. Principal and agent.—In law, as indeed in common sense, no one can escape responsibility for a wrongful act, the commission of which he has ordered or authorised or procured, upon the ground that he himself has not committed it. The maxim *Qui facit per alium facit per se* expresses this rule, that principal and agent are jointly and severally liable as joint wrongdoers for any tort authorised by the former and committed by the latter.

It has been said that a person who does something on behalf of another is, as far as vicarious liability in tort is concerned, either the servant of that other, or an independent contractor (f). In running down cases where vicarious liability is alleged, it is normally pleaded that the negligent driver of the vehicle was driving as the servant or agent of the defendant. It is clear that the defendant would not normally be liable if the driver was acting as an independent contractor. Can it be said that in motoring cases a driver can be driving on behalf of another so as to fix liability on that other for his acts of negligence, and yet not be his servant, as defined below? In a small number of cases (g), it has been held that such a situation may arise, where the driver of the vehicle was requested to use the car, and was driving on another's behalf and not for his own purposes.

2. Partners.—By the Partnership Act, 1890 (h), and at Common Law partners are jointly and severally liable for each other's torts committed "in the ordinary course of the business of the firm." The negligent driving of one partner while on the business of the firm will therefore impose vicarious liability on all other partners (i).

One tort is expressly excepted from this rule, that of fraudulent misrepresentation as to the character and solvency of any person, unless the representation is in writing and signed by all the partners (k).

3. Master and servant.—The first and most obvious category of cases to which the principle of vicarious liability applies is where the relationship

(c) *Ante*, p. 27.

(d) Note that apportionment is the duty of the judge, not of the jury. The jury, therefore, has first to find whether either or all defendants are liable, before apportionment may take place.

(e) *British Fame (Owners) v. MacGregor (Owners)*, *The MacGregor*, [1943] A. C. 197; [1943] 1 All E. R. 33; *Kisano Maru S.S. v. Otranto S.S.*, [1931] A. C. 194.

(f) Salmond, 10th Edn., p. 83.

(g) *Parker v. Miller* (1926), 42 T. L. R. 408; *Thompson v. Reynolds*, [1926] N. 131; *Samson v. Aitchison*, [1912] A. C. 844; *Smith v. Moss*, [1940] 1 K. B. 424; [1940] 1 All E. R. 469; *Hewitt v. Bonvin*, [1940] 1 K. B. 188; *Egginton v. Reader*, [1936] 1 All E. R. 7.

(h) Sections 10, 12 (12 Halsbury's Statutes 534).

(i) *Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

(k) Statute of Frauds Amendment Act, 1828, s. 6 (3 Halsbury's Statutes 584); *Banbury v. Bank of Montreal*, [1918] A. C. 626; *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301.

of master and servant exists between the person committing the wrongful act, the tortfeasor, and he who has ordered or authorised him, in fact or in implication of law, to commit it. Whether or not the relationship of master and servant exists between these persons is a question purely of fact in any given case (*l*) (with the exception ingrafted by statute in the case of the owners and drivers of hackney carriages (*m*)). The relationship does not depend upon the receipt of pay by the servant (*n*), nor does it depend upon the length or character of his service (*o*); it depends purely upon the question as to whether or not at the time of the wrongful act concerned the one had *the right to control* the actions of the other, both as to what he was to do and as to the way in which he was to do it (*p*). Whether or not actual control was exercised is strictly irrelevant (*q*), the question is one which depends upon the right to control (*r*). This question often arises in connection with the loan of a vehicle to a servant or a friend. The former case is considered below. In the case of a friend, if the vehicle is loaned to the friend for the friend's purposes, then no relation of master and servant arises. If, on the other hand, the vehicle is loaned to the friend for the owner's purposes, then the relation of master and servant arises. Where, however, the owner himself goes in the vehicle with the friend, then a very strong presumption arises that the friend was acting as the owner's servant or agent, because it is presumed that the owner, being in the car, had the right to control the driving of it.

Once it is established that the relationship of master and servant exists between two persons, in accordance with the test laid down above, then the responsibility of the master for his servant's wrongful acts arises. This responsibility is not limited to wrongful acts which the master has expressly authorised, but, for obvious reasons, extends to make the master liable in respect of unauthorised, or even prohibited (*s*), modes of doing authorised acts where these result in liability to other persons, and even though the servants' actions be criminal (*t*). The question frequently arises as to whether a master is liable when his servant makes an unauthorised use of the master's property. In such a case, if the property, e.g. a car, is being used for the servant's own purposes, then the master is not liable for the negligent use of that property. If, however, the servant is making an unauthorised use of the master's property for the master's own purposes, or if such use is merely incidental to an authorised use of the property, then the

(*l*) *Quarman v. Burnett* (1840), 6 M. & W. 499; *Pratt v. Patrick*, [1924] 1 K. B. 488; *Hewitt v. Bonvin*, [1940] 1 K. B. 188, *per* MACKINNON, L.J.

(*m*) London Hackney Carriages Act, 1843 (19 Halsbury's Statutes 125); also in the case of carriers and stevedores and their servants; see Carriage of Goods by Sea Act, 1924 (18 Halsbury's Statutes 813).

(*n*) *Degg v. Midland Rail. Co.* (1857), 1 H. & N. 773; *Pratt v. Patrick* (*supra*).

(*o*) *Donovan v. Laing, Wharton and Down Construction Syndicate*, [1893] 1 Q. B. 629.

(*p*) *Performing Right Society v. Mitchell and Booker (Palais de Danse), Ltd.*, [1924] 1 K. B. 762.

(*q*) *Parker v. Miller* (1926), 42 T. L. R. 408; *Reichardt v. Shard* (1914), 31 T. L. R. 24.

(*r*) *Donovan v. Laing, Wharton and Down Construction Syndicate*, [1893] 1 Q. B. 629; *Bull (A. H.) & Co. v. West African Shipping Co.*, [1927] A. C. 686; *Higbid v. Hammett (R. C.), Ltd.* (1932), 49 T. L. R. 104. See also *Pratt v. Patrick*, [1924] 1 K. B. 488; *Britt v. Galmoye and Nevill* (1928), 44 T. L. R. 294; *Barnard v. Sully* (1931), 47 T. L. R. 557; *Hewitt v. Bonvin*, [1940] 1 K. B. 188; *Passmore v. Vulcan Boiler and General Insurance Co., Ltd.* (1936), 154 L. T. 258.

(*s*) *Limpus v. London General Omnibus Co.* (1862), 1 H. & C. 526; *Beard v. London General Omnibus Co.*, [1900] 2 Q. B. 530, *cf.* *Ricketts v. Tilling (Thos.) Ltd.*, [1915] 1 K. B. 644; *Jefferson v. Derbyshire Farmers, Ltd.*, [1921] 2 K. B. 281.

(*t*) *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Exch. 259; *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716.

master will be liable (u). The master is only exempt if the servant was engaged exclusively on his own business. Where property is bailed to an employer, and during a frolic of the servant, for his own purposes, the property is destroyed, the employer may be liable to the bailor (v). Though if an accident had occurred causing damage to a third party during that servant's unauthorised jaunt, the employer would not, it is submitted, have been found liable. As regards thefts by servants, if the property stolen was entrusted to the servant, and put in his care, then the employer will be liable if the servant steals the property. If the property is stolen by a servant to whom the property had not been entrusted, the master will not be liable unless he himself was negligent in selecting that servant or unless the servant to whom the property was entrusted by his negligence induced the theft (w).

The acts of the servant for which the master is thus liable must have been committed within the course of that servant's employment. It is within the course of employment if it is either a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by the master. Thus in *Beard v. London General Omnibus Co.* (x) the conductor of an omnibus decided himself to turn the vehicle round at the end of a journey, and in doing so collided with another vehicle. The company was held not liable. But in *Ricketts v. Thos. Tilling, Ltd.* (y) the company was held liable for the negligence of the driver of one of the company's omnibuses in wrongly allowing another person to drive the vehicle, whereby a collision resulted. The liability of the master for the consequences of his servant's acts, even though they have been expressly prohibited, rests on this, that if the servant was acting within the scope of his employment—and the prohibition is relevant in determining the limits of his employment—then the master is still liable for the wrongful mode in which that servant carries out his duties. Thus in *Canadian Pacific Rail. Co. v. Lockhart* (z) the employers were held liable when their servant in spite of an express order not to use uninsured motor cars drove his own uninsured car whilst on a journey which came within the scope of his employment.

It is not to be thought that every time someone engages another to do something for him the relationship of master and servant with its full legal consequences arises. The question of the right of control in its full significance is vital. Where an employer sends his servant to work for another, it is a question of fact depending on the arrangement made between the two employers, and again, the degree of control exercised by each, whether that servant becomes the servant of the temporary employer, or remains the servant of the general employer. In *Northern Ireland Road Transport Board v. Century Insurance Co.* (a) the agreement between the employers was held to be one for the transference of services, and not a transfer of servants, while in *McFarlane v. Coggins and Griffiths* (b), in which a crane driver was

(u) Cf. *Mitchell v. Crassweller* (1853), 13 C. B. 237, with *Storey v. Ashton* (1869), L. R. 4 Q. B. 476; *Irwin v. Waterloo Taxicab Co., Ltd.*, [1912] 3 K. B. 588; *Leggott (G. W.) & Son v. Normananton (C. H.) & Son* (1928), 98 J. K. B. 145; *Sanderson v. Collins*, [1904] 1 K. B. 628.

(v) *Aitchison v. Page Motors, Ltd.* (1935), 154 L. T. 128.

(w) *Cheshire v. Bailey*, [1905] 1 K. B. 237; *Abraham v. Bullock* (1902), 86 L. T. 796; *Bontex Knitting Works, Ltd. v. St. John's Garage*, [1943] 2 All E. R. 690.

(x) [1900] 2 Q. B. 530.

(y) [1915] 1 K. B. 644.

(z) [1942] A. C. 591; [1942] 2 All E. R. 464; See also *McKean v. Raynor Brothers, Ltd. (Nottingham)*, [1942] 2 All E. R. 650.

(a) (1942), 72 Ll. L. R. 119.

(b) (1946), 79 Ll. L. R. 569. See *Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool), Ltd.*, [1947] A. C. 1; [1946] 2 All E. R. 345.

lent, the test was said to be whether authority was delegated by the habitual employer to direct the manner in which the machine was operated.

4. Independent contractors.—There is, in general, no liability resting on the employer for the negligent acts of an independent contractor. There are, however, certain cases in which the employer will be held liable on the ground that he himself has broken his duty. There are three classes of such cases. First, when the independent contractor is authorised by the employer to carry out an illegal act: the liability of the employer arises in such cases from the ordinary principles of vicarious liability of the principal for the acts of his agent, and the authorisation may be precedent or the act may be subsequently ratified by the employer. Secondly, the employer is liable where he negligently chooses an independent contractor who is not properly qualified to carry out the work entrusted to him; a duty of care rests upon the employer to see that the work is properly executed, and he may not delegate this duty except with due care (c). Thirdly, there are certain duties resting on an employer to a person or classes of persons, and he may not evade liability for a breach of that duty by delegating the performance of that duty to someone else. These non-delegable duties arise in the following circumstances:

(i) *Cases of absolute liability.*—Where the act which the contractor is employed to do is one which the employer does at his peril, that is to say, where the absence of negligence is no defence to the harmful consequences of that act, it is no defence to claim that the damage was the result of the collateral negligence of the contractor. Such absolute statutory duties exist, for instance, under the Factory Acts, to supply proper safeguards to dangerous machinery. So also the escape of dangerous things under the rule in *Rylands v. Fletcher* (d) imposes liability on the employer, even though the contractor was directly responsible by his negligence for allowing that escape.

(ii) Where, too, the employer undertakes a specially hazardous act, using material or machinery which is in itself dangerous to others, he may not delegate the responsibility for avoiding damage to others by delegating its use to others, however properly chosen. The employer has not merely a duty to take care, but an inescapable duty to see that care is taken (e).

(iii) Lastly, the creation of dangers in a highway may not be delegated to an independent contractor except on the terms that the employer warrants the public against the negligence of the contractor. In *Penny v. Wimbledon Urban Council* (f) a heap of soil was negligently left by the contractor on the highway unlighted and unprotected. In *Tarry v. Ashton* (g) there was a failure of a contractor to repair a lamp suspended over a street. In *Hardaker v. Idle District Council* (h) there was a failure to support a gaspipe when a sewer was under construction beneath the highway. In *Gray v. Pullen* (i) a householder employed a contractor to cut a trench in a road, whereby subsidence occurred.

This line of cases deals only with alterations to the structure of the roadway whereby unusual danger is caused to members of the public using the road. Where a normal use is made of the highway, no such vicarious liability

(c) *Robinson v. Beaconsfield Rural Council*, [1911] 2 Ch. 188.

(d) (1868), L. R. 3 H. L. 330.

(e) *Honeywill and Stein v. Larkin Brothers (London's Commercial Photographers), Ltd.*, [1934] 1 K. B. 191; *Brooke v. Bool*, [1928] 2 K. B. 578, at p. 587.

(f) [1899] 2 Q. B. 72.

(g) (1876), 1 Q. B. D. 314.

(h) [1896] 1 Q. B. 335.

(i) (1864), 5 B. & S. 970.

arises. Thus a taxi driver whom I employ is not my servant, and he is responsible alone for the consequences of his negligent driving (*k*).

IV.—EFFECT OF DEATH UPON A CAUSE OF ACTION.

1. **Death of a party to an action.**—Before the Law Reform (Miscellaneous Provisions) Act, 1934, (*l*) came into effect, the Common Law rule was that on the death of either party to an action, the action abated and could not be continued or recommenced by or against the representatives of the deceased. This rule, which was conveniently expressed in the maxim *Actio personalis moritur cum persona*, was subject to wide exceptions. It did not apply to contracts (*m*) and rights of action for their breach, with the limited exception of promises to marry and contracts for personal service. So that the maxim was confined wholly to actions in tort, and even in this respect it was limited in its application.

No executor or administrator could sue or be sued for any tortious act committed by or against the deceased during his lifetime (*n*). An action in tort must have been begun during the joint lives of the injured person and the wrongdoer. If after such an action had been begun either party died, the action came to an end and could not be continued or recommenced by or against the representatives of the deceased. There were a number of statutory exceptions to the operation of this principle which had thus been cut down in practice to apply only to actions for unliquidated damages such as are, generally, actions for personal injuries, fraud, defamation or trespass (*o*).

The exceptions were of three types :

(i) The principle did not apply to torts involving the wrongful appropriation or acquisition by one man of property belonging to another. Executors might sue and be sued for the value of such property whether or not the property or its proceeds could be traced at the time when the action was brought (*p*).

(ii) The principle did not apply to actions *against* executors and administrators for injuries committed by the deceased within six months of his death in respect of the plaintiff's real and personal property (*q*).

(iii) The principle did not apply to actions by executors for injury done to the real estate of the deceased within six months before his death, or to his personal estate done at any time (*r*).

The latter exception did not apply to pecuniary loss which was merely consequential upon a wrongful act whereby injury was sustained to the

(*k*) *Quarman v. Burnett* (1840), 6 M. & W. 499.

(*l*) 27 Halsbury's Statutes 220.

(*m*) *Jackson v. Watson & Sons*, [1909] 2 K. B. 193. But the damages recoverable in such an action would not extend to damages for pain and suffering, or for loss of support, and the action could only be brought by the personal representatives of the party to the contract, not by his dependants.

(*n*) *Finlay v. Chirney* (1888), 20 Q. B. D. 494; *Phillips v. Homfray* (1883), 24 Ch. D. 439.

(*o*) Damages are termed unliquidated when they have not been assessed, calculated or agreed beforehand by the parties to the action or by statute (10 Halsbury's Laws, 2nd Edn. 85, 133-9).

(*p*) *Phillips v. Homfray* (1883), 24 Ch. D. 439.

(*q*) Administration of Estates Act, 1925, s. 26 (5) (8 Halsbury's Statutes 319), re-enacting the Civil Procedure Act, 1833, s. 2 (8 Halsbury's Statutes 283).

(*r*) Administration of Estates Act, 1925, s. 26 (2) (8 Halsbury's Statutes 318), as to real estate; *ibid.*, s. 26 (1), re-enacting the provisions of statutes of 1330 (4 Edw. 3, c. 7) and 1351-2 (25 Edw. 3, Stat. 5, c. 5), as to personal estate.

deceased's person or reputation (s). Thus the representatives of a man killed by the negligent driving of a third party could not take advantage of the exception in order to sue for pecuniary loss entailed by reason of having to pay doctor's bills, etc. (t). From the above exceptions it will be seen that while the maxim *actio personalis moritur cum persona* had no application in cases of contract, its application in cases of tort was limited to claims based upon acts causing bodily injury or damage to reputation.

Now by s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, all causes of action vested in a person at the date of his death survive for the benefit of his estate. Any cause of action subsisting against him, even if he is a bankrupt, at the time of his death survives against his estate if either it arose not more than six months before his death (tt), or if proceedings in respect of it had been commenced against him before his death. The old Common Law rule that torts consisting in the wrongful appropriation by the deceased of property belonging to another survive as before, and the limitations as to the time of commencement of the action laid down by s. 1 (1) of the 1934 Act do not apply. This section of the 1934 Act, on the other hand, expressly excepts from the general rule that torts now survive against or for a deceased person's estate the torts of defamation, seduction, inducing one spouse to leave the other, and claims in the Divorce Division for damages on the ground of adultery.

The benefit of this change effected by s. 1 is however severely limited in its effect by the express preservation of the Common Law rule next considered, that the death of a person cannot be complained of, as a ground for damages, in a civil court. To all intents, where in a motor accident the death immediately follows the collision, the only claim surviving is that for loss of expectation of life.

Secondly, by s. 1 (2) (c) of the 1934 Act, the damages recoverable, where the death was caused by the tortious act which gave rise to the cause of action, are assessed without reference to any loss or gain to the estate consequent on the death. Thus, if the death is that of a person entitled to an annuity, the loss of that annuity must be disregarded in assessing the damages. Earnings also that the deceased might have acquired had he remained alive cannot be taken in account (u), and insurance monies payable on the death must also be excluded.

2. Actions based on death.—"The death of a human being cannot be made the subject matter of an action, but the shortening of his life may be a ground of damages" (v).

As has already been stated, this principle had no application to breaches of contract resulting in death so as to prevent a claim for pecuniary loss thereby occasioned (w). Thus, for example, the personal representatives

(s) *Hatchard v. Mege* (1887), 18 Q. B. D. 771.

(t) *Pulling v. Great Eastern Rail. Co.* (1882), 9 Q. B. D. 110. But *aliter* in cases where the personal representatives of the deceased base their claim on contract (*Bradshaw v. Lancashire and Yorkshire Rail. Co.* (1875), L. R. 10 C. P. 189). In a fatal motor car accident a negligent defendant, although he cannot be sued at Common Law for damages in respect of the death of his victim, can be sued for damages which have been sustained by the victim's motor car in the same accident, and for medical expenses. In this case proceedings must be commenced not later than six months after representation has been taken out.

(tt) In such a case proceedings must be begun not later than six months after representation has been taken out. See s. 1 (3) (b) of the 1934 Act.

(u) *Benham v. Gambling*, [1941] A. C. 157, at p. 167; [1941] 1 All E. R. 7, at p. 10.

(v) See *Flint v. Lovell*, [1935] 1 K. B. 354, and *Rose v. Ford*, [1937] A. C. 826; [1937] 3 All E. R. 359.

(w) *Bradshaw v. Lancashire and Yorkshire Rail. Co.* (*supra*); *Jackson v. Watson & Sons*, [1909] 2 K. B. 193. But in this case the damages are limited to the pecuniary loss which has been sustained by the death; general damages for pain and suffering cannot be recovered. Nor might funeral expenses.

of a passenger who was fatally injured by the negligence of a defendant under contract to carry him with care and in safety, might and may still claim damages for breach of contract in respect of the fatal injury (*uw*). In cases of wrongful acts which were not at the same time breaches of contract, the principle operated so as to prevent death from forming the subject matter of an action (*x*). This effect has been derogated from considerably by statute. Lord Campbell's Act (*y*) enabled the representatives or dependants of a deceased person whose death has been brought about by the wrongful act of another to sue him for damages to compensate them for such pecuniary loss as has been sustained by reason of that death. Claims under Lord Campbell's Act were and still are subject to certain limitations both as to the time within which they should be brought, as to those dependants who are entitled to bring them, and as to the type of loss which may be recovered (*z*). A claim under Lord Campbell's Act is dependent for its validity upon the deceased person himself being entitled to claim in the same circumstances had he lived (*a*). The Act has made substantial inroads into the Common Law, yet the Common Law rule quoted above remains; furthermore, no claim could be made under Lord Campbell's Act against the personal representatives of a negligent defendant who died in or after the accident and before judgment.

Except for certain enlargements of claims under the Fatal Accidents Act, the Law Reform (Miscellaneous Provisions) Act, 1934, did not alter the second branch of this maxim.

The Fatal Accidents Acts (1846–1908) do not apply in Scotland. The Common Law of that country, together with the Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940, gives a right of action to certain classes of the deceased person's relatives. They can recover for loss of support and also a sum by way of solatium for their wounded feelings. If a person commences an action but dies before obtaining judgment, his executors may continue the action for the benefit of his estate, claiming (1) loss to the estate, including medical and other expenses, (2) for his suffering, (3) for the shortening of his life. The former type of action is precluded by the com-

(*uw*) See note (*w*), p. 53, *ante*.

(*x*) *Baker v. Bolton* (1808), 1 Camp. 493; *Osborn v. Gillett* (1873), L. R. 8 Exch. 88; *Clark v. London General Omnibus Co., Ltd.*, [1906] 2 K. B. 648; *Admiralty Comrs. v. S.S. Amerika*, [1917] A. C. 38.

(*y*) Fatal Accidents Act, 1846 (12 Halsbury's Statutes 335), as amended by the Fatal Accidents Act, 1864 (12 Halsbury's Statutes 337), and by the Fatal Accidents (Damages) Act, 1908 (12 Halsbury's Statutes 340).

(*z*) Damages are limited to actual loss or loss of a reasonable expectation of pecuniary benefit by reason of the death. Medical expenses must be excluded. Against the loss must be set off any benefits, other than those arising under policies of insurance, which have accrued from the death to the persons suing. Dependent relations entitled to sue are husband, wife, children (including posthumous children), grandchildren, step-children, father, mother, step-parents and grandparents. Illegitimate and adopted children are deemed to be children under this Act by s. 2 (1) and (2) of the Law Reform (Miscellaneous Provisions) Act, 1934. Action must be brought within 12 months of the death by the executor or administrator of the deceased on behalf of the relatives. By the Law Reform Act, 1934, s. 2 (3) funeral expenses may now be awarded under the Fatal Accidents Acts if the expenses have been incurred by the dependent relatives.

(*a*) *Read v. Great Eastern Rail. Co.* (1868), L. R. 3 Q. B. 555; *British Columbia Electric Rail Co., Ltd. v. Gentile*, [1914] A. C. 1034; *Venn v. Tedesco*, [1926] 2 K. B. 227; *Vincent v. Southern Rail. Co.*, [1927] A. C. 430. While the dependants' claim is dependent upon the deceased himself had he lived having a claim, their claim is nevertheless different in character from his. This has the curious consequence that whereas the deceased can bar his dependants' right to claim by accepting money in full satisfaction during his life, yet if he only agrees to limit the amount of his liability or makes some similar agreement then the dependants are unaffected (*Nunan v. Southern Rail. Co.*, [1924] 1 K. B. 223).

ment of the latter. Note also that in Scotland there is no claim for loss of services available to husband, parent or employer.

3. Claims for loss of services.—An action in tort lies at Common Law at the suit of the master against one who has deprived him of the services of his servant by causing him bodily harm (*b*), or at the suit of a husband who has lost the consortium of his wife. The service of the servant may be either contractual, *de facto* or constructive, and in the case of the first two can be claimed for under the ordinary head of special damage. Constructive service of a child to its parent is presumed where the child is old enough to perform such acts, and is living at home or in such a relationship to the parent that such services can be assumed to be the normal consequence. It is unnecessary that in fact, in this last case, services are rendered, and indeed money payment for any services that are rendered is not essential. General damages are recoverable if the parent is deprived of such constructive service. In practice, claims for loss of service are normally claimed by way of special damage, and this is also true of claims for loss of the consortium of a wife.

Where a wife is prevented by injury arising from an accident caused by negligence from performing the normal housekeeping duties for her husband, he is entitled to sue in his own name for such loss of service, and if he is compelled to expend money in obtaining a temporary housekeeper to conduct his household, he may claim such expense by way of special damage.

Where, however, the servant is killed by the accident, the master or parent or husband could only claim at Common Law for the loss of services or consortium which occurred between the time of the accident and the date of the death (*c*). The death of the servant or wife, even though in such a case it permanently deprived the master or spouse of such services, could not be made a matter of complaint. It will be remembered (*d*) that this rule did not operate in breaches of contract, and where the accident gave rise to injuries which could form the basis of a claim for breach of contract, the death of the person injured was a substantial factor in the claim for damages (*e*). The Law Revision Committee in 1934 recommended the abolition of this anomalous distinction, but the resulting Act of 1934 (*f*) did not carry out this recommendation. Unless, therefore, the parent or spouse affected by the loss of services resulting from an injury has a claim under the Fatal Accident Acts as a dependant (*g*), the personal claim of that master or parent or spouse is still extinguished by the death.

4. Measure of damages where deceased is killed as result of an accident.

The quantum of damages likely to be recovered under the various heads of damage, where death results from a motor accident, comes now to be considered.

(i) *Under the Fatal Accidents Act, 1846.*—Damages for pecuniary loss to a dependant. Under this Act the dependant's claim is limited to certain specified heads. Damages are limited to actual loss or loss of a reasonable expectation of pecuniary benefit by reason of the death. Against the loss must be set off any benefits other than those arising under policies of

(b) *Bradford Corporation v. Webster*, [1920] 2 K. B. 135; *Att.-Gen. v. Valle-Jones*, [1935] 2 K. B. 209; *Mankin v. Scala Theodrome Co., Ltd.*, [1947] K. B. 257; [1946] 2 All E. R. 614. Note that there is no such claim for loss of service in Scotland.

(c) *Baker v. Bolton* (1808), 1 Camp. 493; *Admiralty Comrs. v. S.S. Amerika*, [1917] A. C. 38.

(d) *Ante*, p. 52.

(e) *Jackson v. Watson & Sons*, [1909] 2 K. B. 193.

(f) Law Reform (Miscellaneous Provisions) Act, 1934 (27 Halsbury's Statutes 220).

(g) *Ante*, p. 54.

insurance (h) which have accrued from the death to the persons suing. By a later Act in the series, widow's pension, additional allowance and orphan's pension payable under the 1929 Act (i) are not to be taken into account, and by s. 2 (5) of the Law Reform (Personal Injuries) Act, 1948, any right to benefit under the National Insurance Acts, 1946, is to be disregarded. The calculation of the award is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which may to a certain extent depend upon the regularity of his employment. Then there is the estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that a widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt (k). The facts in *Davies' Case* (k), to give a typical example, were these: Davies, the deceased, aged 23, earned £2 2s. 4d., of which he kept 5s. each week for himself. £110 1s. 4d. was therefore expended per annum on his family. His widow, aged 21, was awarded £5 (plus £700 under the Law Reform Act, 1934); his daughter, aged 2, was awarded £100; and his son, aged 6 months, £150. In the same case, the deceased Williams, aged 42, earned £3 15s. 5d. per week, of which he kept 2s. 6d. £196 1s. 8d. therefore went to the family every year. His widow, aged 43, was awarded £500 by the House of Lords (plus £250 under the Law Reform Act, 1934); his daughter, aged 13, was awarded £50; his daughter, aged 10, £75; and his son, aged 7, £100.

Again, where the deceased, aged 57, earned £1,000 a year, his widow was granted £2,225 (l).

Although insurance monies payable on death and certain types of widows' and orphans' pensions are not considered in assessing the financial loss to the dependants, war pensions and other normal types of pension have to be taken into account.

Thus, a pension from a Police Pension fund and a gratuity from a Police Charitable fund payable on the death of a policeman *pro tanto* reduce the damages payable to his widow and children under Fatal Accident Acts (m). The reasonable prospect of the award of a war pension has also to be considered (n). In so far as the amount of a war pension varies according to the amount of damages awarded, the Court will take into account the practice of the Ministry of Pensions in this respect. Before the passing of the Law Reform (Personal Injuries) Act, 1948, the practice has been not entirely to withhold the pension or gratuity, but to reduce it. Broadly, the practice has been to reduce the pension by £50 or by the annuity value of 90 per cent (in death claims) of the lump sum that may have been awarded in the civil courts by way of damages. After July 5, 1948, the same practice will be continued, save that for widows over 40, or with children, the pension will not be reduced to below 30s. a week, and for other persons 20s. Children

(h) Fatal Accidents (Damages) Act, 1908 (12 Halsbury's Statutes 340).

(i) Widows', Orphans' and Old Age Contributory Pension Act, 1929, s. 22 (20 Halsbury's Statutes 646); overruling the effect of *Carling v. Lebbon*, [1927] 2 K. B. 108.

(k) *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2), [1942] A. C. 601; [1942] 1 All E. R. 657.

(l) *Lory v. Great Western Rail. Co.*, [1942] 1 All E. R. 230. See also *Hall v. Wilson*, [1939] 4 All E. R. 85.

(m) *Lory v. Great Western Rail. Co.*, [1942] 1 All E. R. 230.

(n) *Johnson v. Hill*, [1945] 2 All E. R. 272. In this case the widow, mother of four young children of a leading aircraftman in the R.A.F., aged 39, earning in civil life £6 per week was awarded £3,250, reduced to £2,750 in view of the probability of the grant of a pension.

will retain £150 of the damages and a minimum pension of 7s. 6d. a week. Civil damages will be retained in full by the widow, and in the computation of them no regard will be had by the courts to any income already received by way of war pension (nn).

(ii) *Under the Law Reform (Miscellaneous Provisions) Act, 1934 (o).*—The object of this statute, as Lord RUSSELL said, is to put a person who has by his negligence caused damage to someone who has subsequently died in the same position as regards liability as he would have been in, if the injured person had sued and recovered judgment while still alive (p). The heads of damage under which the injured person could have recovered if he had not died, are for general damages, pain and suffering, loss of expectation of life, and, by way of special damages, loss of wages or earnings, pecuniary damage and medical and other expenses consequent on the injury. In the event of death, the special damage is calculated only, owing to the preservation of the rule in *Baker v. Bolton* (q), between the date of the injury and the date of the death. For pain and suffering the damages awarded will depend, of course, on the length of time between receipt of the injuries and the death, the magnitude and nature and effect of the injuries, and the capacity of the injured person during that period to suffer pain. In *Rose v. Ford* (p), where a girl of 19½ died four days after the accident, and suffered the amputation of a leg after two days, being in a coma for most of the time, the pain and suffering was assessed at £20 for the four days, and £2 nominal damages for the two days' loss of the leg. The quantum to be awarded under the head of loss of expectation of life has given rise to many conflicting dicta. In *Flint v. Lovell* (r), which was considered in *Rose v. Ford* (p), it was held that the judge in considering the quantum to be awarded under this head should assess the damages on the basis of the fact itself of the shortening of the deceased's expectation of life. The mental disquiet caused by the consciousness that life was shortened can be considered under the heading of pain and suffering or under a separate head of mental suffering (s). In *Rose v. Ford* (t) the dead girl was awarded £1,000 by the Court of Appeal, and this amount was not contested in the House of Lords. Lord ROCHE (u) did give a warning that the sums awarded under this head might result in the inflation of damages in undeserving cases, and Lord WRIGHT (v) felt that juries should award what was fair and moderate by common sense standards, in view of all the uncertainties and contingencies of human life. Special cases might occur, such as that of an infant or an imbecile or an incurable invalid or a person involved in hopeless difficulties.

This sum of £1,000 was taken as the standard for the next few years (w), until the House of Lords came to consider the sum of £1,200 awarded to an infant of 2½ in *Benham v. Gambling* (x). The trial judge in this case had had placed before him the tables of expectation of life prepared by the Registrar-General, but had properly paid little attention to them. Lord SIMON

(nn) *Per* the Attorney-General in the House of Commons, May 28, 1948. It was added that the practice to be pursued in the future, after the passing of the Law Reform (Personal Injuries) Act, 1948, would require careful consideration by the Minister of Pensions and the National Advisory Committee. See also *post*, p. 66. On June 22, 1948, the Minister of Pensions confirmed that in general the same practice would be observed after July 5, 1948.

(o) 27 Halsbury's Statutes 220.

(p) In *Rose v. Ford*, [1937] A. C. 826; [1937] 3 All E. R. 359.

(q) (1808, 1 Camp. 493. (r) [1935] 1 K. B. 354.

(s) *Roach v. Yates*, [1938] 1 K. B. 256; [1937] 3 All E. R. 442.

(t) [1937] A. C. 826, [1937] 3 All E. R. 359.

(u) *Ibid.*, at p. 860.

(v) *Ibid.*, at p. 850.

(w) Cf. £1,000 to a child of three in *Bailey v. Howard*, [1939] 1 K. B. 453; [1938] 4 All E. R. 827.

(x) [1941] A. C. 157; [1941] 1 All E. R. 7.

reviewed the various amounts assessed by the Lord Justices in the Court of Appeal and finally awarded £200. The consideration to be taken into account was not the prospect of length of days, but the prospect of a predominantly happy life. Arithmetical calculations were to be avoided, and only the loss of a measure of prospective happiness was to be considered. The Court was to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness of which the victim had been deprived by the defendant's negligence. The character and habits of the individual were therefore to be considered. No regard should be had to financial losses or gains during the period of which the victim has been deprived. The damages were in respect of loss of life, not of loss of future pecuniary prospects. In the case of a very young child there was necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness could be made. In such a case the damages under this head must be reduced to quite a small sum. Finally, as GODDARD, L. J. (as he then was), had pointed out in the Court of Appeal (y), the compensation was not being given to the person who was injured at all, for the person who was injured was dead. Damages which would be proper for a disabling injury might well be much greater than for deprivation of life. In the circumstances, very moderate figures should be chosen. Lord SIMON expressed the hope that in future, as a result of this case, a lower standard of measurement might be set than had hitherto prevailed for what was in fact incapable of being measured in coin of the realm with any approach to real accuracy. Since this case was decided in 1941, the amounts awarded under this head seem to vary from a maximum of £500 to a minimum of £50, the larger sums being awarded to persons established in life with every prospect of good health and happiness, while the lower sums go to the very young and the very old.

(iii) *Duplication of damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934.*—It was thought when the 1934 Act was passed that if damages for loss of expectation of life were awarded to the administrator of the estate of a deceased person, killed as the result of negligent driving, there might be a risk of duplication of damages, because the Act of 1934 by s. 1 (5) provides that the rights conferred by the Acts shall be in addition to and not in derogation of rights conferred on dependants by the Fatal Accidents Acts. The matter was resolved by Lord WRIGHT in *Rose v. Ford* (z), who declared that there need in fact be no duplication. The jury could be properly directed to take into account either that they were at the same time giving damages under Lord Campbell's Act, or that such damages might or had been given. The object of damages under the Law Reform Act is compensation for the benefit of the estate. The claims under Lord Campbell's Act are independent and are for the separate pecuniary loss sustained by the dependants, whereas the damages under the Act of 1934 go into the general estate in which quite different persons, creditors, legatees and other beneficiaries, may be interested. But one of the fruits of continued life is generally provision for dependants. If that provision is made good by awards under the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced.

Then Lord Justice GODDARD (as he then was), in *Ellis v. Raine* (a), made some practical observations. "I do not think," he said,

"that there is any real difficulty at all. I have always directed juries somewhat in this way. The Fatal Accidents Acts deal with pecuniary

(y) *Gambling v. Benham*, [1940] 1 All E. R. 275, at p. 280.

(z) [1937] A. C. 826; [1937] 3 All E. R. 359.

(a) [1939] 2 K. B. 180; [1939] 1 All E. R. 104.

"loss only. If the parties who will benefit from the damages awarded under the Fatal Accidents Acts are the same as those who will benefit from the damages awarded under the Law Reform Act, the damages under the Fatal Accidents Acts must be reduced by the amount which is given as loss under the Law Reform Act. If the amount given under the latter Act is equal to or exceeds what the jury may give under the Fatal Accidents Acts, they give nothing under the Fatal Accidents Acts at all. If, on the other hand, in any particular case a jury (as may well happen) should consider that the damages under the Fatal Accidents Acts exceed the damages given under the Law Reform Act, then it may be necessary to assess both."

In *Davies v. Powell Duffryn Associated Collieries, Ltd.* (No. 2) (b), the point was considered by the House of Lords that there might be a duplication of damages owing to the wording of s. 1 (5) of the Law Reform Act, 1934. It was held that, in assessing damages awarded under the Fatal Accidents Acts, damages under the Law Reform Act must be taken into account in the case of dependants who will benefit under the latter Act. The balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately.

If at the time of assessing the damages under the Fatal Accidents Acts, no proceedings have been taken under the Law Reform Act, the judge assessing the damages could always take into account the possibility of such proceedings, and make allowance accordingly. It was acknowledged to be a difficult matter, and quite incapable of accurate valuation. In some circumstances the extent of the loss depends on data which cannot be accurately ascertained and must necessarily be matters of estimate, and, it might be, partly of conjecture. The deceased might have willed away from the widow his estate in whole or in part, or the estate might be insolvent.

Owing to the difference between the forms of action under the Fatal Accidents Act and the Law Reform Act, it is of advantage to frame a claim for damages, where such a claim may be made under either Act, wholly under the Fatal Accidents Act. The damages recoverable under the Law Reform Act are subject to estate duties, whereas those under the Fatal Accidents Acts are not (c). Administration expenses under the Law Reform Act, 1934, may be deducted from the sum awarded under the Act for loss of expectation of life. The net sum is then calculated against the sum recoverable under the Fatal Accidents Acts, as is shown by the following examples.

The plaintiff, a blind widower of 73, claiming in respect of the death of his wife, aged 71, lost 10s. a week old age pension himself by her death. The deceased, who lived for three weeks after the accident, was in receipt of an old age pension of 10s. a week. The plaintiff was awarded £600 under the Law Reform Act as administrator of the deceased's estate. From this sum was deducted £25 for administration expenses, leaving a net sum of £575. He was awarded £625 under the Fatal Accidents Act. The first sum was set off against the second, and the final award was therefore £600 under the Law Reform Act, and £50 under the Fatal Accidents Acts (d).

In the second example, the award was £350 under the Fatal Accidents Acts, and £200 under the Law Reform Act. The net value of the estate (excluding insurance monies) was £121, but against this sum was set £21 administration expenses and duty. From the Fatal Accidents Acts assessment of £350 was therefore deducted £200 (the Law Reform assessment) and

(b) [1942] A. C. 601, [1942] 1 All E. R. 657.

(c) *Hall v. Wilson*, [1939] 4 All E. R. 85; *Feay v. Barnwell*, [1938] 1 All E. R. 31; *Hutchinson v. London and North Eastern Rail. Co.*, [1942] 1 K. B. 481; [1942] 1 All E. R. 330.

(d) *Feay v. Barnwell*, [1938] 1 All E. R. 31.

£100 (the net value of the estate). The final award was therefore £50 under the Fatal Accidents Acts and £200 under the Law Reform Act (e).

V.—DAMAGES.

1. Heads of damage.—So far in this brief consideration of the principles of the law of tort affecting the use of motor vehicles on the highway, the general conditions of liability have been taken into account. It now remains to review the kinds of damage for which the defendant, if he is found liable, will be required to pay. The heads of damage under which a plaintiff who has suffered personal injuries may claim are one or all of the following: (1) loss and expenditure, actually and reasonably incurred, such as medical fees, hospital charges and loss of earnings during incapacity (f), (2) future pecuniary loss and expense, (3) the loss of expectation of life, (4) pain and suffering, past and future, including any diminution of the injured person's power to enjoy life (g). Where damage to property is incurred, the cost of reinstating the property to its original condition and the loss of use of that property during the period of reinstatement are the normal heads under which damages are claimed. But apart from those specific heads of damage under which claims are most commonly made in running down actions the plaintiff may claim for any damage which (1) the defendant intended should result from his wrongful act, (2) is the direct consequence of the injury (h).

The word "direct" is normally applied now to describe damage for which redress will be given in actions of tort, rather than the words "immediate," "proximate," "natural" or "probable." What is a direct consequence is difficult to define as a matter of principle. The rule is based on practical considerations of convenience and common sense and does not profess to be based on principles of abstract logic (i). Justice and expediency must also be taken into account (j). It is of little use in considering this point to turn to the textbooks. If the matter is to be decided by a jury, the members of the jury will, in spite of all possible exhortations to the contrary, decide as a matter of common sense whether the negligent defendant should pay for certain damage, and apart from certain well-defined principles of law their verdict will rarely be upset by an appellate Court. These principles govern the question of the remoteness of damage and are considered hereafter. But it should be mentioned here that if the damage be the direct consequence of the wrongful act, it is immaterial to inquire whether or no it could have been foreseen to be the consequence of the act by a reasonable person. The "foreseeability" of the damage is relevant only to the question of liability, not to the question of compensation. It is inevitable that the consequences of some harmful acts should cause damage far beyond the likely or foreseeable result of the act. *Re Polemis and Furness, Withy & Co.* (k), was such a case.

(e) *The Oropesa*, [1942] P 140; affirmed, [1943] P 32; [1943] 1 All E. R. 211.

(f) For free medical treatment provided under the National Health Insurance Act, 1936, no claim can be made by the injured person. Hospitals may not recover the cost of "free" treatment except under s. 36 (2) of the Road Traffic Act, 1930, and under s. 16 of the Road Traffic Act, 1934, for emergency treatment. By s. 2 (4) of the Law Reform (Personal Injuries) Act, 1948, the possibility of avoiding any hospital expenses, otherwise reasonably incurred, by making use of the National Health Service, is to be disregarded.

(g) The whole of the damages are payable in a lump sum, which therefore includes an estimate sum for further loss and suffering. No income tax is payable on the sum awarded.

(h) *Quinn v. Leathem*, [1901] A. C. 495, at p. 537, per Lord LINDLEY.

(i) *Liebosch Dredger v. Edison, S.S.*, [1933] A. C. 449, at p. 469, per Lord WRIGHT.

(j) *Smith v. Harris*, [1939] 3 All E. R. 960, per DU PARCQ, L.J.

(k) [1921] 3 K. B. 560.

The charterers of a ship loaded in the hold a quantity of tins of petrol, which leaked during the voyage, so that petrol vapour filled the hold of the ship. To unload some cases of benzine at one port heavy planks were placed at the top of the hatch as a platform. The rope of the sling which was being used to unload the benzine was carelessly handled so that it knocked one of the planks through the hatch into the vapour filled hold. An immediate fire resulted, and the ship, worth nearly £200,000, was totally destroyed. The charterers were held liable for this extraordinary and abnormal accident. Once the act of letting a plank fall into the hold was proved negligent, it was considered immaterial that the direct result could not have been foreseen (*l*). The rule in *Re Polemis* is well exemplified in running down actions by the requirement that a negligent defendant should pay for killing a man even though it is shown by medical evidence that if the deceased had had a skull of normal thickness, he would not have died as a result of his injuries. The defendant must take the plaintiff as he finds him. It is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart (*m*).

2. Remoteness of damage.—It is a matter of law, for the Court to decide, whether the particular damage of which the plaintiff complains is sufficiently connected with the wrongful act of the defendant so as to make him responsible and liable to compensate the plaintiff for it. Even where liability is proved, the test of "directness" will prevent the defendant from being liable *ad infinitum* for all the consequences of his act. If he assaults the plaintiff, who has to go to hospital as a result, and on the way falls over an obstruction and breaks his leg, the defendant is not liable for this further injury, even though there is a causal connection between the assault and the breaking of the leg (*n*).

To take an actual example (*o*), the plaintiffs' dredger was sunk by the admitted negligence of the defendants. It so happened that owing to their impecuniosity, the plaintiffs could not buy a dredger to replace the sunken vessel, but were forced to hire another one at an exorbitant rate in order to carry out their part of a contract, which in order to avoid a heavy penalty had to be completed within a specified time. It was held by the House of Lords that the measure of damages was the value of the sunken dredger as a profit-earning vessel at the time and place of her loss, and the sum awarded by way of damages should therefore include the cost of replacing her with a comparable dredger, and the cost of transporting such a comparable dredger to the place where the *Liebosch* was sunk, together with all incidental expenses. But that any special loss or extra expenses due to the financial position of one or other of the parties must be disregarded as being too remote. The distinction between this case and the case of the killing of the man with the abnormally thin skull is that in the *Liebosch* Case the impecuniosity of the plaintiffs was an extraneous matter, which did not arise from the dangerous condition set up by the defendants' wrongful act, whereas the death of the abnormal man was part and parcel of the risk

(*l*) The rule in *Re Polemis* is not, however, established beyond doubt in English law—*cf.* Lord RUSSELL in *Hay (or Bourhill) v. Young*, [1943] A. C. 92, at p. 101; [1942] 2 All E. R. 396, at p. 401—and it has been doubted as being applicable in Scots law; see Lord MACMILLAN in same case.

(*m*) *Dulieu v. White & Sons*, [1901] 2 K. B. 669, at p. 679, *per* KENNEDY, J.; *The Arpad*, [1934] P. 189, at p. 202, *per* SCRUTTON, L.J.; *Liebosch Dredger v. Edison, S.S.*, [1933] A. C. 449, at p. 461, *per* Lord WRIGHT.

(*n*) *Per* SCRUTTON, L.J., in *The San Onofre*, [1922] P. 243.

(*o*) *Liebosch Dredger v. Edison, S.S.*, [1933] A. C. 449.

created by the defendant. A rule has been formulated (*p*) to cover reported cases on this subject as follows :

"the liability of the defendant for the unintended consequences of his wrongful act is limited to the consequences which flow from the act by way of some dangerous condition thereby created in violation of the plaintiff's rights : such a condition exists at the peril of the wrong doer, and he must pay for all the results thereof in so far as they concern the particular interest of the plaintiff affected (*q*) however unexpected and abnormal in nature, magnitude or mode of causation they may be, but the defendant's liability does not extend to consequences which though they flow from the act itself are independent of any risk so wrongfully imposed on the plaintiff either because that risk has already ceased to exist, or because though still existing the consequences were due to some independent cause."

This rule is applicable where one of many heads of damage complained of as resulting directly from the defendant's wrongful act is considered by the Court. Where the plaintiff has suffered only one sort of damage, and it is claimed by the defendant that that damage could not have been foreseen by him, it may be that the defendant will escape liability altogether (*r*).

3. Novus actus interveniens.—The last branch of the formulated rule is exemplified in cases in which damage is considered too remote because of the operation of some *novus actus interveniens*, the intervention of human activity between the defendant's act and its consequences. Here again the distinction between the defendant's liability to the plaintiff and his liability to pay for certain consequences of his wrongful act must be clearly borne in mind. If he must have foreseen that the *novus actus* would result from his act, he will be liable. But as a matter of compensation he will not have to pay for results of his act which arise substantially from the voluntary intervention of another, whether it be of the plaintiff (*s*), a third person (*t*), or even sometimes an animal (*u*). Such results are not the direct consequences of the defendant's wrongful act. Thus apart from cases where the plaintiff has been himself guilty of contributory negligence, in which cases he cannot recover for the consequences of his negligent act, he cannot recover for the consequences of a voluntary act by which he intentionally brings loss upon himself. Thus where the Crown sued for recovery of the value of pensions paid on compassionate grounds to the dependants of members of a submarine's crew which had been sunk by the negligence of the defendants, it was held that as the money had been paid not under legal compulsion but voluntarily, the claim failed (*a*).

The rule has however marked limitations. Where the *novus actus* was intentionally procured by the defendant (*b*), or where the law imposes a duty of care to guard against the *novus actus* (*c*), or where the intervening

(*p*) Salmond, *Law of Torts*, 10th Edn., at p. 140

(*q*) *Hay (or Bourhill) v. Young*, [1943] A.C. 92, at p. 110, [1942] 2 All E.R. 396, at p. 405, per Lord Wright

(*r*) *Hay (or Bourhill) v. Young*, [1943] A.C. 92; [1942] 2 All E.R. 396

(*s*) *Culler v. United Dairies (London), Ltd.*, [1933] 2 K.B. 297

(*t*) *Rothwell v. Caverswall Stone Co., Ltd.*, [1944] 2 All E.R. 350

(*u*) *Aldham v. United Dairies (London), Ltd.*, [1940] 1 K.B. 507, at p. 511, [1939] 4 All E.R. 522, at p. 525, per Lord Greene, M.R.

(*a*) *Admiralty Comrs. v. S.S. Amerika*, [1917] A.C. 38. But compare *All-Gen. v. Valle-Jones*, [1935] 2 K.B. 209, where the Crown's payment of wages and hospital expenses did not increase the damages for which the defendant would have been liable, and therefore the Crown could recover those wages paid from the tortfeasor. Payments by employers of wages to workmen while incapacitated by an accident, should always be expressly made by way of loan, especially now that workmen obtain sickness benefit from the State during incapacity under the National Insurance (Industrial Injuries) Act, 1946. See p. 66, *post*.

(*b*) *De Freville v. Dill* (1927), 43 T.L.R. 431.

(*c*) *Northwestern Utilities, Ltd. v. London Guarantee and Accident Co., Ltd.*, [1936] A.C. 108

actor is not fully responsible (*d*), the chain of causation between the damage and the defendant's wrongful act is not broken, and he will be liable. Irresponsible children (*e*) and adults acting in an emergency (*f*) do not become new independent causes of damage in such circumstances.

In what are called "rescue" cases, where the plaintiff has intervened to save life (*g*) or property (*h*) and in so doing was properly actuated by a sense of legal or moral duty, the intervention follows directly from the risk created by the defendant, for which he is responsible in damages. For acts done by the plaintiff consciously in order to minimise damages, this being also a legal duty, the defendant may also be responsible (*i*).

4. Measure of damages.

(i) *For personal injuries*.—There is no yardstick by which the Court can measure the amount to be awarded for pain and suffering or ensuing liability (*g*). It would, however, be most unjust if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done. Scarcely any sum would compensate a labouring man for the loss of a limb, yet "you do not in such case give him enough to maintain him for life" (*k*).

If the jury take into account as well as the special damage, the pain and suffering, the loss of expectation of life, the mental suffering and the physical disabilities ensuing from the injuries and award a sum which is not clearly excessive or too small, the Court of Appeal will rarely interfere with the assessment. An appeal from a judge sitting alone, on the other hand, is a rehearing (*l*). A boy was awarded £10,000 for the loss of both hands by a judge sitting alone, and the amount was not reduced on appeal (*m*). The Court took into consideration the loss of earning power, that he could not dress himself, his suffering after the accident and throughout his life, the necessity of permanent assistance, and the loss of recreation. It was held not to be a sufficient ground for reducing the amount awarded that it might exceed the amount the plaintiff was likely to have earned in his life had he not been injured.

The principle on which the Court of Appeal reviews the assessment of damages, whether too high or too low, is not because the Court of Appeal might have given rather more or rather less, but only (i) if the judge has omitted some relevant consideration or admitted some irrelevant consideration (*n*), or (ii) if the amount is so excessive or insufficient as to be plainly unreasonable (*o*).

(*d*) *Weld-Blundell v. Stephens*, [1920] A. C. 956, at p. 985.

(*e*) *Martin v. Stanborough* (1924), 41 T. L. R. 1; *Wells v. Metropolitan Water Board*, [1937] 4 All E. R. 639; *Liddle v. North Riding of Yorkshire County Council*, [1934] 2 K. B. 101, at p. 130; *Donovan v. Laing, Wharton and Down Construction Syndicate*, [1893] 1 Q. B. 629.

(*f*) *Scott v. Shepherd* (1773), 2 Wm. Bl. 892 (the squibs case); *The Oropesa*, [1943] P. 32; [1943] 1 All E. R. 211; *Hyett v. Great Western Rail. Co.*, [1947], 2 All E. R. 264.

(*g*) *Haynes v. Harwood*, [1935] 1 K. B. 146.

(*h*) *D'Urso v. Sanson*, [1939] 4 All E. R. 26.

(*i*) *Dee Conservancy Board v. McConnell*, [1928] 2 K. B. 159.

(*j*) *Per GODDARD, L.J.* (as he then was), in *The Testbank*, [1942] P. 75; [1942] 1 All E. R. 281.

(*k*) *Armsworth v. South-Eastern Rail. Co.* (1847), 11 Jur. 758.

(*l*) *Owen v. Sykes*, [1936] 1 K. B. 192.

(*m*) *Heaps v. Perrite, Ltd.*, [1937] 2 All E. R. 60.

(*n*) As where lesser damages were awarded to a child five years old on the ground that the sum would be much larger when the time came for it to be handed over to the plaintiff on attaining his majority (*Gold v. Essex County Council*, [1942] 2 K. B. 293; [1942] 2 All E. R. 237).

(*o*) *Greenfield v. London and North-Eastern Rail. Co.*, [1945] K. B. 89; [1944] 2 All E. R. 438.

As a very rough rule of practice, the amount awarded is not usually altered on appeal as being unreasonable unless it should be either halved or doubled.

Damages, it would appear, for mental suffering, resulting from wounded feelings, as opposed to physical pain or grievous shock, are not recoverable (p).

Damages for illness due to nervous shock are undoubtedly recoverable. The wide view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact. The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system (q). But whether nervous shock is only one of many heads of damage for which the plaintiff claims, or whether shock is the only damage suffered, it must be remembered (in the former case) that the nervous shock must be the direct result of the defendant's negligent act (r), and (in the latter case) it must be shown that the defendant owed a duty to take care to avoid doing that particular harm to the plaintiff.

In *Dulieu v. White & Sons* (s), the view was expressed that the shock where it operates through the mind must be a shock which arises from a reasonable fear of immediate personal danger, and this expression of opinion has been largely followed in Scotland. In *Hambrook v. Stokes* (r), however, damages were recovered for nervous shock occasioned by apprehension by a mother for the safety of her children, when the defendant's lorry, left unattended in the street, rushed downhill. In *Hay (or Bourhill) v. Young* (t), the extension of this principle was left an open question, but it is submitted that in all such cases the real question is one not of remoteness of damage but of the duty owed by the defendant, that is a matter of the defendant's liability.

In *Owens v. Liverpool Corporation* (u) a jury had found that there was a direct causal link between the overturning of a hearse by the defendant's negligence and the nervous shock caused to the mourners at seeing their relative's body overturned. It was suggested in *Bourhill v. Young* that had this case been contested on the ground that the defendant owed no duty to the plaintiff to avoid such damage (the "foreseeability" test), the defendant could have avoided liability, but on the point whether the damage to nervous shock was too remote the jury's finding was conclusive (the directness test).

Lastly, in cases where the plaintiff is suffering from a neurosis as a direct result of the accident, it is a matter of medical evidence whether the neurosis itself is preventing the injured person from making the effort necessary to overcome the physical disability otherwise resulting from the accident, and secondly whether the nervous disease is causing pain to the plaintiff when he attempts to perform certain acts. It is of course true that if the plaintiff can avoid the neurotic pain by not doing certain normal things, then he can recover damage because he cannot do them. Conversely, if he attempts

(p) *Per* Lord PORTER in *Hay (or Bourhill) v. Young*, [1943] A. C. 92; [1942] 2 All E. R. 396.

(q) Lord MACMILLAN in *Hay (or Bourhill) v. Young*, [1943] A. C. 92, at p. 103; [1942] 2 All E. R. 396, at p. 398.

(r) *Hambrook v. Stokes Brothers*, [1925] 1 K. B. 141, where a woman received a shock when seeing a lorry run down a hill out of control towards her children.

(s) [1901] 2 K. B. 669.

(t) [1943] A. C. 92; [1942] 2 All E. R. 396.

(u) [1939] 1 K. B. 394; [1938] 4 All E. R. 727.

them and feels pain, he has again suffered damage (a). On the other hand, the court is always entitled to take into account the medical evidence as to the neurosis itself, that as a result of freedom from anxiety over the result of the case the plaintiff may well find himself freed from the nervous disability, and therefore capable once more of pursuing his old physical habits and enjoyments.

It should be stressed that it is the duty of the Court in actions for personal injuries (or injury to property) to assess the damages once and for all. The plaintiff may not bring the defendant to court for a second time to claim further damages for violation of the same right, even though in the first action he was not fully compensated inasmuch as the extent of his injuries was not fully appreciated (b). On the other hand, he may claim in a second action for violation of a second right even though that violation took place at the same time and from the same negligence as the violation in the first action. Thus, a second action for injury to a motor vehicle may be maintained although in a prior action damages for personal injuries were granted as a result of the same accident (c). Where a settlement has been arranged between the parties, it is a matter for the jury to decide in any later action brought to recover damages in respect of the same accident whether the mind of the plaintiff went with the settlement so as to preclude him from later suing the defendant (d). The rules of the law of contract relating to agreements, and accord and satisfaction apply in such a case.

No income tax is payable on damages awarded, even though this tax would have been assessed on the wages which the injured person would have earned had it not been for the accident, and for which part of the damages have been awarded. Where interest is granted on the capital sum awarded as damages (and this is almost unknown in running-down cases), income tax is payable on that interest (e).

(ii) *Damage to property*.—In addition to special damages for actual expense incurred in repairing property to its original condition and for out of pocket expenses incurred as a result of the loss of the use of the property, the owner of property made unserviceable by negligence may recover general damages for the loss of its use, even though he may have incurred no out of pocket expenses consequential thereon.

Even the loss of use for a time of a chattel which the owner would not have used during that time may give rise to substantial damages, whether in an action for damages or for conversion (f).

The emphasis here is placed rather on the injury that the defendant has done, than on the actual loss sustained by the plaintiff. The plaintiff has been deprived of a thing from which he derived profit or pleasure, and the defendant must pay for that deprivation. Lord HALSBURY (g) gives the example of the taking of a chair from a room for twelve months: the damages could not be diminished by proof that the chair was not normally used and that there were plenty of other chairs in the room. The defendant

(a) *Liffen v. Watson*, [1940] 1 K. B. 556; [1940] 2 All E. R. 213.

(b) *Filter v. Veal* (1701), 12 Mod. Rep. 542.

(c) *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141; *Derrick v. Williams*, [1939] 2 All E. R. 559.

(d) *Lovell v. Williams* (1938), 62 Ll. L. R. 249.

(e) *Westminster Bank, Ltd. v. Riches*, [1945] Ch. 381; [1945] 2 All E. R. 111; on appeal, *sub nom. Riches v. Westminster Bank, Ltd.*, [1947] A. C. 390; [1947] 1 All E. R. 469.

(f) Lord PORTER in *Caxton Publishing Co., Ltd. v. Sutherland Publishing Co.*, [1939] A. C. 178; [1938] 4 All E. R. 389.

(g) *The Mediana (Owners) v. Comet (Owners)*, *The Mediana*, [1900] A. C. 113, at p. 117; *The London Corporation*, [1935] P. 70.

has no right to consider what use is going to be made of the property. Nevertheless, where the owner of a car being repaired cannot show positively that apart from special damage he has suffered great inconvenience, such general damages awarded for loss of use during the period of repair will not be large. Nor can damages be recovered for a period of loss of use which is extended because the plaintiff has no means to pay for repairs (*h*).

(iii) *Law Reform (Personal Injuries) Act, 1948 (hh)*.—This Act, which at the time of printing is passing through the final stages in Parliament, makes, by virtue of s. 2, changes in the method of assessment of the quantum of damages to be awarded to certain classes of persons injured in motor accidents. In assessing the loss of earnings or profits which has accrued or probably will accrue to the person injured from the injuries, one half of the value of any rights which have accrued or probably will accrue to him by way of industrial injury benefit, industrial disablement benefit or sickness benefit under the National Insurance Acts, 1946, for the five years dating from the accruing of the cause of action, shall be taken into account. The subtraction of this half of the rights available to the injured person under the National Insurance Acts, 1946, shall, in cases where the injured person, owing to his own contributory negligence, does not recover the whole of the damages otherwise recoverable in the running-down action be made from the total sum recoverable, before the proportional reduction for his own negligence is calculated. The enactment applies only if the cause of action accrued on or after July 5, 1948.

VI.—CONCURRENCE OF BREACH OF CONTRACT AND TORT.

The same wrongful act frequently happens to be both a breach of contract and a tort. This concurrence may occur in a variety of cases which may be conveniently summarised as follows :

(i) When a person commits a breach of a duty which he has undertaken by contract to perform for another, but it rests upon him independently of such contract (*i*). For example, a person to whom the owner entrusts the custody of goods is bound by his contract to return those goods, and he is also bound by law not to detain the goods of another person.

(ii) Where a person wilfully or negligently commits a breach of a contract involving the exercise of care and skill, and such breach results in personal injury to the person with whom the contract was made (*k*). Common instances of such cases of concurrence are found in claims by passengers for reward who have been injured by the negligence of the person with whom they have contracted for their conveyance, or of his servants.

(iii) Where a person under a contractual duty to another breaks that duty in such a way that harm is caused to a third party. In exceptional cases such third party may have a right of damages in tort notwithstanding that no duty under the contract is owed to him (*l*).

(*h*) *Liebosch Dredger v Edison, S.S.*, [1933] A. C. 449

(*hh*) 11 & 12 Geo 6, c. 41. For the reasons underlying this section see the Report of the Committee on Alternative Remedies, July, 1946, Cmd. 6860. As to medical expenses, etc., and the national health service, see p. 268 *post*, note (*i*).

(*i*) *Bryant v. Herbert* (1878), 3 C. P. D. 389; *Turner v. Stallbrass*, [1898] 1 Q. B. 56.

(*k*) *Kelly v. Metropolitan Rail. Co.*, [1895] 1 Q. B. 944; *Edwards v. Mallan*, [1908] 1 K. B. 1002; *Jackson v. Watson & Sons*, [1909] 2 K. B. 193.

(*l*) *Pippin v. Sheppard* (1822), 11 Price, 400; *Langridge v. Levy* (1837), 2 M. & W. 519; affirmed *sub nom. Levy v. Langridge* (1838), 4 M. & W. 337. *Meux v. Great Eastern Rail. Co.*, [1895] 2 Q. B. 387; *Donoghue v. Stevenson*, [1932] A. C. 562; *Malfrout v. Noxal, Ltd.* (1935), 51 T. L. R. 551; *Haseldine v. Daw & Son, Ltd.*, [1941] 2 K. B. 343; [1941] 3 All E. R. 156.

(iv) When a tort has been committed, particularly in relation to money or property, the injured person subsequent to the commission of such wrongful act may elect to treat the transaction as if it were one arising under contract. This process is known as waiving the tort and suing on a contract. The contract, however, in these cases is a fictitious one (*m*).

The importance of concurrent remedies both for breach of contract and for tort lies in the fact that the rights of action in such cases are not affected by the maxim *actio personalis moritur cum persona* dealt with above, although the damages obtained in such cases can be assessed upon the basis appropriate to actions of tort rather than on the lower basis appropriate to actions of contract (*n*). In a case where tortious and contractual liability concur, any limitations contained in the contract affect the right of the injured party in his claim in tort. Thus the limitations upon liability contained in the contract of carriage made between a passenger for reward on the one hand and a railway or omnibus company on the other will operate to prevent damages being claimed in tort in the event of such conditions coming into operation, just as those conditions would have been an answer to a claim based upon the contract between the parties (*o*).

VII.—THE DISCHARGE OF RIGHTS OF ACTION FOR TORTS

Rights of action for tortious acts are brought to an end by waiver or by death in the circumstances detailed above. A waiver of a right of action for a tort, unless it is followed by suing upon the breach of a fictitious contract, as it may in certain circumstances be (*p*), must be supported by consideration in order to be valid (*q*). A right of action for damages for tort is extinguished when judgment is obtained for damages in respect of that tort, and even though further damage is subsequently suffered from the same cause such damage cannot be claimed, as the right of action for it has been extinguished (*r*). A further method of discharging rights of action for torts consists in the method of accord and satisfaction which has been briefly dealt with (*s*). An accord and satisfaction requires for its

Cases under this head are anomalous, inasmuch as the general rule is that no person not a party to a contract can claim rights or remedies under it. The exceptions fall into two classes: either where the third party is notionally introduced into the contract, as, e.g., when the relationship of trustee and beneficiary, express or implied, or of agency is imported into the transaction, or where a dangerous article is delivered under an agreement by one person to another and subsequently damage is caused through its dangerous qualities to third parties.

(*m*) This will apply when, for example, a plaintiff's money or goods are wrongfully taken by the defendant and where the plaintiff chooses to sue him for the return of such goods or their value or for money had and received instead of suing him upon the wrongful act (*Rodgers v. Maw* (1846), 15 M. & W. 444; *United Australia, Ltd. v. Barclays Bank, Ltd.*, 1941, A.C. 1, 1940, 4 All E.R. 20).

(*n*) Damages in tort are not limited to the amount which is necessary to compensate the injured party for such loss and damage as has been inflicted upon him by the natural and ordinary consequences of the breach of the contract in question.

(*o*) *Elder-Dempster & Co. v. Paterson, etc.*, [1924] A.C. 522; *The Kite*, [1932] P. 154; *Hall v. Brooklands Auto-Racing Club*, [1933] 1 K.B. 205. By s. 97 of the Road Traffic Act, 1930 (23 Halsbury's Statutes 674), companies carrying passengers for reward may not "contract out" of the consequences to those passengers of the negligence of the companies servants. Cf. *Wilkie v. London Passenger Transport Board*, [1947] 1 All E.R. 258.

(*p*) See note (*m*) *supra*.

(*q*) *Rice v. Reid*, [1900] 1 Q.B. 54. Unless it is made by deed.

(*r*) *Fitter v. Veal* (1701), 12 Mod. Rep. 542; *Read v. Great Eastern Rail. Co.* (1868), L.R. 3 Q.B. 555, and see *Tounend v. Askern Coal and Iron Co.*, [1934] Ch. 463; cf. *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141; *Conquer v. Boot*, [1928] 2 K.B. 336.

(*s*) See *ante*, p. 7, and 7 Halsbury's Laws, 2nd Edn. 234-7.

validity both an agreement based upon good consideration and the performance by one of the parties to it of his obligations under this agreement (i). Unless these elements are present there will be no accord and satisfaction.

Although an injured party can bar himself from claiming damages in any of the methods described above, he cannot legally assign his right to bring such an action (u). While both rights arising under contracts and rights of action arising out of breaches of contracts are assignable in law, a purported assignment of a right of action for damages for a tort is illegal and void (v). This rule, however, does not extend to invalidate an assignment of the proceeds of an action in tort, even though such agreement be made before the action is brought or judgment obtained, since such an assignment is an assignment of future property; the benefits of a judgment are, of course, assignable (w).

VIII.—ESTOPPEL (x)

Estoppel arises when a person is not allowed to allege the untruth of a certain statement of fact, whether in reality it be true or not. Estoppel is not a cause of action, a fact which cannot be too strongly stressed, for much confusion has arisen owing to this basic principle being overlooked. "Estoppel is only a rule of evidence. You cannot found an action upon estoppel" (y). No case for the application of the doctrine will arise, then, unless there is in existence some cause of action quite independent of the estoppel (z). During the trial of a cause of action the allegations on either side are proved by evidence, and it is at this juncture that the application of the rules of estoppel may become important, as in any given case precluding a party from denying the truth of certain facts or allegations made by the other (a).

Estoppels are of three categories. Estoppel by record applies when any given issue has been decided in proper proceedings in a court of competent jurisdiction (b). Judgments constitute estoppels by record in that the parties to them (c) are not only precluded from denying the truth of the

(i) This may be illustrated by the difference between a settlement and an agreement to settle. Whereas a settlement is a payment, and receipt of money in full satisfaction by the plaintiff in an action of tort discharges his right to sue, a mere agreement until it has been fulfilled by the carrying out of its terms does not discharge his right to sue.

(u) *Danson v. Great Northern and City Rail Co.*, [1905] 1 K. B. 260; *Ellis v. Torrington*, [1920] 1 K. B. 399. This rule is subject to certain qualifications by reason of which when property is transferred or assigned the right to sue for a tort which has affected that property may also be assigned with it. Further, a trustee in bankruptcy may assign a right to sue for a tort which is vested in him as trustee. Lastly, the rule does not affect the well-known principle of subrogation applicable to contracts of insurance whereby the insurance company is entitled to the benefit of the rights of action of the assured even though they be rights of action in tort. See p. 101, *post*, and *King v. Victoria Insurance Co., Ltd.*, [1896] A. C. 250. See also chapter IX, *post*.

(v) *Glegg v. Bromley*, [1912] 3 K. B. 474.

(w) *Ibid.*

(x) See 13 Halsbury's Laws, 2nd Edn. 389 *et seq.*

(y) *Per Bowen, L.J.*, in *Low v. Bouverie*, [1891] 3 Ch. 82, at p. 105.

(z) *Dutton v. Sneyd Bycars, Co., Ltd.*, [1920] 1 K. B. 414; *Simpson v. Crowle*, [1921] 3 K. B. 243; *H. v. H.*, [1928] P. 206, at pp. 213-14.

(a) *Greenwood v. Martins Bank, Ltd.*, [1933] A. C. 51.

(b) *Kingston's (Duchess) Case* (1776), 20 State Tr. 355, 537.

(c) Judgments as to status, e.g. divorce, nullity, etc., act as estoppels against any person. Other judgments operate only to estop the parties to the proceedings and their privies; and only so far as such parties, etc., are claiming in the same right. 13 Halsbury's Laws, 2nd Edn. 420-33.

judgment, but are also prevented from reopening, otherwise than by way of appeal, the dispute with respect to which the judgment was given (d).

The second type of estoppel is estoppel by deed, the basis of which is that no one is permitted to deny any matter which he has asserted in the solemn engagement by deed under his hand and seal (e). Specific and unambiguous statements in a deed bind the parties thereto and prevent them, save in the case of fraud or mistake, from denying the accuracy of the facts therein stated (f). The third and most common type of estoppel is estoppel in pais, or, as it is more generally known, estoppel by representation. This variety of estoppel may arise by virtue of a statement, oral or written, or by conduct (g). The conditions under which estoppel by representation operates to preclude the party who has made the representation from denying its truth are summarised in a following chapter (h). It suffices therefore at this juncture to state that the representation which is made expressly or impliedly must be one as to an existing fact, that it must be made with the actual or apparent intention that the persons or class of persons to whom it is made should act upon it, and that such persons have acted upon the representation in the manner in which they were intended or apparently intended to act and have suffered detriment by reason of such action (i). Where these conditions are co-existent the party who has made the representation concerned is precluded from denying the truth of that representation as against the persons who were intended to act and have acted upon it (k).

(d) *Op. cit.*, pp 402-49

(e) *Bourman v. Taylor* (1834), 2 Ad. & El. 278.

(f) *Tsang Chuen v. Li Po Kwai*, 1932] A. C. 715; see 13 Halsbury's Laws, 2nd Edn. 455-68.

(g) 13 Halsbury's Laws, 2nd Edn 468-518. *Yorkshire Insurance v. Craine*, [1922] 2 A. C. 541.

(h) See chapter IX, *post*, Part 10

(i) *Greenwood v. Martins Bank Ltd.*, [1933] A. C. 51.

(k) *Freeman v. Cooke* (1848), 2 Exch. 654; *MacLaine v. Gatty*, [1921] 1 A. C. 376.

CHAPTER II

GENERAL PRINCIPLES OF MOTOR INSURANCE LAW

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PART 1.—NATURE AND EFFECT OF INSURANCE CONTRACT

I.—GENERAL DEFINITION

An insurance contract has been variously described as " a contract upon speculation " (a), " a contract of indemnity " (b), and " a contract whereby one person called the insurer undertakes in return for the agreed consideration, called the premium, to pay another person, called the assured, a sum of money on the happening of a specified event " (c).

It is unnecessary to go at great length into the academic questions raised in attempting to define an insurance contract. The last definition quoted above is a good general description of an insurance contract, but is not a strictly accurate definition. It includes an ordinary wager. Some con-

(a) *Per* Lord MANSFIELD in *Cartier v. Boehm* (1766), 3 Burr. 1405

(b) *Godsall v. Boldero* (1807), 9 East, 72.

(c) *Wellford on Accident Insurance*, 2nd Edn., p. 3

tracts of insurance are substantially contracts on speculation, whilst others are indemnities. Life insurance is technically a contract of speculation (*d*).

So also according to the general view may be accident and sickness (*e*) insurance.

It is however necessary to attempt the difficult task of defining the nature and meaning of the word *insurance*, and to distinguish it from other words which are frequently used as referring to it, but can properly only be applied to transactions of a different class. As will appear later, the distinction becomes of importance when considering certain sections (*f*) of the Statute Law relating to motor insurance (*g*).

The difficulties of this task can best be illustrated, and at the same time the task itself partially accomplished, by referring to the definitions of others.

1. "By the law of insurance, although the underwriter directly promises 'to pay on a certain event the contract is treated as one of indemnity; and it follows that, if the assured, who has been indemnified (*h*) by the underwriter as on a total loss, saves anything upon the loss, the salvage must go to the underwriter, otherwise the insured would be more than indemnified." *Per* Lord ESHER, M.R. (*i*).

2. "An 'indemnity' is a contract, express or implied, to indemnify 'against a liability, and the liability under which is coterminous with the liability it is intended to cover, and is independent of the question whether somebody else makes default or not.'" STROUD (*j*).

3. "A guarantee is a collateral engagement to answer for the debt, default, or miscarriage of another person." STROUD (*k*).

4. "It has been said that a guarantee is a promise to another *qua* creditor to secure the payment of a debt payable to him; whereas an indemnity is a promise to another *qua* debtor to secure the repayment of 'a debt payable by him.'" STROUD (*l*).

5. "There is no essential difference between the word 'insurance' and the word 'guarantee.' There is no magic in the use of those words. Whether a contract provides the one or the other depends upon the terms 'of the contract itself.'" *Per* ROMER, L.J. (*m*).

It will thus be seen that insurance is equivalent to indemnity, but differs from guarantee. The dictum of ROMER, L.J., is inserted above in order to stress the point that the use of a particular word in a contract does not of itself determine the real character of that contract. For this purpose the terms of the contract itself must be examined.

(*d*) *Dalby v India and London Life Assurance Co.* (1854), 15 C. B. 305; *Law v London Indisputable Life Policy Co.* (1855), 1 K. & J. 223; *Gould v. Curtis*, [1913] 3 K. B. 84, at p. 95. See also Life Assurance Act, 1774 (9 Halsbury's Statutes 846).

(*e*) See *Theobald v Railway Passengers Assurance Co.* (1854), 10 Exch. 45, 53; and see *Castellain v Preston* (1883), 11 Q. B. D. 380; Porter's Laws of Insurance, 8th Edn., p. 13; Wellford on Accident Insurance, 2nd Edn., p. 6.

(*f*) See *post*, pp. 121, 180, 279.

(*g*) See chapters III, IV, and V, *post*.

(*h*) See the double meaning of this word discussed *post*, p. 278.

(*i*) *Dane v Mortgage Insurance Corporation*, [1894] 1 Q. B. 54, at p. 61; see also *Kent v. Bird* (1777), 2 Cowp. 583, at p. 585; *Castellain v. Preston* (1883), 11 Q. B. D. 380; *Darrell v. Tibbitts* (1880), 5 Q. B. D. 560.

(*j*) Stroud's Judicial Dictionary, 2nd Edn., p. 956, citing *Pontifex v. Foord* (1884), 12 Q. B. D. 152; *Calton v. Bennett* (1884), 26 Ch. D. 101; *Speller v. Bristol Steam Navigation Co.* (1884), 13 Q. B. D. 96; *Carshore v. North Eastern Rail. Co.* (1885), 29 Ch. D. 344; *Birmingham and District Land Co. v. London and North Western Rail. Co.* (1886), 34 Ch. D. 261; *Tritton v. Hankart* (1887), 56 L. J. Ch. 629.

(*k*) Stroud's Judicial Dictionary, 2nd Edn., p. 841, citing De Colyar on Guarantees. Cf. Statute of Frauds, 1677 (3 Halsbury's Statutes 583).

(*l*) *Op. cit.*, p. 841, citing 38 S. J. 577.

(*m*) In *Seaton v. Heath*, [1899] 1 Q. B. 782, at p. 792. See also SCRUTTON, L.J., in *Trade Indemnity Co., Ltd. v. Worthington Harbour and Dock Board*, [1937] A. C. 1; [1936] 1 All E. R. 454.

Unfortunately, however, throughout the law the same word is used in different senses, not only in different branches of the law, nor only in different cases dealing with the same branch, but frequently in different parts of the same case (n).

Herein lies the difficulty of defining the word insurance. For whilst it has generally been held to be equivalent to indemnity (o) in all cases save those which have been mentioned (p); the following is the true position :

A. Indemnity has two meanings :

1. Compensation for actual loss sustained (q).

This hereafter is called the true meaning.

2. Payment of a sum of money sufficient to satisfy a loss which may or may not actually occur.

This hereafter is called the legal meaning.

B. " Insurance " includes indemnity in both senses (r).

C. In most classes of insurance the word " insurance " is equivalent to indemnity only in the true sense of that word (s).

Thus, in fire insurance, the assured cannot recover any sum on his policy in respect of a fire unless (t) and only to the extent that (u) he has suffered an actual pecuniary loss as a result of the fire (v). Thus if the assured has sold the property insured (w), or has been compensated for his loss by a third party (x), he is entitled to nothing on his policy. The same principle applies in marine insurance (y). Upon it the important doctrine of subrogation is based (z).

Nevertheless the principle does not apply to all insurance. Life insurance is, for the purposes of the subject under consideration, in a class by itself. The principle applies to accident (or sickness) insurance, although its application thereto is not strictly logical. In some cases of accident (or sickness) insurance, *in the result which actually happens*, the sum received by the insured is not a true indemnity. This occurs when the insured is compensated for the results of the accident by a third party, and at the same time receives the sum insured by his policy, or where he suffers no real financial loss by the sickness but is nevertheless entitled to receive an agreed weekly sum (a). This occurs also in third party liability insurance, to which the word " indemnity " in its legal sense only is aptly applied.

(n) Cf. the different meanings of the word " risk ". *Vincentelli & Co v Rowlett (John) & Co* (1911), 105 L T 411.

(o) See Wellford on Accident Insurance, 2nd Edn., p. 6, Porter on Insurance, 8th Edn., p. 1.

(p) Life Insurance and some Accident Insurance; see *ante*, p. 71.

(q) See O. E. D.

(r) See Stroud's definition, cited *ante*.

(s) See Lord ESHER's definition, cited *ante*, p. 71, and see *post*, p. 78.

(t) *Dalby v. India and London Life Assurance Co* (1854), 15 C B 365. *North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co* (1877), 5 Ch D 569. *Darrell v Tibbitts* (1890), 5 Q B D 500.

(u) *Dane v Mortgage Insurance Corporation*, [1894], 1 Q B 54.

(v) *Sed quære*: suppose A is insured against fire occurring on another's property which he is liable to keep in repair, etc. The fire occurs: might not A then recover the sum insured by the policy although in fact he never satisfied his liability to the owner of the property destroyed?

(w) See *post*, chapter X.

(x) *Castellain v. Preston* (1883), 11 Q B D 380. *Hamilton v. Mendes* (1761), 2 Burr. 1198, 1210; *Law v. London Indisputable Life Policy Co.* (1855), 1 K. & J 223, 228; *Bruce v. Jones* (1863), 1 H & C 769. *Godsall v. Boldero* (1807), 9 East, 72.

(y) See Chalmers on Marine Insurance, 4th Edn., p. 2, and see Lord ESHER's definition, *ante*, p. 71.

(z) As to subrogation, see *post*, p. 101, and chapter X.

(a) As a rule insurance companies will only undertake to pay the insured a considerably less amount than his average earnings when in health.

Thus it will be seen that the word "insurance" is equivalent to "indemnity" only if that word is understood in the legal sense as well as in the true sense.

II.—INSURANCE AND SPECULATION

There is an essential element, called insurable interest, which distinguishes most, if not all (b), genuine contracts of insurance from gaming transactions (c).

"A contract which would otherwise be a mere wager may become an insurance by reason of the assured having an interest in the subject-matter—that is to say, the uncertain event which is necessary to make the contract amount to an insurance must be an event which is *prima facie* adverse to the interest of the assured. The insurance is to provide for the payment of a sum of money to meet a loss or detriment which will be or may be suffered upon the happening of the event. . . . A contract of insurance, then, must be a contract for the payment of a sum of money, or for some corresponding benefit such as the rebuilding of a house or the repairing of a ship, to become due upon the happening of an event, which event must have some amount of uncertainty about it, and must be of a character more or less adverse (d) to the interest of the person effecting the insurance" (e).

There is a possible error in the above description. It is in the word "benefit." The ostensible purpose of every contract of insurance, which distinguishes it from a mere bet, is not to secure a benefit, but to guard against a loss (f). The law does not in most cases allow a contract the object of which is to make a profit from an accident (g). It does, however, in some cases allow a contract the result of which may be to make a profit from an accident. Of these the most notable is third party liability (gg) insurance which forms the most important part of motor insurance. This aspect of that class of insurance is discussed in the following section.

Different kinds of insurance.—It will be seen from the foregoing that all insurance contracts may be divided according to their fundamental nature into Contracts of Indemnity and Contracts of Speculation.

There are various methods of classification, but it is of little or no practical or legal importance which is adopted (h).

A contract of insurance upon the assured's own life is always a speculation upon the length of that life (i). Where, however, the death insured against is not that of the assured (or of the husband or wife of the assured),

(b) See *post*, p. 79.

(c) *Wilson v. Jones* (1867), L. R. 2 Exch. 139, *per* BLACKBURN, J., at p. 150; *Prudential Insurance Co. v. Inland Revenue Comrs.*, [1904] 2 K. B. 658, *per* CHANNELL, J., at p. 663.

(d) But see *Gould v. Curtis*, [1913] 3 K. B. 84, *per* BUCKLEY, L.J., at p. 95, *per* KENNEDY, L.J., at p. 98.

(e) *Per* CHANNELL, J., in *Prudential Assurance Co. v. Inland Revenue Comrs.*, [1904] 2 K. B. 658, at p. 663.

(f) See last note and see *post*, p. 74.

(g) *Castellain v. Preston* (1883), 11 Q. B. D. 380; *Matthey v. Curling*, [1922] 2 A. C. 180, at p. 219; *City Tailors, Ltd. v. Evans* (1921), 126 L. T. 439, at p. 444.

(gg) Where a person is insured against a financial loss, and recovers damages from a third party who caused it, he cannot keep both the insurance money and the damages; see *post*, p. 76. Liability is not necessarily loss.

(h) For a useful summary of other classifications, see Welford on Accident Insurance, 2nd Edn., p. 4.

(i) *Dalby v. India and London Life Assurance Co.* (1854), 15 C. B. 365.

the contract appears to be substantially one of indemnity (j), since the assured cannot recover on the policy a sum greater than the value of his interest. But in law it is deemed not to be a contract of indemnity (k) and the assured, who cannot insure for or recover a sum greater than the value of his interest (l), can none the less recover the full sum insured, although his interest has since the making of the contract been extinguished and he has not, in the event, suffered any actual loss (m).

Thus if A lends B £1,000, A has an insurable interest in, and can insure B's life to the extent of £1,000. If before B dies he repays A the £1,000, A can none the less recover this sum on the policy, and thus make a profit of £1,000 (m) (less the premiums which he has paid, and in many cases these would have been defrayed by B).

Insurance against personal injury and insurance against sickness may be regarded as wholly contracts of speculation (n), wholly contracts of indemnity (o), or partly both (p). They are usually the latter.

If a man insures against the loss of a limb for a fixed sum, he is entitled to be paid this sum in the event of the loss, although in addition he may recover indemnity (in the sense of compensation) by way of damages against the person who caused it (q). On the other hand, insurance against any loss of earnings, or against medical expenses, actually caused by sickness or accident, would be a true indemnity and not speculation (r).

According to the standard works on Insurance Law (s), all other kinds of insurance are and must be contracts of true indemnity (t). But this is not so.

In a line of cases (u) it has been held that a contract of liability insurance under which a sum is payable upon the happening of a specified event is not a contract of indemnity in the true sense of that word.

It has been repeatedly decided that under such a contract the insurers are obliged to pay whatever sum the policy provides, irrespective of whether the event insured against has or has not caused an actual loss of money to the insured.

(j) *Godsall v Boldero* (1807), 9 East, 72 (overruled by *Dalby v India and London Life Assurance Co*, *supra*). And see Porter's Laws of Insurance, 8th Edn., pp. 11, 12.

(k) *Dalby v India and London Life Assurance Co*, *supra*; *Lau v London Indisputable Life Policy Co* (1853), 1 K & J 223.

(l) Life Assurance Act, 1774, ss. 1, 3 (i) Halsbury's Statutes 840). This seems an anomalous rule and affords an easy opportunity of fraud, in that a collusive loan could be made to create an insurable interest.

(m) See cases under note (k), *supra*.

(n) *Theobald v Railway Passengers Assurance Co* (1854), 10 Exch. 45, *per* ALDERSON, B., at p. 53, and see *post*, p. 78.

(o) As where the insurance is against actual loss of earnings caused by sickness. A common practice is to insure only for a certain proportion of average earnings actually earned before the incapacity.

(p) E.g. a policy which provides for payment of £x on the loss of a limb and medical expenses up to y.

(q) See *Bradburn v. Great Western Rail Co* (1874), L. R. 10 Exch. 1; *Jebson v East and West India Dock Co* (1875), L. R. 10 C. P. 300.

(r) See *ante*, p. 72.

(s) See Welford on Fire Insurance, 4th Edn.; Welford on Accident Insurance, 2nd Edn.; Porter on Insurance, 8th Edn.

(t) See *Castellain v. Preston* (1883), 11 Q. B. D. 350; *Lucena v. Craufurd* (1806), 2 Bos. & P. (S. R.) 269; *Prudential Insurance Co v. Inland Revenue Comrs*, [1904] 2 K. B. 658.

(u) *Carr v. Roberts* (1833), 5 B. & Ad. 78; *Dane v. Mortgage Insurance Corporation*, [1894] 1 Q. B. 54; *Finlay v. Mexican Investment Corporation*, [1897] 1 Q. B. 517; *Ashdown v. Ingamells* (1880), 5 Ex. D. 280; *Re Eddystone Marine Insurance Co, Ex parte Western Insurance Co*, [1892] 2 Ch. 423; *Re Perkins, Poyser v. Beyfus*, [1898] 2 Ch. 182; *Liverpool Mortgage Insurance Co's Case*, [1914] 2 Ch. 617; *Re Harrington Motor Co, Ltd, Ex parte Chaplin*, [1928] Ch. 105; *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793.

In *Re Harrington Motor Co., Ex parte Chaplin*, (v) Lord HANWORTH, M.R., observed :

"*Carr v. Roberts* (w) is treated as an original authority and has been followed in a number of other cases in which it has been pointed out that the liability of the insurance company is as to the full amount on the contract of insurance, and is not measured or varied by what may happen to the money when received or by what has been done by the assured."

In the same case ATKIN, L.J. (as he then was) (x), approved the statement of KENNEDY, L.J., in the *Liverpool Mortgage Insurance Co.'s Case* (y) that

"How the person who receives payment of a sum of money under a contract of insurance or re-insurance (z) or, I will add, of indemnity (a) deals with that sum is, in general and apart from special consideration, no concern of the party who in fulfilment of his contract has made the payment to him" (*Liverpool Mortgage Insurance Co.'s Case*) (b).

In the earlier *Liverpool Mortgage Insurance Co.'s Case* (c), KENNEDY, L.J., had said that he thought that the discharge of the liability, against which the contract of insurance or re-insurance was the protection, was not a condition precedent to the right to claim payment of the amount of the insurance or re-insurance. In *Re Harrington Motor Co., Ex parte Chaplin* (d), ATKIN, L.J., whilst agreeing with this view of the law, went on to point out (e) that it was material, in dealing with a case of that kind, to consider the actual terms of the contract, which in the ordinary form of policy were

"the Company will indemnify the assured against all sums which the assured shall be legally liable to pay, etc."

and that it was with reference to a contract in such terms that his judgment applied (f). It is remarkable that, in view of the decision in these cases, and particularly the observations of ATKIN, L.J., in the last case, in *Israelson v. Dawson* (g), GREER, L.J., said that after full consideration he had come to the conclusion that, under an identical clause in a motor policy, the insurers did not undertake to pay the assured anything, but only to indemnify him against such payment as he may have to make, which was an obligation which they could discharge by paying to the third party the amount which the assured is liable to pay such third party. However this may be, it should be noted that, by special drafting of its terms, a policy of liability insurance may be made a true contract of indemnity (h). Indemnity, that is, in the sense of "compensation for loss" (i). This opinion of GREER, L.J., received confirmation, though *obiter*, in the judgment

(v) [1928] Ch. 105

(w) Later Lord ATKIN.

(z) But see *British Dominions General Insurance Co., Ltd. v. Duder*, [1915] 2 K. B. 394, with which case KENNEDY, L.J.'s, statement and the cases noted later in the text of this section are hard to reconcile.

(a) For the meaning of the word "indemnity" in motor policies, see also *post*, p. 156

(b) [1914], 2 Ch. 617, at p. 639

(c) [1928] Ch. 105 (C. A.)

(d) *Ibid.*, at p. 121

(e) But not perhaps in the legal sense, as to which sense see *Pontifex v. Foord* (1884),

12 Q. B. D. 152; *Callon v. Bennett* (1884), 20 Ch. D. 101; *Speller v. Bristol Steam Navigation Co.* (1884), 13 Q. B. D. 90; *Carshore v. North Eastern Rail. Co.* (1885), 20 Ch. D. 344; *Birmingham and District Land Co. v. London and North Western Rail. Co.* (1886), 34 Ch. D. 261; *Trillon v. Bankart* (1887), 56 L. J. Ch. 629. At any rate not in the legal sense in which it is now used in reference to contracts of insurance. See *Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617, and the cases there cited.

(i) As to its dictionary sense, see *Shorter Oxford Dictionary*, vol. i, p. 987.

(w) (1833), 5 B. & Ad. 78

(y) [1914] 2 Ch. 617.

(z) But see *British Dominions General Insurance Co., Ltd. v. Duder*, [1915] 2 K. B. 394.

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(i) As to its dictionary sense, see *Shorter Oxford Dictionary*, vol. i, p. 987.

of Lord MAUGHAM in *Digby v. General Accident Assurance Corporation, Ltd.* (j). This case is discussed at length elsewhere in this book, and it will suffice to state here that this was a claim by a chauffeur to be indemnified by the insurers of his employer, Miss Thompson, against a judgment obtained against him by his employer for personal injuries incurred while she was travelling as a passenger in the car driven by himself. Lord MAUGHAM pointed out that the appeal should be treated just as though the appellant were the employer herself, for among other reasons "I see no reason to doubt that the obligation, if any, of the corporation could have been discharged by a payment direct to Miss Thompson."

In this connection it should also be noted that if payment by the assured to the third party is a condition precedent to the right to recovery, the policy may be of little value to the person indemnified, who may be unable to meet the claim in the first instance (k).

It is possible, however, to have a policy which will not have the effect of obliging the insurance company in certain circumstances to pay large sums to persons who have no real claim to them, or to the insured who may make a handsome profit thereby, whilst at the same time the policy is fully as beneficial to the insured. As ATKIN, L.J. (l), pointed out in *Harrington Motor Co.'s Case* (m):

"It would appear as though a person who is insured against risks and
"who has general creditors whom he is unable to satisfy, has only to go out
"into the street and to find the most expensive motor car or the most
"wealthy man he can to run down, and he will at once be provided with
"assets which will enable him to pay his creditors a substantial dividend."

The case suggested by ATKIN, L.J., would not now be possible since the passing of the Third Parties (Rights against Insurers) Act, 1930 (n), but it is still possible that in some cases with a policy in the terms referred to above the insurance company may be compelled to pay a sum which becomes a pure profit to the assured (o).

For example, suppose A, a solicitor, is insured against becoming liable for negligence to his clients. By reason of his negligence he becomes liable to pay a client the definite sum of £1,000. Thereupon, if A's policy is in the terms indicated by ATKIN, L.J., his insurance company must, according to this authority referred to above, at once pay to A the £1,000. After receiving payment of this sum A, with this money, buys his wife a diamond bracelet costing £500 and then persuades his client to accept £500 on account and forget the rest. If anybody questions A as to the legality of this transaction A will refer him to the line of cases quoted. If A is then pressed as to the propriety of this dealing he will point out that, as Lord Justice KENNEDY (p) has laid it down, he only got the amount for which he bargained in his policy and for which he has paid an adequate premium. Many examples (q) in which payment under an insurance policy by the insurers

(j) [1943] A. C. 121, [1942] 2 All E. R. 319. See note (r), *post*, p. 77, and *Beacon Insurance Co., Ltd. v. Langdale*, [1939] 4 All E. R. 204.

(k) *Per* NEVILLE, J., in *Liverpool Mortgage Insurance Co.'s Case*, [1913] 2 Ch. 604, at p. 612.

(l) As he then was, later Lord ATKIN.

(m) [1928] Ch. 105, at p. 124.

(n) 23 Halsbury's Statutes 12. See *post*, chapter III. And, it is submitted, was not possible in law until the later case of *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793, was decided.

(o) But see *post*, p. 156.

(p) In the *Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617, at p. 640.

(q) But few would occur in practice.

might in fact result in profit to the assured may be imagined (r). But in any case in which the assured does both in fact and in law make a profit from the insurance, the insurers can recover such profit from him. Thus if in the example given A had persuaded his client to accept £500 in full settlement of his claim, the insurance company could, it is submitted, compel A to refund the £500, on the authority of the case of *British Dominions General Insurance Co., Ltd. v. Duder* (s). For in that case, A would have reduced his liability, and the contract only obliges the company to indemnify to the extent of his liability.

Finally, it should be remarked that in the *Liverpool Mortgage Insurance Co.'s Case* (t) KENNEDY, L.J., said (u) :

" I do not think it is true to say that in such a case as the present the party who is entitled makes a profit ; he gets only the amount for the payment of which he bargained in the event which has occurred, and he has paid a premium based upon the risk, in such event, of that amount having to be paid."

But is this not precisely the same thing as a bet ? And would not the Life Assurance Act, 1774, section 1, or the Gaming Act, 1845 (v), section 18, make a policy which has this result illegal ? It is submitted that these dicta must be read as qualified by the case of *British Dominions General Insurance Co., Ltd. v. Duder* (s).

The classification indicated is, therefore, so far as it is possible to make it accurate, as follows :

A. Contracts of Speculation :

Most life insurance.

(r) In practice, of course, the insurers settle direct with the third party in motor accident claims and the money payable under the policy does not come into the hands of the insured at all. It is at least questionable whether the insured could not, if he desired so to do, in law compel the insurers to pay such monies direct to him. This, it is apprehended, would result from the position that the indemnity provided by the policy is an indemnity against liability. In matters of re-insurance the re-insurer has to pay the original insurer his liability whether he has discharged it or not, and it is immaterial to him what the original insurer does with the money. But if the original insurer has reduced his liability by settlement the re-insurer cannot be compelled to pay more than a sum to cover the reduced liability. *Per* PICKFORD, L.J., in *British Dominions General Insurance Co., Ltd. v. Duder*, [1915] 2 K. B. 394, at p. 405 ; see also *per* BUCKLEY, L.J., [1915] 2 K. B. 394, at p. 403. The same principle, as it has been explained and defined, *ante*, at p. 72, applies to the obligation to indemnify under motor insurance contracts. An extremely difficult case might occur in the following circumstances : the third party has been given judgment for £1,000 against the insured and then for some reason the insurers pay the £1,000 to the insured. It is subsequently discovered that the insured had prior to the payment of the £1,000 to him committed an act of bankruptcy. Upon his becoming bankrupt, will the insurers have to pay again to the third party (this time under the provisions of the Third Parties Act) ? See this question discussed in chapter III, *post*, p. 115 *et seq.*

(s) [1915] 2 K. B. 394. " The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnified is bound to pay ; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes in equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." *Per* Lord BLACKBURN in *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333.

(t) [1914], 2 Ch. 617.

(u) *Ibid.*, at p. 640.

(v) Section 18 (8 Halsbury's Statutes 1152).

B. *Contracts of True Indemnity:*

1. Insurance against damage to property caused by fire, accident, loss, theft.
2. Some life insurance.
3. Some liability insurance.

C. *Contracts of Legal Indemnity—which may result in True Indemnity or may have the same result as Speculation:*

1. Some life insurance.
2. Some sickness and accident insurance.
3. Some contracts of liability insurance.

While the classification given above is intended to be a logical classification in law, in ordinary or commercial language insurance is classified according to the nature of the subject-matter insured or the risk undertaken. Thus the following terms are used: Fire Insurance; Life Insurance; Accident Insurance; Marine Insurance; Burglary Insurance; Employer's Liability Insurance; Third Party Liability Insurance; Plate Glass Insurance; Fidelity Insurance; Road Traffic Insurance, etc.

The law of motor insurance is now in very complex situation. The rights and liabilities of the parties to a contract of motor insurance *inter se* are still governed by the Common Law modified by such general statutes as affect any other contract (u). But legislation has imposed upon persons who undertake motor insurance an almost infinite obligation towards the whole world. In certain circumstances this obligation is absolute, and cannot be avoided even when the only person (*i.e.* the insured) to whom the insurer expressly undertook the obligation has forfeited every title of right to it.

Contracts of insurance, again, are more broadly divided into: Fire, Life, Accident, and Marine Insurance.

The law relating to marine insurance has been codified and is to be found in the Marine Insurance Act of 1906 (x). All other insurance is governed by the Common Law (y). There are, however, various statutes which deal with miscellaneous, but in some cases important points. The application of the Gaming Acts and the Life Assurance Act has already been noted. In addition to these the statutes which affect motor insurance are the Assurance Companies Act, 1909 (z), the Third Party (Rights against Insurers) Act, 1930 (a), the Road Traffic Act, 1930 (b), and the Road Traffic Act, 1934 (c).

It should be observed that one contract may contain insurances of different classes. An ordinary comprehensive private motor car policy is possibly the best example of such (d). It contains:

- (1) Insurance against liability to the public (*i.e.* third parties).
- (2) Insurance against damage to the insured property caused by:
 - (i) Fire;
 - (ii) Theft;
 - (iii) Accident;
 - (iv) Negligence;
 - (v) Malicious Damage.

(u) *E.g.* the Statute of Frauds, the Gaming Acts, the Companies Acts, etc.

(x) 9 Halsbury's Statutes 851. Much of this Act states the law applicable to all insurance. See *post*, chapter VII.

(y) As modified by various statutes (see note (u)), *i.e.* there is no general code of insurance law.

(z) 2 Halsbury's Statutes 724.

(a) 23 Halsbury's Statutes 12.

(b) 23 Halsbury's Statutes 607.

(c) 27 Halsbury's Statutes 534.

(d) See more fully chapter VIII, *post*.

- (3) Life insurance (upon the life of the assured and others, *e.g.* the assured's wife).
- (4) Personal injury insurance.

III.—INSURABLE INTEREST

At Common Law, wagers and contracts of insurance in which the assured had no insurable interest were valid and enforceable (*e*). The Life Assurance Act of 1774 (*f*) makes void all insurance, except insurance on ships, goods, or merchandise (*g*), in which the assured has no insurable interest (*h*). It also prohibits the recovery of a sum greater than the value of the assured's interest (*i*).

By the Gaming Act of 1845 (*j*) all contracts by way of gaming or wagering are null and void (*k*). It seems generally to be supposed that a contract of insurance upon goods or merchandise in which the assured has no insurable interest must necessarily be a gaming transaction and therefore void (*l*). No doubt in practice most insurances in which the assured has no interest would be gaming transactions. But it does not necessarily follow that all such must be.

Suppose that A insures against the risk that B, his son, may be held liable for damages to a third party in respect of B's driving a car which A has lent him. A has no insurable interest in this risk (*m*). But as ROCHE, J., put it in *Williams v. Baltic Insurance Association of London, Ltd.* (*n*), "Such a person, would be very much surprised to be told he had taken out a gaming policy" (*o*). Nevertheless the insurance, not being upon goods or merchandise, would formerly have been void (*p*). The law is that in the case of insurance upon goods (*q*) the absence of an insurable interest does not by itself vitiate the contract, which will be enforceable unless it is in substance a wagering transaction.

Suppose, again, that A gives his son B a motor car. A insures the car in his own name against loss and damage. Having no property in the car, and no obligation to repair its loss or damage, A has no insurable interest. But, it is submitted, such a policy would not be held to be a gaming transaction (*r*).

The essence of gaming is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain

(*e*) 25 Halsbury's Laws, 2nd Edn. 344, 354.

(*f*) Known as "the Gambling Act", 6 Halsbury's Statutes 846.

(*g*) *Ibid.*, s. 4.

(*h*) *Ibid.*, s. 1.

(*i*) *Ibid.*, s. 3.

(*j*) 8 Halsbury's Statutes 1140.

(*k*) *Ibid.*, s. 18; see also s. 1 of the 1774 Act.

(*l*) See, *e.g.*, Welford on Accident Insurance, 2nd Edn., p. 14.

(*m*) But see now *Monk v. Warbey*, [1935] 1 K. B. 75.

(*n*) [1924] 2 K. B. 282 (doubted in the Privy Council in *Fandepille v. Preferred Accident Insurance Corporation of New York*, [1933] A. C. 70). (In *Williams' Case* it seems to have been decided that insurable interest was not essential to the validity of an insurance upon a motor car. But the authority for this was *Waters v. Monarch Life Assurance Co.* (1856), 5 E. & B. 870, in which the question was not whether a contract in which the assured had no insurable interest was void, but whether the assured could recover an amount in excess of his interest, as trustee for others, and it was held that he could.) See also *North British and Mercantile Insurance Co. v. Moffatt* (1871), L. R. 7 C. P. 25.

(*o*) *Ibid.*, at p. 288.

(*p*) *I.e.* before the Road Traffic Act, 1930 (23 Halsbury's Statutes 607).

(*q*) Insurable interest in insurance upon ships and upon goods at risk in a maritime adventure has been made necessary by the Marine Insurance Act of 1906 (9 Halsbury's Statutes 851).

(*r*) See *e.g.*, *James v. British General Insurance Co.*, [1927] 2 K. B. 311.

nature (s). But where the assured has no insurable interest he cannot in most cases win, since he holds any sum recoverable under the policy in trust for the person who has actually suffered the loss (t). Nor can the company win, since the premium is paid and is of the same amount, irrespective of whether the event occurs (u).

"A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win, there being no other real consideration for the making of such contract by either of the parties" (v).

"It is also essential that there should be mutuality in the transaction. For instance, if the evidence of the contract is such as to make the intentions of the parties material in the consideration of the question whether it is a wagering one or not, and those intentions are at variance, those of one party being such as if agreed in by the other would make the contract a wagering one, whilst those of the other would prevent its becoming so, this want of mutuality would destroy the wagering element of the contract and leave it enforceable as an ordinary one" (w).

It has been held that a motor insurance is in substance an insurance upon goods (a). But this decision has been doubted (b), and inasmuch as many motor policies do not insure the car at all, the question of insurable interest may determine the validity of a motor policy (c).

Moreover, proof of an insurable interest prevents a policy from being a wagering policy (d).

It becomes necessary, therefore, to define "insurable interest." This cannot be done with accuracy (e), but it may be said that

"an insurable interest exists where the assured stands in some legal relation (f) to the subject matter of the insurance whereby he stands to incur some legal loss (g) if the event insured against occurs."

(s) *Per* COTTON, L. J., in *Thacker v. Hardy* (1878), 4 Q. B. D. 685, approved in *Forget v. Ostigny*, [1895] A. C. 318, at p. 326.

(t) *London and North Western Rail. Co. v. Glyn* (1859), 1 E. & E. 652; *Grant v. Hill* (1812), 4 Taunt. 380; *Armitage v. Winterbottom* (1840), 1 Man. & G. 130; *Dalglish v. Buchanan* (1854), 16 Dunt. (Ct. of Sess.) 332; *Waters v. Monarch Life Assurance Co.*, *ante*, p. 79.

(u) See *post*, chapter IX, as to when the premium must be returned.

(v) *Per* HAWKINS, J., in *Carlill v. Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484, at p. 490; see also *Thacker v. Hardy* (1878), 4 Q. B. D. 685; *Universal Stock Exchange v. Strachan*, [1896] A. C. 166.

(w) *Per* HAWKINS, J., *ibid.*, at p. 491. "There is a profound distinction, legally and practically, between speculative transactions enforceable by law and mere gaming transactions unenforceable by law. The test is this. If the parties meant that no legal bargain should be effected between them, and that there should be no legal right to demand payment except a moral right, the contract is a gaming contract. But if the parties intended to enter into a legal contract, though it deals with speculative transactions, it is enforceable" (*per* MCCARDIE, J., in *Barnett v. Sanker* (1925), 41 T. L. R. 660). For other respects in which an insurance contract differs from a mere wager, see *Welford's Fire Insurance*, 4th Edn., p. 8.

(a) *Williams v. Baltic Insurance Association of London, Ltd.*, *ante*, p. 79.

(b) In *Vandepitte v. Preferred Accident Insurance Corporation of New York*, *ante*, p. 79.

(c) See p. 79, *ante*, and the example there suggested of a father who insures his son; and see *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A. C. 70.

(d) *Per* WILLES, J., in *Wilson v. Jones* (1867), L. R. 2 Exch. 139; and see s. 4 of the Marine Insurance Act, 1906 (9 Halsbury's Statutes 852).

(e) *Lucena v. Craufurd* (1806), 2 Bos. & P. (N.R.) 269, *per* Lord ELDON.

(f) *Inglis v. Stock* (1885), 10 App. Cas. 263, at p. 270.

(g) *Lucena v. Craufurd*, *supra*, *per* LAWRENCE, J., at p. 302. But see *Hobbs v. Hannam* (1811), 3 Camp. 93, and *Macaura v. Northern Assurance Co.*, [1925] A. C. 619.

The interest must amount to more than a mere expectancy (*h*).

For example, a garage proprietor has an interest in any car which is kept at his garage and maintained and repaired by him. He can insure the car against loss or damage occurring to it whilst in his possession or control (*i*). If the owner is killed whilst driving the car, or if the car is lost or destroyed, the garage proprietor may lose a valuable custom. But he has no insurable interest in that customer's life, or in the car, and could not therefore validly insure against the owner's death or against the loss or destruction of the car whilst out of his control even to the extent of the profits he expected to make from the continued custom (*j*).

The following is a descriptive but not an exhaustive list of the persons who would be held to have an insurable interest in a motor car:

1. *The Owner*.—He may be the legal or equitable owner (*k*), but need not be both. He need not be the absolute or sole owner (*l*) of the car, nor need he be entitled to its possession or use (*m*). But a man registered as the owner who is not in fact the legal or equitable owner but who, for instance, only advanced the purchase price to another to enable him to purchase the vehicle, has not sufficient insurable interest in the car so as to be able to "permit" some other person to use it on the roads, within the meaning of that word as used in s. 35 (1) of the Road Traffic Act, 1930 (*n*).

2. *The Seller*.—The owner of a car who enters into a contract to sell it retains his ownership until the property in the car passes to the buyer (*o*). When the property has passed the seller may still have a right of lien or a right of stoppage *in transitu* or both. If he has either he still has an insurable interest for some purposes, but not, it is submitted for the purpose of the user of the car on the road (*p*). If the property has passed to the purchaser, and the seller has no right of lien or right of stoppage in transition, he will have no insurable interest (*q*), unless the car is at his risk by special agreement between him and the purchaser (*r*), or he has contracted to insure (*s*) it.

(*h*) *Lucena v. Craufurd*, *ante*, p. 80; *Moran, Galloway & Co. v. Uzzelli*, [1905] 2 K. B. 555.

(*i*) See cases cited *post*, pp. 82-3, notes (*e*), (*f*), (*g*) and (*h*).

(*j*) *Buchanan & Co. v. Faber* (1809), 15 T. L. R. 383: "A man may be largely interested in the arrival of a ship and yet have no insurable interest in her, as where the ship is bringing goods to a market where the man deals, which, when they arrive, he can buy and so fulfil his contracts and thereby save himself from loss" (*per* BIGHAM, J., in *Price v. Maritime Insurance Co.* (1900), 16 T. L. R. 481); and see note (*q*), *infra*.

(*k*) *Castellain v. Preston* (1883), 11 Q. B. D. 380, *per* BOWEN, L.J., at p. 307. But he must be the owner at the time he effects the insurance. *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1931), 146 L. T. 26.

(*l*) *Page v. Fry* (1800), 2 Bos & P. 240, *Robinson v. Gleadow* (1835), 2 Bing. (N. C.) 156.

(*m*) *Ward v. Cartlar* (1865), L. R. 1 Eq. 29, at p. 31.

(*n*) *Zurich General Accident Insurance Co. v. Buck* (1939), 64 Ll. L. R. 115. See chapter IV, *post*, p. 172.

(*o*) When the property passes depends upon the circumstances and terms of each particular contract. See Sale of Goods Act, 1893, Part II, ss. 16-20 (17 Halsbury's Statutes 620-3).

(*p*) *Collingridge v. Royal Exchange Assurance Corporation* (1877), 3 Q. B. D. 173; *Castellain v. Preston* (1883), 11 Q. B. D. 380; *Clay v. Harrison* (1829), 10 B. & C. 99; *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1938] 2 All E. R. 267.

(*q*) *North British and Mercantile Insurance Co. v. Moffat* (1871), L. R. 7 C. P. 25; *Anderson v. Morice* (1876), 1 App. Cas. 713. In this case it was held that the purchaser of a "cargo" of rice upon a certain vessel had no insurable interest to support a claim under a policy in respect of loss of some of the rice already loaded on the vessel as cargo at a time when the remainder had not yet been shipped. This case, upon which the House of Lords was evenly divided, has been distinguished in later cases and should be applied with caution (*cf.* *Tattersall v. Drysdale*, [1935] 2 K. B. 174, *per* GODDARD, J., (as he then was); *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1938] 2 All E. R. 267).

(*r*) *Heckman v. Isaac* (1862), 6 L. T. 383.

(*s*) *Collingridge v. Royal Exchange Assurance Corporation*, *supra*; *Inglis v. Stock* (1883), 10 App. Cas. 263; *Phoenix Assurance Co. v. Spooner*, [1905] 2 K. B. 753.

3. *The Purchaser*.—A person who agrees to buy a car acquires an insurable interest in it the moment the contract is completed. It does not matter that the property has not passed to him (*t*) or that he has not paid or become liable to pay the purchase money (*u*), or that the car is not in his possession.

4. *Parties to a hire-purchase agreement*.—A hire-purchase agreement is either an agreement to purchase by instalments or an agreement to hire with an option to purchase (*v*).

In the case of an agreement to purchase the seller will have an insurable interest only if the hire-purchase agreement either gives him the right to re-take possession of the car if the instalments are not paid (*w*), or stipulates that the property shall not pass until the last instalment is paid (*x*). In the case of an agreement to hire the owner does not part with his property in the car, and therefore retains an insurable interest (*x*). In both cases the purchaser or hirer has an insurable interest in the car (*y*), and this is so even if he is under no liability to the owner for the loss of or damage to the car (*z*). But he must stand to lose something by its loss or damage (*a*). The difficult and important questions concerning the rights of the parties to a hire-purchase agreement under a motor insurance policy are discussed more fully elsewhere (*b*).

5. *Persons to whom the legal ownership passes*.—Trustees (*c*), receivers, liquidators, trustees in bankruptcy, executors and administrators of a deceased person's estate and others to whom the legal ownership passes have an insurable interest (*d*).

6. *Persons in possession of the car*.—Any person who has possession of a car has an insurable interest in the car to the extent to which he will suffer a loss if the car is lost, destroyed or damaged. And this is so irrespective of any liability to the owner. Thus factors (*e*), garage proprietors (*f*),

(*t*) As to when the property passes, see Sale of Goods Act, 1893, ss. 16–20 (17 Halsbury's Statutes 620–3). *Bullock v. Bellamy* (1941), 67 Ll. L. R. 392.

(*u*) *Joyce v. Swann* (1864), 17 C. B. (N.S.), 84, at p. 104; *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (1886), 12 App. Cas. 128, distinguishing *Anderson v. Morice* (1876), 1 App. Cas. 713.

(*v*) See 1 Halsbury's Laws, 2nd Edn. 761, 2; *McEntire v. Crossley Brothers, Ltd.* (1895), A. C. 457.

(*w*) There is no authority upon this. There are dicta in marine insurance cases to the contrary. See *Stainbank v. Fenning* (1851), 11 C. B. 51, at p. 75, and *Stainbank v. Shepard* (1853), 13 C. B. 418, at p. 443; and see cases cited under note (*p*), *ante*, p. 81.

(*x*) *Helby v. Matthews*, [1895] A. C. 471; *Belsize Motor Supply Co. v. Cox*, [1914] 1 K. B. 244.

(*y*) *Armitage v. Winterbottom* (1840), 1 Man. & G. 130; *Marks v. Hamilton* (1852), 7 Exch. 323; *Waters and Steel v. Monarch Fire and Life Assurance Co.* (1850), 5 E. & B. 870; *London and North Western Rail. Co. v. Glyn* (1859), 1 E. & E. 652; *Simpson v. Scottish Union Insurance Co.* (1863), 1 Hem. & M. 618; *Martineau v. Kitching* (1872), L. R. 7 Q. B. 436; *Dixon v. Whitworth* (1879), 4 C. P. D. 371.

(*z*) *Ebsworth v. Alliance Marine Insurance Co.* (1873), L. R. 8 C. P. 596.

(*a*) *Ex parte Houghton, Ex parte Gribble* (1810), 17 Ves. 251; *Ebsworth v. Alliance Marine Insurance Co.* (1873), L. R. 8 C. P. 596, at p. 638; *Fry v. Fry* (1859), 27 Beav. 144; *Re Betty, Betty v. Att.-Gen.*, 1899, 1 Ch. 821.

(*b*) *Post*, chapter IX, Part 2.

(*c*) *Macaura v. Northern Assurance Co.*, [1925] A. C. 619.

(*d*) *Camden v. Anderson* (1794), 5 Term Rep. 709; *Ex parte Yallop* (1808), 15 Ves. 60, at p. 67.

(*e*) *Waters and Steel v. Monarch Fire and Life Assurance Co.*, *supra*; *London and North Western Rail. Co. v. Glyn* (1859), 1 E. & E. 652; *Dixon v. Stansfeld* (1850), 10 C. B. 398, at p. 417.

(*f*) *Waters and Steel v. Monarch Fire and Life Assurance Co.*, *supra*; *Martineau v. Kitching*, *supra*. In *Dalglish v. Buchanan* (1854), 16 Dunl. (Ct. of Sess.) 332, it was held that a coach builder had an insurable interest in vehicles left with him for repairs.

carriers (g), innkeepers and others (h) have as bailees an insurable interest in any car which comes into their possession, provided that they would lose some advantage accruing to them from the bailment if the car were lost, destroyed or damaged. But in any case a person who has possession of a car is always responsible to the owner for any loss or damage caused by his (or his servant's) negligence (i). Moreover, he has an insurable interest to the extent that he benefits by the possession (j). It can therefore be said generally that any person in possession of a car has an insurable interest in it. Thus a person who borrows a friend's car could insure it in his own name, since he has an interest in the risk that he may be liable for damage caused by his own (or his servant's) negligence (k), and his enjoyment of the use of the car will be lost if the car is damaged, destroyed or lost (l). Indeed there is no reason why a person who does not own a car should not be validly insured against third party risks whenever he happens to be driving a car belonging to somebody else (m).

Apart from loss of or damage to the car, a motor policy must always cover the risk of liability to third parties (n), usually also covers the risk of personal accident to the assured, and sometimes covers the risk of death and personal injury to the assured's wife. The indemnity against third party liability is often purported to extend to any person driving with the assured's permission (o). All these are insurances to which the Life Assurance Act, 1774, applies, and are therefore invalid unless the assured has an insurable interest in the risk (p). The assured has an insurable interest in the life of his wife (q), and presumably also in the risk that she will be injured (r).

He has an insurable interest in the liability of or accidents to persons driving the car with his consent (s).

IV. —INSURABLE INTEREST IN MOTOR INSURANCE CASES

1. Before and apart from the Road Traffic Act, 1930.—The question of insurable interest in motor car insurance is sometimes thought to be of little importance. Yet its importance is indicated by the following remarks of

- (g) *Crowley v. Cohen* (1832), 3 B. & Ad. 478.
- (h) See Wellford's Fire Insurance 4th Edn., p. 43. *Asia v. Bridge House Hotel (Staines), Ltd.* (1927), 137 L. T. 200 (innkeeper). Also pawnbrokers by the Pawnbrokers Act, 1872, s. 27 (12 Halsbury's Statutes 695).
- (i) *Coggs v. Bernard* (1703), 2 Ld. Raym. 909. 1 Halsbury's Laws, 2nd Edn. 723 *et seq.*
- (j) *Castellain v. Preston* (1883), 11 Q. B. D. 380.
- (k) *Stirling v. Vaughan* (1809), 11 East, 619; *Sidaway v. Todd* (1818), 2 Stark 400; *Crowley v. Cohen* (1832), 3 B. & Ad. 478; *Waters and Steel v. Monarch Fire and Life Assurance Co.* (1856), 5 E. & B. 870; *London and North Western Rail. Co. v. Glyn*, *supra*; *Joyce v. Kennard* (1871), L. R. 7 Q. B. 78.
- (l) He will be responsible for the slightest negligence. *Coggs v. Bernard*, *supra*; *Vaughan v. Menlove* (1837), 3 Bing. (N.C.) 468, *per* LINDAL, C.J., at p. 475.
- (m) *Tattersall v. Drysdale*, [1935] 2 K. B. 174, at p. 179, *per* GODDARD, J. (as he then was). Though in practice such cover is not usually granted, as the premium is normally assessed on the characteristics and proposed uses of a particular vehicle.
- (n) Road Traffic Act, 1930, s. 35 (23 Halsbury's Statutes 630).
- (o) *Paulor v. Co-operative Insurance Society* (1930), 38 Ll. L. R. 237.
- (p) *Shilling v. Accidental Death Insurance Co.* (1857), 2 H. & N. 42.
- (q) *Griffiths v. Fleming*, [1900] 1 K. B. 805; *Reed v. Royal Exchange Assurance Co.* (1795), Peake, Add. Cas. 70.
- (r) Since he is entitled to her consortium and her services and can claim damages from any person who deprives him of them. *Guy v. Limesey* (1618), Cro. Jac. 501; *Hyde v. Scysson* (1619), Cro. Jac. 538.
- (s) *Monk v. Warbey*, [1935] 1 K. B. 75.

SCRUTTON, L.J., in *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (t).

"The parties in this case could not be said to have intended to depart from the cardinal principle of insurance law that a person could not recover for a loss in respect of a subject-matter in which he no longer had an insurable interest."

In this case the assured was covered in respect of third party risks arising from his driving car "A" or any other car "instead of car 'A.' " He sold car "A" and then, having been involved in an accident with his new car, sought an indemnity under his policy. The insurers succeeded upon appeal in resisting this claim on the ground that the assured had no longer any insurable interest in the subject-matter of the policy when he sustained the loss (u).

At this point the distinction must be made between four descriptions of insurable interest :

- ✓ 1. Interest in the risk of loss or damage to the insured car.
2. Interest in the risk of incurring third party liability from the driving of the insured car by the assured.
3. Interest in the risk arising from the driving and use of other cars by the assured.
4. Interest in the risk of incurring liability to third parties from the driving of the insured car by persons other than the assured, i.e. those driving on the order or with the permission or consent of the assured.

In the first class of insurance the insurable interest lies in and is inseparable from some property in or possession of the insured car ; in the second class of third party liability insurance the insurable interest is not in the car itself, but in the driving or use of the insured car by the assured or by his servant or agent. It does not follow that a change in the assured's interest in the car (as where, for instance, he decides to share its ownership with a reckless driver) will not, in the case of third party liability insurance, avoid the policy (a). This result may well be brought about by reason of such a change constituting a material alteration in the circumstances of the risk insured. In so far as the judgments in *Rogerson's Case* (b) may seem to decide that a possessory interest in the car is necessary to the validity of third party insurance they must be applied with caution. There seems no reason in principle why a person should not effect a third party liability policy in respect of his driving a car in which he has no interest—e.g. his brother's car (c).

It must, in view of the remarks of SCRUTTON, L.J., above and those of the Privy Council in *Vandepitte's Case* (d), be taken to be the law that a policy of motor insurance covering third party liability requires an insurable interest

(t) (1930), 47 T. L. R. 46 ; on appeal (1931), 48 T. L. R. 17 (H. L.).

(u) As GODDARD, J. (as he then was), said in *Tattersall v. Drysdale*, [1935] 2 K. B. 174, at p. 179: "both in the Court of Appeal and the House of Lords the decisive factor (in *Rogerson's Case*) was that the subject matter of the insurance was the specified car, and that as the assured had parted with it he no longer was interested in the policy."

(a) Cf. *Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

(b) *Supra*.

(c) Indeed most motor policies cover the assured when driving other people's cars. See GODDARD, J., in *Tattersall v. Drysdale*, [1935] 2 K. B. 174, at p. 179.

(d) *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A. C. 70. See also *Guardian Assurance Co., Ltd. v. Sutherland*, [1939] 2 All E. R. 246 ; *Bullock v. Bellamy* (1939), 63 Ll. L. R. 392.

in the assured for its validity (e). Thus the assured or any other person seeking to claim indemnity under the policy (either as an injured third party under the provisions of the Third Parties Act, 1930 (f), and the Road Traffic Acts, 1930 and 1934 (g), or as a third party driving with the insured's consent and claiming to be covered under the policy) may, in some cases, be met by the defence of no insurable interest to support the policy. In *Coles v. F. Young, Ltd.* (h), it was held that the assured could not enforce a policy in respect of a lorry of which he could not prove his ownership in law.

In *Bell Assurance Association v. Licenses and General Insurance Co., Ltd.* (i), a "knock for knock" agreement was held inapplicable when the policy between one set of insurers and their assured was invalid through the absence of insurable interest (j).

The authorities and principles governing insurable interest summarised in the preceding pages may be regarded as generally applicable to motor insurance policies. The case of *Waters and Steel v. Monarch Fire and Life Assurance Co.* (k), which is authoritative upon the nature of insurable interests in goods, has been quoted and followed in motor car cases, *inter alia* in *Aked & Co., Ltd. v. Wheel and Wings Assurance Association, Ltd., and Mountain* (l). In his judgment in this case MACKINNON, J., pointed out that the assured may effect his insurance in one of three capacities—as owner, as a person with a possessory interest, or as agent or trustee for the owner of the property in respect of the owner's insurable interest. The plaintiffs claimed to be indemnified against damage sustained by a car temporarily under their control as agents for the owner, when it was running under their trade numbers. The owner of the car happened to be the managing director of the plaintiff company. MACKINNON, J., held that the plaintiffs were not entitled to the indemnity claimed, inasmuch as they had no insurable interest in respect of the loss involved, the car being neither their property nor one in respect of which they were under any legal liability. The learned Judge further held that the plaintiffs had not, on the facts, made out a good claim under the third head of "agency or trusteeship for another." The decision is of great interest in indicating that "insurable interest" is as necessary an element in policies of motor insurance as in other cases. That a possessory interest in the property of others is a sufficient "insurable interest" to support a motor insurance policy was further upheld in *Aria v. Bridge House Hotel (Staines), Ltd.* (m), where the assured was an inn-keeper.

The line of cases on this point, starting with *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (n), has been continued in *Tattersall v.*

(e) In practically every instance such an insurable interest can be discovered. Thus, an assured who takes out a policy to cover his own liability to third parties while he is driving unspecified vehicles has such an interest. If, for instance, a father insures against his daughter's liability to third parties whilst she is driving a car in which the father has no material interest, it may well be that he would be considered his daughter's agent or trustee in this respect. But if he alleges to insurers that he has an interest in a vehicle whereas in fact he has none, and the policy is based on the supposition that he has that interest, the policy becomes unenforceable by him.

(f) 23 Halsbury's Statutes 12.

(g) 23, 27 Halsbury's Statutes 607, 534.

(h) (1929), 33 Ll. L. R. 83.

(i) (1923), 15 Ll. L. R. 226; on appeal, 17 Ll. L. R. 100.

(j) See BANKES, L.J.'s, remarks in that case.

(k) (1856), 5 E. & B. 870.

(l) (1925), 21 Ll. L. R. 200. And in *Williams v. Baltic Insurance Association of London, Ltd.*, [1924] 2 K. B. 282.

(m) (1927), 137 L. T. 299.

(n) (1930), 47 T. L. R. 46; on appeal (1931), 48 T. L. R. 17.

Drysdale (o), *Peters v. General Accident Fire and Life Assurance Corporation, Ltd. (p)*, and *Guardian Assurance Co., Ltd. v. Sutherland (q)*, and establishes beyond doubt that where the subject matter of a policy is a specified vehicle, and the assured enters into the contract on the basis that he has a particular, specified interest in that vehicle, the policy lapses if he parts with that interest. In *Tattersall v. Drysdale (o)*, GODDARD, J., as he then was, used these words:

"The true view in my judgment is that the policy insures the assured in respect of the ownership and user of a particular car, the premium being calculated, as was found in *Rogerson's Case*, partly on value and partly on horsepower. It gives the assured by the extension clause a privilege or further protection while using another car temporarily, but it is the scheduled car which is always the subject of insurance. Though the words differ in the two policies, the effect and intention seem to me to be the same, and express provision is made for what is to happen when the assured parts with the car. To construe this policy otherwise would be to hold in effect that two distinct insurances were granted, one in respect of the scheduled car, and another wholly irrespective of the ownership of any car (r). It may be that a person who does not own a car can get a policy which would insure him against third party risks whenever he happens to be driving a car belonging to someone else; but the clause I am considering is expressly stated to be an extension clause, that is, extending the benefits of this policy, and accordingly if the assured ceases to be interested in the subject matter of the insurance, the extension falls with the rest of the policy."

Lastly, the fourth class of insurable interest mentioned above comes to be considered. In *Williams v. Baltic Insurance Association of London, Ltd. (s)*, the assured lent his car to his sister, who subsequently became liable to satisfy a judgment obtained against her by a third party in respect of her driving of the insured car. The assured claimed against the company that they should indemnify his sister, and should pay the amount of the judgment against her either to her or to him as her trustee. The company claimed that the assured had no insurable interest in his sister's driving, and therefore the indemnity which the policy purported to give by the usual "extension clause" was void by reason of the Life Assurance Act of 1774. In the event, it was held that the insurance was an insurance upon goods, which does not by the Act of 1774 require an insurable interest, and the assured was therefore paid.

In *Vandepitte v. Preferred Accident Insurance Corporation of New York (t)*, in which doubt was thrown upon the decision in *Williams v. Baltic Insurance Association of London, Ltd. (s)*, it was held that a person effecting a motor policy has no insurable interest in the driving of the insured car by some person who drives with his consent, but not as his servant or agent. This, then, was the position with regard to the last class of insurable interest when the Road Traffic Act, 1930, came into effect, and, as will be seen in the

(o) [1935] 2 K. B. 174, 52 Ll.L. R. 21.

(p) [1938] 2 All E. R. 267.

(q) [1939] 3 All E. R. 246.

(r) Contrast *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319, where the inclusion of an "extension clause" covering the driving of the scheduled car by an "authorised driver" was held in effect to import a fresh promise of indemnity, and to create a new though limited contract. The decision in this case, however, does not, it is thought, affect the reasoning of GODDARD, J., in *Tattersall v. Drysdale*.

(s) [1924] 2 K. B. 282.

(t) [1933] A. C. 70. This was a decision in Canadian law, and is not now an authority on this point in English law.

ensuing paragraph, the difficulty arising from this lack of interest of the assured in such a person's driving of the insured car and that lack in the "authorised driver" himself was removed by s. 36 (4) of that Act.

2. Effect of Road Traffic Act, 1930, on insurable interest.—In conclusion it remains only to stress that whilst "insurable interest" is still important as a fundamental factor in motor insurance law, the necessity for insurable interest has to a limited extent been abolished by section 36 (4) of the Road Traffic Act, 1930 (*u*). The section, which only applies to insurance against liability in respect of the death of or bodily injury to third parties, provides, by subsection (4) that "notwithstanding anything in any enactment" a person issuing a policy of motor insurance in respect of such liability shall be obliged to indemnify the persons specified in the policy (*v*).

* It has been held that that subsection nullifies the effect of the Life Assurance Act, 1774 (*w*), upon motor insurance contracts in respect of liability for the death of or personal injury to third (*x*) parties (*a*). The section says that it shall apply "notwithstanding anything in any enactment," and it has been held that this aims at the Life Assurance Act, 1774 (*b*), which, as has been noted, provides *inter alia* that no insurance except insurance upon goods shall be valid without any insurable interest. But it is submitted that section 36 equally aims at the Gaming Act, 1845 (*c*), which prohibits contracts by way of gaming or wagering.

In *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.* (*d*), a policy was taken out by one Coomber with the defendant company to cover his driving of a specified car. There was the usual extension clause in the policy covering any person who was driving the specified vehicle on the policy holder's order or with his permission. Two months before the accident occurred in which the plaintiff was injured, Coomber sold the car to one Pope, and Mr. Pope was driving the car at the time of the accident, and later was found liable to the plaintiff in damages. At the time of the accident, Coomber was still due to receive £5 of the purchase price from Pope. In his judgment, which was approved in its entirety by the Court of Appeal (*e*), GODDARD, J., as he then was, used these words:

"I am asked to hold that Mr. Coomber still retained an interest in the car. The only interest that I can see that he retained was an interest to be paid £5. He may have had, as an unpaid vendor, an insurable interest for some purposes—I do not know—but he parted with the car. The property in the car passed on the sale, and a clearer instance of property passing at the time of sale of specific goods I confess I cannot well imagine. The car thereupon became Pope's property. Now what became of the policy? . . . Well, I think that the policy lapsed. I think there was thereafter no policy in existence on this car because the only person who was insured was Mr. Coomber, and Mr. Coomber had parted with the car. I think that unless I held that, I should be going behind *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (*f*), and *Tattersall v. Drysdale*" (*g*).

(*u*) 23 Halsbury's Statutes 607; and see *post*, p. 96 and chapter IV, p. 211.

(*v*) The provisions of this section and their effect are fully discussed later; see chapter IV, *post*.

(*w*) 9 Halsbury's Statutes 846.

(*x*) See *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 50 T. L. R. 528; 49 Ll. L. R. 361; and see *Gray v. Blackmore*, [1934] 1 K. B. 95; *Tattersall v. Drysdale*, [1935] 2 K. B. 174.

(*a*) *McCormick's Case*, *supra*.

(*b*) 9 Halsbury's Statutes 846.

(*c*) 8 Halsbury's Statutes 1146.

(*d*) [1937] 4 All E. R. 628, at p. 631.

(*e*) [1938] 2 All E. R. 267.

(*f*) (1931), 146 L. T. 26.

(*g*) [1935] 2 K. B. 174.

This s. 36 (4) of the Road Traffic Act, 1930, does not therefore remove entirely the necessity for insurable interest in all motor policies. It is clear from cases decided since 1934 (*h*) that authorised drivers are no longer, owing to this section, precluded from claiming indemnity from insurers by reason only of their own lack of insurable interest in the subject-matter of the policy, and that this relief applies to all forms of third party liability arising from the driving of the car, and not only to those forms made compulsory by s. 36 (1) (b) of the Road Traffic Act, 1930 (*i*). Nevertheless, on the principle of *Rogerson's Case*, where a policy is taken out to cover the driving of a specified car, the policy lapses if the assured parts with his interest in that car, and neither he nor any person whom the policy purports to cover can claim indemnity under it.

In *Zurich General Accident Insurance Co. v. Buck* (*k*), the assured never owned the insured car. He had merely lent his brother the money with which to purchase it. The policy was a third party risks policy, and there was no way in which any third party injured by the car while it was being driven by the brother could possibly have had any claim under the policy against the assured, for the assured, not being the owner, had no power to permit or refuse his brother's driving of the vehicle (*l*). The brother used the vehicle himself all the time. The assured therefore was held by BRANSON, J., to have no insurable interest in the matter in respect of which the policy was issued. For that reason, the policy was valueless (*m*).

Summary.

The position may be put as follows :

1. In so far as insurable interest was made necessary by the Life Assurance Act, 1774 (*n*), or the Gaming Act, 1845 (*o*), it is no longer so, not only in regard to the insurance made compulsory by the Road Traffic Act, 1930, s. 36 (1) (b), but in regard to any third party liability which the policy purports to cover (*p*).

2. Where, however, the assured is issued with a policy in respect of a specified car, and the basis of the contract is that he possesses a specified interest in that car, if he parts with his interest in that car the policy lapses (*q*). Again, if he never had the interest in the car which he purported to have when the policy was issued, the policy never comes into effect (*r*).

(*h*) *Tattersall v. Drysdale*, [1935] 2 K. B. 174; *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319, *per Lord Wright*.

(*i*) *Austin v. Zurich General Accident Insurance Co., Ltd.* (1944), 77 Ll. L. R. 109.

(*h*) [1939] 64 Ll. L. R. 115.

(*l*) See also *Guardian Assurance Co., Ltd. v. Sutherland*, [1939] 2 All E. R. 246.

(*m*) BRANSON, J.'s finding was tested immediately thereafter. The injured third party brought an action against the assured, claiming damages for breach of statutory duty in that the assured had caused or permitted his brother to drive the car whilst uninsured. It was held that as the defendant had no interest in the car, he could not cause or permit anyone to drive it (*Goodbarne v. Buck*, [1940] 1 K. B. 771; [1940] 1 All E. R. 613).

(*n*) 9 Halsbury's Statutes 846.

(*o*) 8 & 9 Vict. c. 109.

(*p*) *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250; [1945] 1 All E. R. 316.

(*q*) *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1931), 146 L. T. 26 (H. L.).

(*r*) *Guardian Assurance Co., Ltd. v. Sutherland*, [1939] 2 All E. R. 246. See chapter VI, *post*, for the liability of the "insurer concerned" to an injured third party under such circumstances.

3. It is possible to obtain a policy to cover driving unspecified cars, in which the assured has no interest, so long as that fact is made known to insurers. Such a contract would not normally be held to be one by way of gaming and wagering (s).

4. Insurable interest is still therefore of importance in Motor Insurance Law, for although s. 36 (4) of the Road Traffic Act, 1930, removes the necessity for proof of insurable interest in practically all cases where a *bona fide* policy against third party liability is taken out, yet where the interest of the assured in a vehicle, on which the policy is based, is not as represented by him, that policy cannot be enforced against insurers at his suit (t).

3. Parties to the Contract.

The Assured.—The assured, as was indicated by the third of the definitions quoted at the beginning of this chapter (a), is the party in whose favour the insurance takes effect. According to the language of the Road Traffic Act, 1934, he is the "person by whom the policy is effected (aa)."

The assured may be a person or a corporation. Several persons or corporations may be assured in one contract, provided that each has some insurable interest in the subject-matter thereof (b). Before any company or corporation can enter into a binding contract of any kind it must have the constitutional power to make a contract of that kind (c). Individuals must have the ordinary capacity to contract, if the contract is to be binding upon them. An infant or a married woman may enter into, and if they do will be bound by, a contract of motor insurance. Before motor insurance against third party risks became compulsory (d) it might have been a nice question as to how far an infant could bind himself by a contract of motor insurance.

The rule was that he was only so bound if the contract was for his benefit (e). This question would depend upon the facts of each case (f). But since motor insurance is now compulsory it could not, it is submitted, be held that a contract of motor insurance was not for the infant's benefit, at any rate in so far as it insures third party risks. This question might now become of practical importance, since under the Road Traffic Act of 1934 (g) the company may be obliged to pay at once the damages recovered by a third party against its insured, and will then be obliged to sue the insured if he has by his breach of condition disentitled himself to the indemnity under the policy (g). It is submitted that if, in such a case, the assured were an infant, he could not successfully rely upon that fact (h). Nor, on the other hand, could the infant avoid his obligations to the company, since he could not both affirm the contract in so far as it was advantageous

(s) *Williams v. Baltic Insurance Association of London, Ltd.*, [1924] 2 K. B. 282; *Tattersall v. Drysdale*, ante, p. 88.

(t) See however, the effect of the Domestic agreement, chapter VI, post, p. 377.

(a) See p. 71, ante.

(aa) But see *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319, where an "authorised driver, when claiming under the policy, was held to be *pro hac vice* the assured. *Contra*, *General Accident Co. v. Watson* (1942), 73 Ll. L. R. 189, applicable in Scotland.

(b) *Stockdale v. Dunlop* (1840), 6 M. & W. 224.

(c) *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L. R. 7 H. L. 653; 5 Halsbury's Laws, 2nd Edn. 1 et seq.

(d) Road Traffic Act, 1930 (23 Halsbury's Statutes 607). See chapter IV, post.

(e) See *Clements v. London and North Western Rail. Co.*, [1894] 2 Q. B. 482.

(f) *Ibid.* See Chitty, 18th Edn., pp. 167-8.

(g) S. 10 (27 Halsbury's Statutes 544). See more fully chapter V, p. 271, post.

(h) See *Clements v. London and North Western Rail. Co.*, [1894] 2 Q. B. 482.

to him, and at the same time avoid his obligations in respect of it on the ground of infancy (i).

It is, however, possible that a case might arise in which the infancy of the assured became material. For example, suppose an infant in moderate circumstances purchases a 50 h.p. car, which would not be a necessity. He insures this car, *inter alia*, against damage to the car. The car is damaged and put out of action in collision with a third party. Subsequently the infant recovers the amount of these costs in an action against the third party. The company sues the infant for the return of the money paid by them for the repairs (j).

Can the infant successfully defend the action on the ground that the insurance contract was not binding upon him?

An infant cannot be made a bankrupt (k).

A married woman can as freely enter into a contract of motor insurance as any other person (l).

The capacity of a corporation or company to enter into a contract of motor insurance depends upon the constitution of the particular corporation (m). Provided it has by its constitution power to do so, a corporation or company can enter into a contract of motor insurance to the same extent as can an individual (n).

A department of the Government may or may not have power to bind itself by contracts. It depends upon the statutory regulations governing the department in question (o). The compulsory insurance required by the Road Traffic Act, 1930, does not apply to the Crown (p) or to local or police authorities (q), and therefore many vehicles owned by the Government or a Government department (e.g. the Post Office) are driven on the roads without there being an insurance policy in relation thereto in force.

Foreign sovereigns and ambassadors (r) of foreign states have full capacity to enter into any contract in England, but if they refuse or fail to perform their contract they cannot be sued in any English court of law unless they submit to its jurisdiction (s). Moreover, foreign sovereigns and ambassadors cannot be sued (t) or prosecuted (u) in the courts of this country in respect of any tort or crime committed by them. This immunity, which extends to the sovereign's or ambassador's family and suite (v), may have an important effect upon the rights of persons involved in a motor

(i) See notes (f) and (g) above

(j) As to recovery by insurers in such circumstances, see *post*, chapter IX.

(k) 2 Halsbury's Laws, 2nd Edn 13, 14, and cases there cited

(l) Law Reform (Married Women and Tortfeasors) Act, 1935 (28 Halsbury's Statutes 104, 473)

(m) *Ashbury Railway Carriage and Iron Co v Riche* (1875), L. R. 7 H. L. 653

(n) Even though no power to make such contract is expressly conferred there can be no doubt that a trading company, at least, has an implied power to do so

(o) 6 Halsbury's Laws, 2nd Edn 488, 90

(p) S. 121 (2) (23 Halsbury's Statutes 687)

(q) S. 35 (4), as amended Road Traffic Act, 1934, Schedule III (27 Halsbury's Statutes 568)

(r) All proceedings against ambassadors are void and solicitors who institute them subject to capital punishment at the discretion of the Lord Chancellor assisted by a judge. Diplomatic Privileges Act, 1708 (3 Halsbury's Statutes 503).

(s) Diplomatic Privileges Act, 1708; *Taylor v Best* (1854), 14 C. B. 487; *Mighell v Johore (Sultan)*, 1894, 1 Q. B. 149; *Re Republic of Bolivia Exploration Syndicate, Ltd.*, [1914] 1 Ch. 139; *Macartney v Garbutt* (1890), 24 Q. B. D. 368

(t) *The Parlement Belge* (1880), 5 P. D. 107.

(u) Phillimore, *International Law*, vol. II, p. 195. Oppenheim, *International Law*, 4th Edn., vol. I, p. 627; but it is doubtful whether the criminal immunity is recognised by English Courts. See 9 Halsbury's Laws, 2nd Edn 25

(v) See 6 Halsbury's Laws, 2nd Edn 507, 510

accident in any case where the assured is a foreign sovereign or ambassador (*w*) (or one of the family or suite of such).

The Company.—Insurance is usually effected either by a company incorporated under the Companies Act (or by Royal Charter or otherwise), or by underwriters, members of Lloyd's. Throughout this book the party who grants the insurance is referred to as "the company" or "the insurers," which terms therefore, wherever they appear, include an underwriter or any other person who is the insurer under a contract of insurance, unless the meaning is expressly or impliedly limited or amplified by the context.

As stated above, the ability of a company to enter into a contract of insurance depends upon the powers given to it in the instrument by which it is constituted (*x*).

Most insurance companies are incorporated under the Companies Act, 1948 (*y*), and in their case therefore the constitution and powers of the particular company are contained in its Memorandum of Association. But a company or corporation may be incorporated by Act of Parliament (*z*), by Royal Charter (*a*), or by Deed of Settlement (*b*). Its powers are to be found in the Act, Charter, or Deed respectively (*c*).

Any insurance which is not within the powers of the company contained in its constitution is void (*d*). If it is so void, the assured cannot recover any claim he has on the policy, but in certain circumstances he may be able to recover any premium already paid by him (*e*). Where the powers of the company are given in wide terms it may be difficult in a particular case to say whether (*f*) certain insurance is within the authorised powers. In such a case the fact that the company has in the past confined its business to other classes of insurance is not conclusive, since the limits of a company's powers are not to be defined by the company's own interpretation of them (*g*).

The power of an individual to make a contract of insurance is unlimited, and depends only upon his capacity to make a contract of any kind (*h*). An insurance contract made by an infant would not be binding upon him (*i*). An unincorporated association of more than twenty persons formed for the purpose of doing insurance business would be unlawful if it had for its object the acquisition of gain (*j*). Most individuals who carry on insurance business are underwriters, members of Lloyd's. Their activities are governed by the rules of Lloyd's and by certain statutory provisions which will be

(*w*) See, e.g., *Dickinson v. Del Solar*, [1930] 1 K. B. 376, and see *Engelke v. Musmann* [1928] A. C. 433.

(*x*) *Ante*, p. 90. For a case in which a company was held to have no power to carry on a particular class of insurance business, see *Re Argonaut Marine Insurance Co., Ltd.*, [1932] 2 Ch. 34.

(*y*) Or under the previous Companies Acts.

(*z*) 5 Halsbury's Laws, 2nd Edn. 11-12.

(*a*) *Op. cit.*, vol. 8, pp. 17 *et seq.*

(*b*) *Op. cit.*, *loc. cit.*, pp. 99-100.

(*c*) *Op. cit.*, *loc. cit.*, p. 71.

(*d*) *Re Phoenix Life Assurance Co., Hoare's Case* (1862), 2 John. & H. 229; *Re Argonaut Marine Insurance Co., Ltd.*, [1932] 2 Ch. 34.

(*e*) *Ibid.*; *Flood v. Irish Provident Assurance Co., Ltd.*, [1912] 2 Ch. 597, n. But see *Sinclair v. Brougham*, [1914] A. C. 398. As to recovery of premium generally, see *post*, chapter IX, Part 8.

(*f*) See 5 Halsbury's Laws, 2nd Edn. 402 *et seq.*

(*g*) *Ibid.*

(*h*) As to which, see *ante*, pp. 89 *et seq.*

(*i*) I.e. a contract made by an infant as insurer; *Cowern v. Nield*, [1912] 2 K. B. 419; *Re A. and M.*, [1926] Ch. 274.

(*j*) See Companies Act, 1948, s. 434.

noted hereafter (*k*). But these rules and provisions do not affect the capacity of the individual to make a contract of insurance, nor his liability on it when made (*l*).

The matters upon which the power of a company, firm or person to enter into a contract of insurance depend have been briefly outlined. These are merely the general rules of law which apply to any class of contract.

The several statutes (*m*) which have made such important alterations and have introduced such entirely novel principles into the law relating to motor car insurance do not, it is apprehended, alter the rights of the parties to the contract *inter se* (*n*); and although the combined effect of the Assurance Companies Acts and the Road Traffic Acts in practice very closely limits and defines the ability (*o*) of a would-be insurer to carry on business, those Acts do not, except in so far as they make illegal (*p*) a contract between parties who have not satisfied their requirements (*q*), restrict the contractual capacity of persons or corporations or destroy the validity of an insurance contract. This therefore is not the place to expatiate upon the many statutory provisions which now impinge upon the law of motor insurance and which provide the rules with which persons or companies must conform if they wish to carry on business as insurers or drive motor cars on the roads, as the case may be. Moreover, the vital importance of these provisions necessitates their treatment in separate chapters, where they will be found hereafter (*r*).

Agents.—A contract of motor insurance may be made by one or both of the parties to it through the medium of agents (*s*).

Agents for the Company.—A contract of insurance is almost invariably made on behalf of the insurers by an agent. A company can, in the nature of things, only act through its agents, and therefore every insurance contract made with a company (as distinguished from an underwriter) must necessarily be negotiated and made by some agent on its behalf (*t*). On the other hand, underwriters in practice always act through brokers, who are sometimes their agents (*u*), but usually the assured's (*v*).

Agents for the Assured.—The assured may negotiate and enter into a motor insurance contract through an agent (*w*). This again is referable to the ordinary law of agency.

Agents for Both Parties.—Many insurance contracts are effected through brokers. A broker is often the agent of the company and at the same

(*k*) *Post*, p. 107.

(*l*) *Sed quare*. See *post*, pp. 227 *et seq.*

(*m*) See *infra*, note (*w*).

(*n*) *I.e.* in as far as the provisions of the respective statutes, particularly as to conditions avoiding policies in specified events, are observed.

(*o*) The would-be insurer must comply with the special requirements concerning accounts, separation of funds, etc. See *post*, p. 107.

(*p*) *Cf.* Moneylenders Acts. See *post*, chapter IV, Part 4.

(*q*) Third Parties (Rights Against Insurers) Act, 1930, s. 1 (8) (23 Halsbury's Statutes 13); Road Traffic Act, 1930, ss. 37, 38 (23 Halsbury's Statutes 639); Road Traffic Act, 1934, s. 12 (27 Halsbury's Statutes 546).

(*r*) Chapters III, IV, and V, *post*.

(*s*) See *post*, chapter VII.

(*t*) *Re Norwich Equitable Fire Assurance Society, Royal Insurance Co.'s Claim* (1887), 57 L. T. 241, *per* KAY, J., at p. 246. *Willmott v. General Accident Corporation* (1935), 53 Ll. L. R. 156.

(*u*) See next note and *Hambro v. Burnand*, [1904] 2 K. B. 10; *Rozanes v. Bowen* (1928), 32 Ll. L. R. 98, and see specially remarks of SCRUTTON, L. J.

(*v*) Save in the exceptional case of issuing certificates under the Road Traffic Act—see *post*, pp. 416, 418, 473 *et seq.*

(*w*) *Newsholme Brothers v. Road Transport and General Insurance Co.*, [1929] 2 K. B. 356, and cases cited therein. See also *Cornhill Insurance Corporation v. Assenheim* (1937), 58 Ll. L. R. 27.

time of the assured. The position of an insurance broker and the questions to which it gives rise are considered in another chapter (x).

The rights and liabilities arising from the fact that an insurance contract is made or negotiated by an agent, whether on behalf of the company or the assured or both, are governed by the ordinary law of agency. This topic in its application to motor insurance is discussed more fully below (xx).

It need only be pointed out that—

(a) the agent must, in order to make a binding contract, have authority either in fact or by estoppel to make it (y); and

(b) whilst an agent for the assured need not himself have any insurable interest in the car insured, the principal on whose behalf the insurance is effected must (z);

(c) where the contract made by an agent is one which is not binding until ratified by the principal, if the ratification takes place before loss the contract is binding (a). If the ratification is after loss, it is, in the present state of the authorities, not possible to state whether or not the contract is binding upon the insurers in respect of that loss (b).

Other Parties.—The ordinary rule of English law is that only the parties to a contract have any rights under it (c). In other words, no one can sue upon a contract to which he is not a party (d).

V.—ASSIGNABILITY OF MOTOR POLICIES

To this rule that only the parties to a contract may sue upon it there are certain apparent exceptions. In the first place, a new party may be substituted to take the place of the original party. This is done either by novation or by assignment. Novation signifies a new contract (e), and is not therefore even an apparent exception to the rule. Assignment occurs where the original party to a contract transfers his rights under it to another (f). He cannot do this without the consent of the other party to the contract in any case where some value is attached, in regard to the subject-

(x) See chapter VII, *post*, p. 473 *et seq.*

(xx) *Ibid.*

(y) See generally 1 Halsbury's Laws, 2nd Edn., 209, 212-13. *Wing v. Harvey* (1854), 5 De G. M. & G. 265; *Davies v. National Fire and Marine Insurance Co. of New Zealand*, [1891] A. C. 485; *Bauden v. London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q. B. 534; *Hambro v. Burnand*, *ante*, p. 92; *Davey v. Pearl Assurance Co.* (1939), 63 Ll. L. R. 54; *Zurich General Accident Insurance Co. v. Buck* (1939), 64 Ll. L. R. 115.

(z) This since the agent is not contracting on his own behalf but on behalf of another. See *Waters and Steel v. Monarch Life Assurance Co.* (1856), 5 E. & B. 870, and *per MacKinnon, J.*, in *Aked & Co. Ltd., v. Wheels and Wings Assurance Association, Ltd.* (1925), 21 Ll. L. R. 200.

(a) See note (y) above; *Grover and Grover, Ltd. v. Mathews*, [1910] 2 K. B. 401.

(b) Ratification after loss. By long standing custom contracts of marine insurance may be ratified after loss (*Williams v. North China Insurance Co.* (1876), 1 C. P. D. 757). This rule is now embodied in the Marine Insurance Act, 1906, s. 86. It does not appear to apply to other contracts of insurance (so held in *Grover and Grover, Ltd. v. Mathews*, [1910] 2 K. B. 401) upon general principles. 1 Halsbury's Laws 2nd Edn. 234. *Portavon Cinema Co., Ltd. v. Price and Century Insurance Co., Ltd.*, [1939] 4 All E. R. 601.

(c) *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*, [1915] A. C. 847; *Price v. Easton* (1833), 4 B. & Ad. 433.

(d) *Ante*, chapter I, p. 6; *Gray v. Pearson* (1870), L. R. 5 C. P. 568. The apparent exception created by assignment is considered below, while the exception created by s. 36 (4), Road Traffic Act, 1930, is considered on p. 211. See also the Third Parties (Rights Against Insurers) Act, 1930, chapter III, *post*.

(e) *Scarff v. Jardine* (1882), 7 App. Cas. 345, *per Lord Selborne, L.C.*, at p. 351.

(f) See 7 Halsbury's Laws, 2nd Edn. 418 *et seq.*

matter or the circumstances of the contract, to his personal character (g). Most contracts of insurance (h), including contracts of motor insurance (i), involve this personal element, and cannot be assigned by the assured without the consent of the company. Moreover, a contract cannot in any case be assigned where one of its terms forbids it (j).

In *Peters v. General Fire and Life Assurance Corporation, Ltd.* (k), the owner of a car insured by the defendants sold it during the currency of the policy, and handed over the policy and the registration book to the buyer. Dealing with the question whether there had been an assignment of the policy thereby, Sir WILFRED GREENE, M.R. (l), used these words :

" It appears to me to be as plain as anything can be that a contract of that kind is in its very nature not assignable. The effect of the assignment would be that—the buyer's name would have taken the place of that of the assured in the policy. In other words, the effect of the assignment would be to impose upon the insurance company an obligation to indemnify a new assured, or persons ordered or permitted to drive by that new assured. That appears to me to be altering *in toto* the character of the risk under a policy of this kind (m). The insurance company in this case, as in every case, made inquiries as to the driving record of the person proposing to take out a policy of insurance with them. The business reasons for that are obvious, because a man with a good record will be received at an ordinary rate of premium, and a man with a bad record may not be received at all, or may be asked to pay a higher premium. The policy is, in a very true sense, one in which there is inherent a personal element of such a character as to make it, in my opinion, quite impossible to say that the policy is one assignable at the volition of the assured."

In *Jenkins v. Deane* (n) the insurers disputed liability on the ground that the insured firm had without their consent taken in a new partner, and that this was equivalent to assigning the policy. GODDARD, J. (as he then was), held that the policy was not avoided, provided that the partner claiming indemnity retained, as he ordinarily would, his undivided interest in the insured vehicle.

It should, moreover, be noted that an assignment of a motor insurance policy to be effective must instantly accompany the transfer to the assignee of an insurable interest in the vehicle (o). The more practical questions as to how an assignment of a motor policy is in practice and can in law be made are discussed later (p). It must, of course, be understood that assignment of monies due under a contract is not assignment of the contract (q).

(g) *Tolhurst v. Associated Portland Cement Manufacturers* (1900), 1903 A. C. 414 ; *Kemp v. Baerselman*, [1906], 2 K. B. 604.

(h) *Lynch v. Dallzell* (1729), 4 Bro. Parl. Cas. 431 ; *Sadlers' Co. v. Badcock* (1743), 2 Atk. 554.

(i) See *Robson v. Drummond* (1831), 2 B. & Ad. 303 ; *Stevens v. Benning* (1855), 6 De G. M. & G. 223 ; *Lucas v. Moncrieff* (1905), 21 T. L. R. 683 ; *Jenkins v. Deane* (1933), 103 L. J. K. B. 250 ; *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1938] 2 All E. R. 267.

(j) See *ante*, p. 82 and chapter X, as to the position of parties to hire purchase agreements.

(k) [1938] 2 All E. R. 267, at p. 269.

(l) Now Lord GREENE, M.R.

(m) See *post*, chapter IX, as to whether the assured is obliged to disclose an alteration of risk.

(n) (1933), 103 L. J. K. B. 250.

(o) *North of England Oil-Cake Co. v. Archangel Insurance Co.* (1875), L. R. 10 Q. B. 249, at p. 253 ; *Lloyd v. Fleming* (1872), L. R. 7 Q. B. 299, at p. 302.

(p) *Post*, chapter IX.

(q) The monies due under a contract can always be freely assigned without any previous consent. [It is sometimes said that the benefits as distinguished from the obligations of a contract can always be freely assigned ; but this is inaccurate and is peculiarly inapplicable in reference to the benefits of a motor insurance policy.] As to this, see *post*, chapter IX.

Subject to the foregoing, where an assignment is properly made (in the case of a motor policy that would be with the consent of the insurers) the person to whom the contract is assigned can enforce all the rights of the assured under the contract although he was not an original party thereto (r). Assignment can also be brought about by operation of law, that is, independently of any act or volition of the parties (s). Death and bankruptcy are the most common causes of this (t). When the party to a contract dies or becomes bankrupt, his rights in so far as they are not thereby terminated pass to his executors or administrators or to his trustee, as the case may be (a).

The Third Parties (Rights against Insurers) Act of 1930 (b) extended a departure (c) from the principle that only a party to a contract has any rights under it (d). This Act provides that, in the event of the bankruptcy of an insured person (or the liquidation of an insured company), any third party to whom the assured has incurred a liability shall be entitled to enforce the rights of the assured against the company—in the words of the Act: “the rights of the insured are transferred to and vest in the third party” (e). Moreover, under this statute the third party may get more rights than the assured himself had (f). This can never be the case under an ordinary assignment, since the assignor cannot transfer more than he has himself got (g), and the assignee's rights against the other party to the contract are subject to every defence which that party had against the assignor (g).

The Road Traffic Act of 1934 (h) goes even further. It provides that, subject to certain exceptions, if judgment is obtained by a third party against an insured for damages in respect of death or personal injuries, the company shall, in some circumstances, even if it is entitled to avoid or cancel the policy, pay to the third party the amount of the judgment and costs (i).

The second apparent exception to the general rule is that where a contract is intended to create a beneficial interest in favour of a third party, that third party may in certain circumstances indirectly enforce the contract (j).

“A party to a contract can constitute himself a trustee for a third party
“of a right under the contract and thus confer such rights enforceable in

(r) Law of Property Act, 1925, s. 130 (15 Halsbury's Statutes 313). See Halsbury's Laws, 2nd Edn. 301 *et seq*.

(s) *Ibid.*, p. 310.

(t) *Ibid.*, p. 311, and see *post*, chapter III.

(a) *Ibid.*, pp. 310-12. See *ante*, chapter I.

(b) See chapter III, *post* 23 Halsbury's Statutes 12.

(c) The principle formerly applied only within the narrow field of Workmen's Compensation under the Acts of 1897, 1906 and 1925 (s. 7) respectively. See also Companies Act, 1948, s. 319 (f), and see *post*, chapter III, and under the Fires Prevention (Metropolis) Act, 1774 (9 Halsbury's Statutes 847). See *Simpson v. Scottish Union Insurance Co.* (1863), 1 Hem. & M. 618, *Wimbledon Park Golf Club, Ltd. v. Imperial Insurance Co., Ltd.* (1902), 18 T. L. R. 815; *Sun Insurance Office v. Galinsky*, [1914] 2 K. B. 545.

(d) See *Re Harrington Motor Co., Ex parte Chaplin*, [1928] Ch. 105; and *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793, the which are supposed to have prompted Parliament to pass the Act.

(e) Section 1.

(f) By the operation of s. 38 of the Road Traffic Act, 1930 (23 Halsbury's Statutes 639), and see generally *post*, chapter IV.

(g) *Mangles v. Dixon* (1852), 3 H. L. Cas. 702, at p. 731; *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374, at p. 380.

(h) Pt. II (27 Halsbury Statutes 544). See fully chapter V, *post*.

(i) *Ibid.*, s. 10.

(j) See *Paylor v. Co-operative Insurance Society* (1930), 38 Ll. L. R. 237; *Gregory v. Williams* (1817), 3 Mer. 582; *Robertson v. Watt* (1853), 8 Exch. 299; *Lloyd's v. Harper* (1880), 16 Ch. D. 290; *Affrèdiers Rhénus Société Anonyme v. Leopold Walford (London), Ltd.*, [1919] A. C. 801; *Royal Exchange Assurance v. Hope*, [1928] Ch. 179.

"Equity on the Third Party. The trustee then can take steps to enforce performance to a beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as defendant" (k).

VI.—PERSONS DRIVING WITH ASSURED'S CONSENT

The Road Traffic Act, 1930, makes an alteration, in motor insurance law, to the general principle that only the named parties to a contract may sue upon it. Section 36 of the Act, which deals with the details of a policy which the Act requires, provides by subsection 4:

"Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

It was designed to apply to the clause contained in most motor policies which purports to cover in respect of certain risks not only the assured but anyone driving the insured car with his knowledge and consent.

Apart from the section, it is clear that such a clause in a policy (l) cannot alter the general rule stated above, that only the party to a contract has any rights under it. It has been held that this rule applies with equal force where the contract not only by implication purports to confer such rights upon a third party but goes further and expressly says:

"It is hereby agreed that the said (third party) has full power to sue the parties in any Court of Law or Equity" (m).

Unless the words of the section were held to confer a right of action on the authorised driver, it was clear that grave difficulties would confront any such person who attempted to claim on a policy to which he was not a party, and for some years after the passing of the Act the answer to this question whether he had such a right remained doubtful. In the first place, it might be said that he had no insurable interest, as required by the Life Assurance Act, 1774 (n). Secondly, he had given no consideration. The assured when paying the premium did not pay it in any way as the agent of the authorised driver (o). Thirdly, the assured did not profess to act as the agent of anyone when entering into the contract (p). Fourthly, in a great many cases the authorised driver was not in contemplation at the time the contract was made (p). Fifthly, the authorised driver had not ratified the contract, and after a loss had occurred probably could not in law do so (q).

It was suggested that perhaps, if the section did not by its terms confer a direct right to claim on the authorised driver, he might still compel the insurers to indemnify him against loss arising from the driving of the car by

(k) *Per* Lord WRIGHT in *Vandepille v. Preferred Accident Insurance Corporation of New York*, [1933] A. C. 70, at p. 79.

(l) Or any such clause which might be devised.

(m) *Tweedle v. Atkinson* (1861), 1 B. & S. 393; see chapter I, p. 6, *ante*.

(n) See p. 79, *ante*.

(o) Chapter I, p. 3, *ante*.

(p) *Keighley, Mason & Co. v. Durant*, [1901] A. C. 240; *Boston Fruit Co. v. British and Foreign Marine Insurance Co.*, [1906] A. C. 336.

(q) *Portlaoon Cinema Co., Ltd. v. Price and Century Insurance Co., Ltd.*, [1939] 4 All E. R. 601.

means of the doctrine of estoppel (r), the doctrine of trust (s) or by means of an action for damages for breach of the statutory duty defined in s. 35 of the Road Traffic Act, 1930 (t), or this s. 36 (4) itself (u).

That the point was not expressly decided before the case of *Tattersall v. Drysdale* (v) in June 1935 may be attributed to the fact that reputable insurance companies whose policy it was to observe the spirit rather than the letter of the law very properly did not see fit to take advantage of any flaw that might be apparent in the wording of s. 36 (4) of the Road Traffic Act, 1930.

In *Tattersall v. Drysdale* (v) the point was taken in a case where it was clear that one of two insurers must be liable to an injured third party, and in view of the importance of the decision, a large section of GODDARD J.'s (w), judgment is included in the text. A Dr. Tattersall, insured in his own name in respect of a Standard car, disposed of the car to a firm of motor car dealers on August 15, 1934. On August 17 he made an arrangement whereby he could drive a Riley car, belonging to and insured in the name of the director of the firm, with the permission of that director, pending his purchase of another car. While driving the Riley he injured a third party in a motor accident, and brought this action against the insurer of the owner of the Riley, as being entitled to sue him direct by virtue of the usual extension clause in the policy covering the Riley car, combined with the effect of s. 36 (4) of the Road Traffic Act, 1930. GODDARD, J., having found that Dr. Tattersall was not covered by his own policy, for he had parted with his interest in his own car by selling it, continued in these words:

"The position, therefore, in my judgment being that the plaintiff was driving the Riley with the permission of Mr. Gilling at the time of the accident, and he was not entitled to indemnity under any other policy. I have now to consider whether he can claim indemnity against the defendant by virtue of the Road Traffic Act, 1930, s. 36, sub-s. (4). Considering that no less an authority than SCRUTTON, L.J., has said that he had read this section several times without understanding it (see *Jones v. Birch Brothers, Ltd.* (a)), I naturally approach its construction with considerable diffidence. But with regard to the opening words of the section: 'Notwithstanding anything in any enactment,' I have the advantage of the decision of the Court of Appeal in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (b). As I understand that case, these words exclude any consequences that might otherwise result from the operation of the Life Assurance Act, 1774 (14 Geo. 3, c. 48). In *Williams v. Baltic Insurance Association of London, Ltd.* (c), it had been held in a Court of first instance that this Act did not apply to a policy of motor insurance, and it seems therefore that this provision is inserted to preserve

(r) I.e. in that the insurers by stating that they would indemnify such an authorised driver in a clause in the policy and in the certificate of insurance issued to the assured were precluded from denying their liability to an authorised driver who placed reliance on their express representations. See GODDARD, J.'s (as he then was), judgment in *Tattersall v. Drysdale* (*infra*).

(s) In *Williams v. Baltic Insurance Association of London, Ltd.*, [1924] 2 K. B. 282, it was held that the assured could enforce the contract in favour of the driver by suing on the policy as his trustee. This doctrine was, however, disapproved in *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A. C. 70 (*infra*).

(t) I.e. that any one causing or permitting a person to drive a car whilst uninsured would be guilty of an offence. See chapter IV, *post*. *Monk v. Warbey*, [1935] 1 K. B. 75.

(u) See chapter IV. See also *Guardian Assurance Co., Ltd. v. Sutherland*, [1939] 2 All E. R. 246, where the policy itself was void for misrepresentation.

(v) [1935] 2 K. B. 174.

(w) As he then was.

(a) [1933] 2 K. B. 597, at p. 608.

(b) (1934), 50 T.L.R. 528.

(c) [1924] 2 K. B. 282,

" the decision to that extent, and to guard against the possibility of a higher Court taking a different view.

" The Eclipse policy which I am considering provides that ' the insurance ' shall extend to indemnify any person who is driving on the assured's ' order or with his permission in respect of any legal liability as aforesaid '— that is to third parties. It has been decided by the Judicial Committee in *Vandepitte v. Preferred Accident Insurance Corporation of New York* (d) that this clause confers no rights on such a person either at Common Law or in equity unless there was an intention on the part of the assured to create a trust for such person, or unless the assured was acting with the privity and consent of such person so as to be contracting on his behalf.

" The question is therefore whether the statute has conferred a right of action on such a person and thereby altered the law. Does the section merely mean that, in spite of the provisions of the Life Assurance Act, the insurers shall indemnify the assured against any liability which the policy purports to cover, or does it mean that, freed from any difficulties caused by the Life Assurance Act as to insurable interest and as to the absence of any name in the policy other than that of the assured, the insurers shall indemnify every one whom they have said they will indemnify, in respect of the liability they have indicated?

" In my judgment both the policy of the Act and the words used point to the latter conclusion being the right one. The Act was aimed at the protection of the public by providing that there should be a body of insurers behind every driver of a car. As I said earlier in this judgment, this clause has been common, and I think universal, in all private motor-car policies for many years. Parliament may be supposed to have known that this was so, and it seems to me no unreasonable supposition that they should enact that if insurers say that they undertake the insurance of persons driving with the assured's permission, statutory effect should be given to their undertaking. The fact that the section mentions ' classes ' of persons ' seems to me to support this view. It is, I should think, difficult to envisage a motor-car policy in which a class of persons contract with the underwriters, the latter contract with A, or with A, B and C, or with A, B, Ltd. But if they say they will also cover the friends or servants of the assured in respect of certain liabilities, it seems to me that they are specifying a class of persons and that the policy purports to cover the liabilities of that class. This view is, I think, supported by the judgment of GRIER, L. J., in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (e). That case was concerned with an attempt by the injured person to sue the underwriters and so is not a direct authority on the present case. But GRIER, L. J., says ' I think it is quite clear ' that the section was intended to meet the difficulty that was patent, ' first, that nobody who was not a party to a contract could bring an action ' on the contract, and, secondly, by reason of the statutory and well-known law that a person who has no interest in the subject-matter of an insurance ' cannot claim the benefit of that insurance ' I read that passage as meaning that in his opinion the section was not only intended to effect but has effected a change in the law and given a cause of action which hitherto did not exist to a person indicated in the policy but not a party to it, and I respectfully agree with their view.

" If the words of the section will bear this construction, then, although another reading of the words may be possible, there seems to be an excellent and indeed compelling reason for preferring it to any other."

This judgment was approved in many later cases and particularly by Lord SIMON, L.C., in *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.* (f). In *Austin v. Zurich General Accident and Liability Insurance*

(d) [1933] A. C. 70.

(f) [1943] A. C. 121; [1942] 2 All E. R. 319.

(e) (1934), 50 T. L. R. 528.

Co., Ltd. (g), in a judgment which was approved *in toto* by the Court of Appeal (*g*), TUCKER, J. (as he then was), decided that the indemnity thus claimable direct by an authorised driver is not confined to a liability which was required to be covered by s. 36 (1) of the Road Traffic Act, 1930 (*i.e.* one of the liabilities against which any driver is compelled to be insured by the Act) but extended to cover any liability covered by the policy.

The extent of this liability to authorised drivers is defined in each policy by the terms of the extension clause providing indemnity to persons driving with the permission or consent of the assured. Usually such a driver is required only to hold a valid licence to drive, and to observe such conditions of the policy as may be applicable to him (see *Austin v. Zurich General Accident and Liability Insurance Co., Ltd. (g)*). Nevertheless, in so far as the authorised driver may drive the insured car under such terms even though he has an extremely bad driving record on the roads, the acceptance of these unknown risks is a remarkable indication of the confidence of insurers in the pride of motor car owners in their cars and their unwillingness to have their cars smashed up (*h*). The interpretation of the terms of s. 36 (4), as laid down in the cases referred to above in effect compels the section to read "Notwithstanding any enactment or rule of law to the contrary, a person insuring . . . shall be liable to indemnify the persons . . . *at the suit of such persons*," the words in italics being read in. The insurers will thus be liable to indemnify such authorised drivers unless there is some breach of condition by such authorised driver or by the policy holder which entitles them to avoid liability under the policy (*i*).

PART 2 -- PECULIARITIES OF CONTRACTS OF INSURANCE

1. Insurable interest.—As has already been stated it is sometimes essential to the validity of an insurance contract that the assured should have an insurable interest in the subject-matter thereof (*j*), but not always in the case of motor insurance (*k*).

2. Uberrima fides.—The ordinary law relating to the formation of contracts is that each party is under a duty not to make any material misrepresentation concerning the subject-matter to the other (*l*). If a contract is induced by misrepresentation of a material fact, the party deceived can avoid the contract (*m*). If the misrepresentation is wilful it amounts to fraud (*n*), and gives a right to the deceived party to claim damages for tort in addition to avoiding the contract (*m*). If the deception is inadvertent the party deceived can only avoid the contract (*m*), and he can only do this if he acts promptly and provided that all parties can be restored to their former position (*m*).

In addition, whilst a mistake made by one party does not affect the validity of a contract (*m*), if that mistake has been induced by the other it may in certain circumstances give the party mistaken the right to avoid the contract (*m*). Apart from the foregoing there is no positive duty to tell the whole truth in relation to the subject-matter of a contract. There

(g) [1944] 2 All E. R. 243; affirmed, [1945] K. B. 250; [1945] 1 All E. R. 316 (C. A.).

(h) See GODDARD, J. (as he then was), in *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1937] 4 All E. R. 628, at p. 630.

(i) *E.g.*, a breach of condition as to notice of the accident to be given to the insurers *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243. The requirement that an authorised driver must comply with the terms of the policy in so far as he is able was considered in *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319.

(j) *Ante*, pp. 79 *et seq.*

(l) *Ante*, chapter I, p. 5.

(k) *Ante*, pp. 83 *et seq.*

(m) *Ante*, chapter I, p. 6.

is only the negative obligation to tell nothing but the truth. This principle, in regard to ordinary contracts, is so well established that no other will be recognised, even in the application of equitable remedies to which the rule that "he who comes to equity must do equity" applies. Thus in *Turner v. Green* (n) it was held that the plaintiff's failure to disclose a fact by accident made known to him, where the defendant would never have entered into the contract had he known it, did not disentitle the plaintiff to the equitable remedy of specific performance.

There is, however, a class of contract into which the condition is implied that each party has disclosed every material fact known to him. There is in this case no different rule in regard to the duty of telling the truth: apart from the contract the failure to disclose has no effect (o). But it is assumed by the law that in contracts within this class each party intended to make the disclosure of all material facts a term of, or a condition precedent to, the contract and, what comes to the same thing, that it is necessary for the carrying on of business in which such contracts are involved that there should be an implied term in such contracts to that effect. This class of contracts is called contracts *uberrimae fidei*—that is, contracts in which the utmost good faith is required. Insurance contracts come within it (p). The rule has been succinctly stated as follows:

"In cases of insurance a party is required not only to state all matters 'within his knowledge, which he believes to be material to the question of insurance, but all which in point of fact are so. If he conceals anything 'which he knows to be material it is a fraud, but besides that, if he conceals anything that may influence the rate of premium which the underwriter 'may require, although he does not know it would have that effect, such 'concealment entirely vitiates the policy" (q).

The word "material" here is relevant to the insurer's acceptance of the risk at the premium which he in fact required. Under s. 10 (3) of the Road Traffic Act, 1934, an action by an insurer to avoid a policy for material misrepresentation or non-disclosure could only succeed if it is known that the policy was actually obtained by the misrepresentation or the non-disclosure (r).

It must not be thought that because, if a party to an insurance contract fails to disclose a material matter which he knows, he commits fraud, there is any departure from the rule that a representation is an essential ingredient of fraud. The party is under an obligation to disclose everything material: by making any representation he impliedly represents that he has disclosed everything—if he has in fact failed to disclose a fact which he knows *and knows to be material* (s) he has not done so and is guilty of a

(n) [1895] 2 Ch. 205.

(o) *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (1934), 49 Ll. L. R. 231; *Pickersgill (William) & Sons, Ltd. v. London and Provincial Marine and General Insurance Co., Ltd.*, [1912] 3 K. B. 614; *Blackburn, Low & Co v. Vigors* (1887), 12 App. Cas. 531. Cf. *Welford on Accident Insurance*, 2nd Edn., pp. 24, 38. See this question discussed more fully in its relation to s. 12 of the Road Traffic Act, 1934 (27 Halsbury's Statutes 546), *post*, p. 316.

(p) See cases in last note and *London Assurance v. Mansel* (1879), 11 Ch. D. 363, *per JESSEL, M.R.*, at p. 367.

(q) *Dalglisch v. Jarvie*, (1850), 2 Mac. & G. 231, *per ROY, B.*, at p. 243.

(r) *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529. And see *Merchants and Manufacturers Insurance Co. Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295; [1941] 1 All E. R. 123; *Ewer v. National Employers' Mutual General Insurance Association, Ltd.*, [1937] 2 All E. R. 193. *Post*, chapter V.

(s) *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863; see remarks of MOULTON, L.J., at p. 884.

fraudulent misrepresentation (*l*) as much as he who by "withholding that which is not stated makes that which is stated absolutely false" (*a*).

The following propositions express the extent of the principle :

1. The assured (or the company as the case may be) (*b*) must disclose every material fact which he knows (*c*).
2. He is also under an obligation to disclose every material fact which in the ordinary course of business he ought to know (*d*).
3. He must disclose every such fact, irrespective of whether he himself considers it to be material (*e*).
4. The test of whether a particular fact is material is—would an ordinary reasonable insurer consider it to be material (*f*) at the time of insuring ? (*g*)

3. Subrogation (*h*).—Subrogation means that the "insurer must be placed in the position of the assured" (*i*). The effect of the doctrine of subrogation is that the insurers are entitled to be placed in the position of the assured and to succeed to all his rights and remedies against third persons in respect of the subject-matter of insurance (*j*). The right of subrogation may be modified by agreement between the insurers and the assured, or between the insurers of the assured and the assurers of a third party against whom the assured has a claim under the policy (*k*). The commonest type of such modification by agreement is found in motor insurance in the so-called "knock for knock agreement," under which there is no subrogation, and the insurers of each person involved in the claim bear the loss of their respective assured (*l*). A knock-for-knock agreement does not apply, however, where the insurance covering one of the parties involved is void, and in such case a right of subrogation arises (*m*).

The right of subrogation does not arise until the insurers have paid the amount due from them to their assured under a valid and subsisting policy.

(*b*) *London Assurance v. Mansel* (1879), 11 Ch. D. 363; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139; *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (1934), 49 Ll. L. R. 231.

(*a*) *Per* Lord CAIRNS, in *Peck v. Gurney* (1873), L. R. 6 H. L. 377. And see *R. v. Kysant (Lord)*, [1932] 1 K. B. 442.

(*b*) *Carter v. Boehm* (1769), 3 Burr. 1005, *per* Lord MANSFIELD, C. J.; *Re Bradley and Essex and Suffolk Accident Indemnity Society*, [1912] 1 K. B. 415; *Refuge Assurance Co., Ltd. v. Kettlewell*, [1909] A. C. 244.

(*c*) See p. 100, *ante*, note (*o*).

(*d*) *Blackburn, Low & Co. v. Vigors* (1887), 12 App. Cas. 531; *London General Insurance Co. v. General Marine Underwriters' Association*, [1921] 1 K. B. 104.

(*e*) See *Dalgiish v. Junie*, *supra*; *Asfar & Co. v. Blundell*, [1896] 1 Q. B. 123, *per* Lord ESHER, M.R., at p. 129; *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139; *Farra v. Hetherington* (1931), 47 T. L. R. 465.

(*f*) Note (*e*) above, and see *Glicksman v. Lancashire and General Assurance Co.*, [1925] 2 K. B. 593, *per* SCRUTTON, L. J., at p. 608.

(*g*) *Lynch v. Dunsford* (1811), 14 East. 494; *Seaton v. Burnand*, [1900] A. C. 135; *Associated Oil Carriers, Ltd. v. Union Insurance Society of Canton, Ltd.*, [1917] 2 K. B. 184; *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Taylor v. Eagle Star and British Dominions Insurance Co.* (1940), 67 Ll. L. R. 136.

(*h*) See chapter X, *post*, where the topic is dealt with fully.

(*i*) *Per* BRETT, L. J., in *Castellain v. Preston* (1883), 11 Q. B. D. 380, at p. 388.

(*j*) *Ibid.* See also *Simpson v. Thomson* (1877), 3 App. Cas. 279; *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.* (1877), 5 Ch. D. 569; *Darrell v. Tibbitts* (1880), 5 Q. B. D. 560.

(*k*) *Bell Assurance Association v. Licenses and General Insurance Co., Ltd.* (1923), 17 Ll. L. R. 100; *Loyst v. General Accident Fire and Life Assurance Corporation*, [1928], 1 K. B. 359.

(*l*) *Ibid.*

(*m*) *Bell Assurance Co. v. Licenses and General Insurance Co., Ltd.* (*supra*).

If the insurers have not paid under the policy, then they have no right to be subrogated to the assured's rights and remedies (n).

When a case for subrogation has arisen the insurers are subrogated to all the rights and benefits and remedies which vest in the assured in connection with the subject-matter of insurance (o), whether such rights arise out of wrongful acts (p) or out of contract (q).

The doctrine of subrogation does not apply so as automatically to transfer rights of action against third parties to the insurers, but it only entitles them, unless there has been an express agreement or transfer, to the benefit of such rights as are and remain vested in law in the assured (r). Actions, therefore, to enforce such rights must be brought in the name of the assured as a rule, and any defence which is valid against the assured (s) as, for example, that he has released or compromised his right of action (t), is available to the defendant in such proceedings. The defendant cannot, however, avail himself of the defence that the assured has already been indemnified or that the insurers who have paid were not entitled to pay the assured (u). In order to make effective the benefits of subrogation the assured is under certain implied duties (v) in relation to the insurers. These duties may be conveniently summarised as—

(a) He is bound to render full assistance to the insurers in respect of the action under consideration (u).

(b) He is bound not to do any such thing in connection with his right of action to which the insurers would be subrogated as would prejudice the insurers from recovering against the third party liable (x).

(n) *Castellain v Preston* *supra*, per BRETT I J at p. 389. *Finlay v Mexican Investment Corporation*, 1897 1 Q B 517. *Edwards (John) & Co v Motor Union Insurance Co.*, 1922 2 K B 249. *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K B 305. *Austin v Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243, affirmed [1945] K B 250 (C A).

(o) Per BRETT, L. J., in *Castellain v Preston*, *supra* at p. 388. *North British and Mercantile Insurance Co. v London, Liverpool and Globe Insurance Co.*, *supra*. *Assicurazioni Generali de Trieste v Impresaria Assurance Corporation, Ltd.*, 1907 2 K B 814. *Horse, Carriage and General Insurance Co., Ltd. v Petch* (1916), 33 T. L. R. 131.

(p) *King v Victoria Assurance Co.*, [1896] A. C. 250, and cases cited in note (1), *supra*.

(q) *Castellain v Preston*, *per* BRETT, L. J., *supra*. *Triavdi, Ltd. v Roberts*, [1917] 1 Ch. 109. *Bank of Montreal v Dominion Gresham Guarantee and Casualty Co., Ltd.*, [1930] A. C. 659.

(r) *Simpson v. Thomson*, *supra*. *Symons v. Mulhern* (1882), 46 L. J. 763. *Employers' Liability Assurance Corporation v Skipper and East* (1887), 4 T. L. R. 55. *King v Victoria Assurance Co.*, *supra*. *Nelson (James) & Sons, Ltd. v Nelson Line (Liverpool), Ltd.*, [1906] 2 K B 217.

(s) *London Assurance Co. v Sainsbury* (1783), 3 Doug. K B 245. *Finlay v Mexican Investment Corporation*, *supra*.

(t) *West of England Fire Insurance Co. v Isaacs*, [1897] 1 Q. B. 226. *Phoenix Assurance Co. v Spooner*, [1905] 2 K B 753. *Austin v Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K B 250, [1945] 1 All E. R. 316.

(u) *Mason v Sainsbury* (1782), 3 Doug. K B 61. *London Assurance Co. v Sainsbury*, *supra*. *Darrell v Tibbitts*, *supra*. *King v Victoria Insurance Co.*, *supra*. *Edwards (John) & Co. v. Motor Union Insurance Co.*, *supra*. *Austin v Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K B 250, [1945] 1 All E. R. 316.

(v) *Wellford on Accident Insurance*, 2nd Edn., pp. 331-3.

(w) *London Guarantee Co. v Fearnley* (1880), 5 App. Cas. 911. *Dane v Mortgage Insurance Corporation*, [1894] 1 Q. B. 54. *Duus, Brown & Co. v Binning* (1906), 22 T. L. R. 529.

(x) *West of England Fire Insurance Co. v Isaacs*, [1897] 1 Q. B. 226. *Phoenix Assurance Co. v Spooner*, [1905] 2 K B 753. *Horse, Carriage and General Insurance Co., Ltd. v Petch* (1916), 33 T. L. R. 131. *Page v Scottish Insurance Corporation* (1929), 98 L. J. K B 308.

(c) If the assured recovers in such proceedings an amount in excess of the amount payable under the policy where the policy is in effect an indemnity (and the assured has been paid for the whole of his loss), the insurers are entitled to retain or to claim this excess (y).

(d) Where the total risk insured is limited by the policy the assured is bound to give the insurers the benefit of any sum he recovers in such proceedings to the extent of the proportion which the risk insured bears to the actual value of the subject-matter (z).

4. Contribution.—In insurances of property or against liability which are contracts of indemnity (a), although there is no limit to the number of policies which an assured may effect, the total amount recovered from all his insurers may not exceed such sum as is sufficient fully to indemnify him against the insured loss (b). Apart from any term in any such policy the assured may select any insurer in order to secure his indemnity, and such selected insurer has the right to call upon the other insurers to share the liability when he, the selected insurer, has satisfied the claim (c). The conditions under which a case of contribution arises are set out more fully below (d). It should be mentioned that many policies of insurance contain clauses which provide that in the event of other insurances covering the same risk having been effected by the assured, the insurers are only liable for a rateable proportion of the claim, or, as is usual in motor policies, that their liability is in such event excluded (e).

No right of contribution arises unless certain conditions are satisfied. At the outset it is necessary that all the policies should comprise the same subject-matter, at least as far as the claim to contribution is concerned (f) and should be all effected against the same peril (g). It is not sufficient that all the policies should cover the same subject-matter unless at the same time they cover the same interest (h), that is to say that all the policies must be effected by or on behalf of the same assured. Further, all the

(a) *Stewart v. Greenock Marine Insurance Co.* (1848), 2 H. L. Cas. 159; *North of England Iron Steamship Insurance Association v. Armstrong* (1870), L. R. 5 Q. B. 244; *The Welsh Girl* (1906), 22 T. L. R. 475, affirmed, *sub nom. The Commonwealth*, [1907], P. 216.

(c) *Goole and Hull Steam Towing Co., Ltd. v. Ocean Marine Insurance Co., Ltd.*, [1928] 1 K. B. 589, also *The Welsh Girl*, *supra*.

(a) See above, pp. 71 *et seq.*

(b) *Godin v. London Assurance Co.* (1758), 1 Burr. 489; *Neubv v. Reed* (1793), 1 Wm. Bl. 410; *Morgan v. Price* (1848), 4 Exch. 615; *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.* (1877), 5 Ch. D. 569; *Nichols & Co. v. Scottish Union and National Insurance Co.* (1885), 2 T. L. R. 190.

(c) *Post*, chapter X.

(d) *Williams v. North China Insurance Co.* (1876), 1 C. P. D. 757; *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.*, *supra*.

(e) *Australian Agricultural Co. v. Saunders* (1875), L. R. 10 C. P. 668; *Loyst v. General Accident, Fire and Life Assurance Corporation*, [1928] 1 K. B. 359; *Gale v. Motor Union Insurance Co.*, [1928] 1 K. B. 359; *Weddell v. Road Transport and General Insurance Co.*, [1932] 2 K. B. 563; *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243.

(f) *Godin v. London Assurance Co.* (1758), 1 Burr. 489; *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.* (1877), 5 Ch. D. 569; *American Surety Co. of New York v. Wrightson* (1910), 103 L. T. 663.

(g) *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.*, *supra*; *American Surety Co. of New York v. Wrightson*, *supra*.

(h) *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.*, *supra*; *Nichols & Co. v. Scottish Union and National Insurance Co.* (1885), 2 T. L. R. 190; *Westminster Fire Office v. Glasgow Provident Investment Society* (1888), 13 App. Cas. 699.

policies in respect of which the claim to contribution is made must be in force (i) and legally binding at the time of the loss (j).

Lastly, no claim for contribution will arise against an insurer in whose policy the right of contribution in the event of co-existing cover is excluded unless such excluding clauses occur in both policies in such circumstances that they cancel one another out, leaving the liability to be rateably proportioned between the two insurers (k); and if the liability to contribute is not excluded but limited by the terms of a policy, a claim against the insurers under that policy will be subjected to the limitations imposed upon it (l).

5. Assurance Companies Acts, 1909 (m) to 1946 (n).—It has already been stated that there are certain enactments applying to insurance which restrict the normal right of an Englishman to carry on business in any manner he chooses, subject to the criminal and bankruptcy laws and, in the case of companies, subject also to the Companies Acts. The chief of these is the Assurance Companies Act of 1909 (m), which applies to any person or body of persons carrying on within the United Kingdom the classes of insurance therein specified, including motor insurance (o). The provisions of this Act in regard to motor insurance will be examined later (p). It is enough to state here that the original requirements laid down by the 1909 Act of persons or companies which do business in the kinds of insurance to which it applies have been completely altered by the Assurance Companies Act of 1946 (n). Whereas by s. 2 of the 1909 Act, as amended by s. 42 (2) of the Road Traffic Act, 1930, a company had to make a deposit of £15,000, in cash or in securities, in the High Court of Justice before it could do motor vehicle insurance business, and an underwriter had to make a similar deposit, and both companies and underwriters had to keep and have audited annual accounts in the manner and subject to the supervision specified in the Act of 1909 (q), now by the Assurance Companies Act of 1946 the system of deposits is abolished. By s. 2 of the 1946 Act a company which starts to do motor vehicle insurance business is required to have a paid-up share capital of not less than £50,000 (qq), and it must after two years be able to pay its debts in this sense, that the value of its assets must exceed the amount of its liabilities by the sum of fifty thousand pounds or by one-tenth of its premium income in its last financial year, whichever sum is the greater (r). If it cannot pay its debts in this sense, then the Assurance Companies (Winding Up) Acts, 1933 (s) and 1935 (t), may be brought into operation against it. By these latter Acts, the Board of Trade is given a general supervisory power over the financial affairs of assurance companies,

(i) *Equitable Fire and Accident Office, Ltd. v. The Chung Wo Hong*, [1907] A. C. 96; *Weddell v. Road Transport and General Insurance Co.*, [1932] 2 K. B. 563.

(j) *Loyst v. General Accident Fire and Life Assurance Corporation*, [1928] 1 K. B. 359; *Gale v. Motor Union Insurance Co.*, [1928] 1 K. B. 359; *Weddell v. Road Transport and General Insurance Co.*, *supra*; *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243.

(k) See, however, the cases cited in last note discussed *post*, chapters VII and X.

(l) *Ibid.*

(m) 2 Halsbury's Statutes 724, as amended by Road Traffic Act, 1930, ss. 36, 42 (23 Halsbury's Statutes 637, 641).

(n) 39 Halsbury's Statutes 37. See p. 227, *post*.

(o) The test of carrying on business is the place where the contracts are made (*Re United General Commercial Insurance Corporation*, [1927] 2 Ch. 51). As to types of business covered, see s. 1 as amended by s. 40 of the Road Traffic Act, 1930.

(p) *Post*, pp. 227 *et seq.*

(q) Ss. 4, 7, 8, 32 and 33.

(qq) S. 2 (1) (39 Halsbury's Statutes 40).

(s) 26 Halsbury's Statutes 63.

(r) S. 3 (1) (*ibid.*).

(t) 28 Halsbury's Statutes 25.

and may petition for the winding up of an assurance company which it believes to be insolvent (*u*). Statements of the financial condition of the company may be required by notice, and if the company does not produce satisfactory information, inspectors may be appointed by the Board to investigate the affairs of the company (*v*).

The new requirements of underwriters, set out in the Assurance Companies Act, 1946 (*w*), are considered later (*x*).

PART 3.—PECULIARITIES OF MOTOR INSURANCE CONTRACTS

1. Compulsory insurance.—The first characteristic of a contract of motor insurance is that it or part of it is compulsory (*a*). That is to say, it is not lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of that vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of Part II of the Road Traffic Act, 1930 (*b*). The insurance or security which the Act requires is against liability to third parties (except voluntary passengers) "arising from death or bodily injury caused by the use of the vehicle on the road" (*c*).

At this point it becomes necessary to define the term "third party."

In the law of contract it means a person who is not a party to the contract, and Lord SIMON, L.J. (*d*), in his dissenting judgment in the hard-fought case of *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, applied this meaning to the phrase used in the Road Traffic Acts. In *Digby's Case* the policy holder was injured by the negligence of her authorised driver while she was travelling as a passenger in the insured car. Lord PORTER (*e*), on the other hand, thought that the phrase was merely a useful description of a particular type of insurance, and by implication suggested that if a policy holder by negligent driving injured the underwriter who insured the policy holder by running him down on the road, then the policy holder could claim an indemnity from the underwriter for the damages due to him—a most remarkable result, but one which must now be taken to be the law. It was generally conceded throughout the case that an authorised driver had a statutory right to sue the insurer direct for an indemnity against the results of his own negligence, and could not therefore be regarded as a third party in the circumstances within the strict meaning of the phrase as used in the law of contract.

The only exceptions to the statutory duty to insure against liabilities to third parties are :

- (i) an owner or driver of a motor vehicle may, instead of insuring, deposit the sum of £15,000 with the Accountant-General of the Supreme Court by way of security (*f*), and

(*u*) S. 1 (26 Halsbury's Statutes 63).

(*v*) See the 1935 Act, s. 1 (28 Halsbury's Statutes 25).

(*w*) Schedule II, Part II (39 Halsbury's Statutes 47).

(*x*) *Post*, p. 227.

(*a*) Certain other forms of insurance are compulsory.

(*b*) S. 35 (23 Halsbury's Statutes 636). See *Ocean Accident and Guarantee Corporation, Ltd. v. Cole*, [1932] 2 K. B. 100. See *post*, chapter IV.

(*c*) *Ibid.*, s. 36. And excepting certain persons, who in the relationship to the insured in which they stand at the moment of the accident are deemed not to be third parties, *ibid.*, and see *post*, pp. 188 *et seq.*

(*d*) [1943] A. C. 121; [1942] 2 All E. R. 319; 73 Ll. L. R. 176, at p. 180.

(*e*) [1942] 73 Ll. L. R. 176, at p. 188.

(*f*) S. 35 (4).

(ii) the obligation to insure under the Act does not apply to the Crown (g) or to local or police authorities (h).

2. Third party indemnity.—The second peculiarity of a contract of motor insurance is that under the statutory law now in force the company in certain circumstances becomes liable to pay money to a person who was not a party to the contract (i); to pay that money irrespective of whether the person who incurred the liability can or cannot pay it himself (j); and to pay that money although the person who caused the damage for which it is paid has not the slightest right either morally or under the terms of his contract to demand it (k).

And yet there it is: a company (l) may be cheated into making a contract of insurance; the cheat may be as well a reckless or drunken driver; he may kill (m) a £10,000 a year barrister who leaves dependants; but if the cheat has been clever enough to conceal his fraud (n) the company is obliged at once (o) to pay the barrister's dependants whatever sum (p) they may have been awarded by a sympathetic Court (q), whilst in the meantime the cheat has hurriedly collected his assets and taken the first aeroplane to Mexico (r). And now, by the Motor Insurers Bureau agreements, considered in chapter VI, the insurers of Great Britain have voluntarily undertaken to indemnify the liabilities of their assureds even though the policy was obtained by the grossest fraud, to third parties who have been injured by the negligent driving of the insured car.

3. Subject-matter.—A third peculiarity of motor insurance is, as has been pointed out, that in one policy six different kinds of insurance are often included. These are insurance against Liability, Life, Accident, Damage to Goods, Fire and Theft.

Liability.—The liability insured against (in a comprehensive policy) is liability for damage to the property or persons of third parties and for their deaths. Insurance against liability for damage to property is not compulsory (s). Nor is insurance against liability to voluntary passengers (t) obligatory. But most people who insure against third party liability are covered by their policies against all possible claims by third parties, whether in respect of death, bodily injury, or damage to property, and including in the

(g) S. 121 (2).

(h) S. 35 (4) as amended by the Road Traffic Act, 1934, Schedule III (27 Halsbury's Statutes 568).

(i) *I.e.* to a third party.

(j) This is the effect of s. 10 of the Road Traffic Act, 1934 (27 Halsbury's Statutes 544). See chapter V, *post*.

(k) This is the combined effect of the Third Parties (Rights against Insurers) Act, 1930, the Road Traffic Act, 1930, ss. 35 and 36, and the Road Traffic Act, 1934, s. 10.

(l) Or underwriters.

(m) Though not perhaps if the killing amounts to murder or manslaughter. See Part II of the Road Traffic Act, 1934, *supra*, and see *post*, p. 107.

(n) So as to prevent the company from commencing an action against him within the time prescribed in subsect. 3 of s. 10 of the Road Traffic Act, 1934. See *post*, chapter V.

(o) And although the third party has not troubled to levy execution. See *post*, pp. 278 *et seq.*

(p) Plus costs and interest (s. 10 (1), *ibid.*).

(q) See *Wood v. Glitzman* (1933), *Times*, 12th July, p. 4, where the Court awarded £13,000 to the dependants of a broker who earned £3,500 p.a. in his business but left his dependants £10,000 under a life policy.

(r) For an example of such a case, see *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 50 T. L. R. 528.

(s) S. 36, Road Traffic Act, 1930 (23 Halsbury's Statutes 637), and see *post*, chapter IV.

(t) *Ibid.*, or to passengers standing in certain other relationships to the insured, e.g. his employee whilst acting in the course of his employment. See *post*, pp. 188 *et seq.*

category of third parties voluntary passengers in the insured car. There is, however, a form of policy (*u*) known as a "Road Traffic Cover only" policy (*v*), which merely provides the insurance made compulsory by the Road Traffic Act, 1930 (*w*). Under a policy of this kind the assured may incur a liability of many thousands of pounds in respect of damage to property which he will, if he can, have to satisfy out of his own pocket. On the other hand, if the assured is a man of small means, the party who suffers the damage will have to bear the loss (*x*). This from one point of view seems to be a serious defect in Motor Insurance Law. It is remarkable (*y*) that, whilst the Road Traffic Act, 1930 (*z*), requires insurance against liability to third parties in respect of death or bodily injury only, the Third Parties (Rights against Insurers) Act, 1930 (*a*), applies to any damage caused to the third party (*b*). But the answer is that Part II of the Road Traffic Act, 1930 (*c*), was designed primarily for the benefit of pedestrians. Pedestrians do not, as a rule, suffer any considerable damage to their property in a road accident. From this point of view, therefore, the omission is not a defect in the legislation.

Life.—The insurance against the death of the assured provided in a motor policy is not life insurance in the strict sense of that term (*d*). Life insurance proper insures against death in any event, which is inevitable (*e*). The motor policy insures only against death arising from the use of the insured car, an event which may never happen (*f*).

Accident.—The comprehensive policy generally provides for the payment of specific sums for the loss of specified limbs, and for the payment of doctors' fees or medical expenses up to a certain sum resulting from the use of the insured vehicle (*g*).

Damage to Goods.—The policy usually covers damage to the insured vehicle, however caused, unless caused by certain matters specifically excepted by the policy (*g*).

Fire and Theft.—Damage caused by fire and theft of the car, or parts of it, and of certain specified goods left in the car, are risks usually covered by a comprehensive policy (*h*).

4. Legality of motor insurance.—It will be noted that a motor insurance policy covers liability to third parties arising from the use of the insured car, and damage to the insured car caused by accidental external means (*i*). Apart from the conditions of the policy which must be observed by the assured, and the general exceptions in regard to damage caused by earthquake, war and the like, there is as a rule no express limit to the cover

(*u*) Issued at an attractive rate of premium

(*v*) See further, as to this form of policy, *post*, chapter VIII

(*w*) 23 Halsbury's Statutes 607, and see *post*, chapter IV

(*x*) And the person who takes this kind of policy will presumably be a man of small means.

(*y*) Since it has been supposed that both the Acts of 1930 were enacted for the same object.

(*z*) 23 Halsbury's Statutes 12

(*a*) 23 Halsbury's Statutes 12, and see chapter III, *post*.

(*b*) And to damage *however* caused.

(*c*) 23 Halsbury's Statutes 607, and see *post*, chapter IV.

(*d*) See *ante*, p. 72.

(*e*) See *ante*, p. 72. In the first case the risk is the length of the assured's life; in the second the possibility that the death may occur.

(*f*) For a description of the benefits provided and the assured's rights under the policy in respect thereto, see *post*, chapter VIII

(*g*) See *post*, chapter VIII (or the cover may be in respect of damage caused by "accidental external means," which form of cover generally has the same effect).

(*h*) See *post*, chapter VIII.

(*i*) See *post*, chapter VIII.

provided (k). That is to say, liability to third parties and damage to the insured car is apparently covered, although caused by the assured's own negligence or, apparently, even his criminal act (l). It is no doubt the practice of most companies to acknowledge liability to this extent. But the legality of this wide interpretation of the cover is at least questionable, and it is submitted that in some cases at least the company could in law repudiate liability to the assured in respect of an accident caused by his criminal conduct. It is doubtful whether it could now (n) repudiate liability in such circumstances to a third party in respect of death or bodily injury in cases where it becomes liable to third parties (o). The general rule applicable is that if an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for indemnity against the liability which results to him therefrom (a).

According to this rule, it would seem that if, for instance, an assured deliberately drives his car at a speed obviously in excess of a speed limit known to him, and an accident results from such excessive speed, he cannot claim to be indemnified by his company (under his policy) for the consequences of the accident which results from such excessive speed (b).

In *James v. British General Insurance Co.* (c) the assured was driving his car whilst drunk and collided with a motor cycle. The driver of the motor cycle was injured and a passenger thereon was killed. The assured was convicted of the manslaughter of the deceased passenger. The driver of the motor-cycle successfully sued the assured and recovered damages and costs. The assured incurred costs in defending this action, in repairing the vehicles, in attending an inquest on the deceased, and in defending himself in the police court proceedings before his trial. The company refused to pay on the grounds

(a) that the assured had created a risk which was never in the contemplation of all parties, and

(b) in so far as the policy covered the consequence of a criminal offence, it was illegal and void as against public policy.

In an action by the assured on the policy it was held, by ROCHE, J., following the decision in a like case of BAILHACHE, J. (d), that the policy was wholly valid, and the assured recovered the amount of the above damages and costs.

The authority of this decision and of that which it followed has been brought into considerable doubt by the observations of SCRUTTON and GREER, L.JJ., in the case of *Haseldine v. Hosken* (e). Moreover, neither

(k) But see *post*, chapter IX.

(l) *Ante*, chapter I, p. 16.

(n) Because of the particular provisions of the Road Traffic Acts, 1930 and 1934, and the general object aimed at by those Acts. And see *post*, chapter IX, where this question is further discussed.

(o) *Sed quære*. This would seem to depend on the nature of the criminal conduct. See s. 12, Road Traffic Act, 1934 (27 Halsbury's Statutes 546), and see *post*, chapter V.

(a) *Per* KENNEDY, J., in *Burrows v. Rhodes*, [1899] 1 Q. B. 816, at p. 828. In *Haseldine v. Hosken*, [1933] 1 K. B. 822, SCRUTTON, L.J., interpreted KENNEDY, L.J.'s dictum (*supra*) as applying if the doer does not know that it is unlawful, provided he knows what he is doing.

(b) This, it is submitted, is not affected by the Road Traffic Act, 1934 (27 Halsbury's Statutes 534). See this question discussed, *post*, chapter IX.

(c) [1927] 2 K. B. 311.

(d) *Tinline v. White Cross Insurance*, [1921] 3 K. B. 327.

(e) [1933] 1 K. B. 822. See note (k), p. 109, *post*.

of these cases suggests that, if an assured deliberately (*f*) drives in a criminal manner, and thereby causes a collision, he will be held to be covered by his policy. It seems clear that he would not (*g*). On the other hand, it may be observed that the extent of cover allowed by considerations of public policy would be held to be considerably wider than it was at the time when the *Tinline* and *James* cases were decided (*h*), having regard to the general object of the compulsory third party liability insurance and the rights of third parties against insurers provided by the Acts of 1930 (*i*) and 1934 (*j*). There are other questions as to the extent of the company's liability in respect of an accident caused by the assured's criminal act. Some of these were raised (*k*) but were apparently not decided (*l*) in *James v. British General Insurance Co.* (*m*). These questions (*n*) which do not affect the legality of the insurance are considered later in this work (*o*). It should be observed that, whatever may be the correct answer to the question of the legality of an insurance against the consequences of a criminal act, it is still open to the company to limit the risk against which it undertakes to insure, as by stipulating in the policy that the risk shall not attach if the car is being driven for an illegal purpose (*p*), or is being knowingly and deliberately driven in excess of a speed limit (*q*).

Such a limitation of the risk would not, of course, operate now against injured third parties, but might enable the insurer, if he saw fit, to recover any sums paid under the Motor Insurance Bureau agreements from the assured (*r*).

On the other hand, it should be remarked that, apart from any modification of the principles of public policy which may have been brought about

(*f*) See the cases referred to and generally *Collburn v. Patmore* (1834), 1 Cr. M. & R. 73; *Shackell v. Roster* (1836), 2 Bing (N. c.) 634; *Fitzgerald v. Leonard* (1803), 32 L. R. Ir. 675; *Thompson v. Hopper* (1858), E. B. & E. 1038, 1049; *Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co.*, [1898] 2 Q. B. 114; *Burrows v. Rhodes*, [1899] 1 Q. B. 816, at p. 828; *Smith (W. H.) & Son v. Clinton and Harris* (1908), 99 L. T. 840; *Leslie (R.) Ltd. v. Reliable Advertising and Addressing Agency, Ltd.*, [1915] 1 K. B. 652; *Weld-Blundell v. Stephens*, [1910] 1 K. B. 520. Compare also the case of "murder by motor-car," *R. v. Mortimer* (1936), 80 Sol. Jo. 227.

(*g*) In *Tinline v. White Cross Insurance*, [1921] 3 K. B. 327, BAILHACHE, J., said (at p. 332): "It must, of course, be clearly understood that if (the occurrence which gave rise to the third party claim) had been due to an intentional act on the part of the (insured), the policy would not protect him," and added: "Manslaughter is the result of accident and murder is not" (*ibid.*, at p. 332). This reasoning conflicts with the application of the rule of public policy by the Court of Appeal in *In the Estate of Hall, Hall v. Knight and Baxter*, [1914] P. 1, where COZENS HARDY, M.R. (at p. 6), said: "I see no reason to draw a distinction between murder and manslaughter in a case like this." Moreover, it is difficult to reconcile with the well-known rules of the Criminal Law. See 9 Halsbury's Laws, 2nd Edn. 10 *et seq.*, 426 *et seq.* In one sense of the word intentional, causing the death of another is, if not intentional, not manslaughter but no crime; in the other sense of intentional, it is also not manslaughter, but is murder. See Kenny's Outlines of Criminal Law, and *op. cit.*, p. 426 *et seq.*

(*h*) *Sed quære*. See this question discussed below, chapter IX, "Implied Terms."

(*i*) *Vide supra*.

(*k*) But in *Haseldine v. Hosken*, [1933] 1 K. B. 822, SCRUTTON, L.J., at p. 835, said: "It must not be taken . . . that I at present approve of the decisions in *Tinline v. White Cross Insurance* (*supra*) and *James v. British General Insurance Co.* (*supra*)," and GREER, L.J., stated, at p. 837: "In this country, no person is allowed to insure himself against the commission of a crime."

(*l*) See the defences relied on by the company, [1927] 2 K. B. 311, at p. 314.

(*m*) [1927] 2 K. B. 311. And see *post*, chapter IX, "Implied Terms."

(*n*) Questions as to the company's obligation to pay the legal costs of proceedings in respect of the crime and as to how far the assured can create the risk insured against.

(*o*) *Post*, chapter IX, "Implied Terms."

(*p*) See this difficult question discussed below, chapter V, pp. 327 *et seq.*

(*q*) *Sed quære*. See *post*, pp. 327 *et seq.*, and chapter IX, "Implied Terms."

(*r*) See *post*, chapter VI.

by the legislation of 1930-1934, any rule of public policy which may be applicable would not apply equally to the benefits which a policy secures for the assured (as, for example, compensation for the loss of a limb or indemnity for damage to the assured's car) as to those in which an innocent third party may become interested.⁹ Thus it had been held that, although a life insurance policy is avoided if the assured dies by his own hand by committing *felo de se* (s), or dies at the hands of justice (t), a clause in the policy which preserves the rights of third parties who have in good faith and for value acquired an interest in the policy is binding and is not against public policy (u). The practical implications of this question are discussed in more detail in a later chapter (v).

5. Insurance certificate.—A motor insurance policy is of no effect for the purposes of the requirements of the Road Traffic Acts, 1930 (w) and 1934 (x), unless and until there is delivered by the company to the assured a certificate showing that there is a policy in force (xx) covering the driving of the insured car (y). This does not necessarily mean that a policy is not perfectly valid as between the assured and the company, although no certificate has been issued (z). But it means that the assured can be prosecuted under the Road Traffic Act, 1930 (a), for driving a car without insurance unless he has both

(i) a policy of the kind prescribed by the Act in force in relation to the car, and (b)

(ii) a certificate in the form prescribed (c) by the Act (d).

The effect in law of a motor insurance certificate remained doubtful for some years after the Road Traffic Act, 1930, came into operation. First, it was thought that by the issue of a certificate the insurer might be estopped from repudiating liability under the policy in so far as the terms of the certificate stated that insurance cover was provided.

Secondly, it was thought that perhaps the rights of third parties might be seriously affected if no certificate had been issued, because in such case the provisions of s. 38 of the Act (whereby the company could not repudiate liability on the ground of breach of conditions subsequent to the accident) (e)

(s) *Horn v. Anglo-Australian and Universal Family Life Assurance Co.* (1861), 30 L. J. Ch. 511; *Beresford v. Royal Insurance Co., Ltd.*, 1937 2 K.B. 197, 1937 2 All E.R. 243, affirmed, 1938 A.C. 586, 1938 2 All E.R. 602.

(t) *Amicable Society v. Bolland* (1830), 4 Bligh (8 S.) 194. And see *Re Pitts, Cox v. Kilsby*, 1931 1 Ch. 540.

(u) See *Moore v. Woolsey* (1854), 4 E. & B. 243, 24 L.J.Q.B. 40. And, generally, on the question of avoidance of life policies in cases where the death is caused by the criminal act of the life insured or of the assured, see *Clift v. Schwabe* (1846), 3 C.B. 437; *Rouett, Leaky & Co., Ltd. v. Scottish Provident Institution* (1926), 134 L.T. 660, affirmed, 1927 1 Ch. 55; *Amicable Society v. Bolland* (1830), 4 Bligh (8 S.) 194; *Horn v. Anglo-Australian and Universal Family Life Assurance Co.* (1861), 30 L.J. Ch. 511; *In the Estate of Crippen*, 1911 P. 108; *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; *In the Estate of Hall, Hall v. Knight and Baxter*, 1914 P. 1; and see *Royal London Mutual Insurance Society v. Barrett*, 1928 Ch. 411; *Beresford v. Royal Insurance Co., Ltd.*, 1938 A.C. 586, 1938 2 All E.R. 602.

(v) *Post*, chapter IX.

(w) 23 Halsbury's Statutes 607.

(x) 27 Halsbury's Statutes 534.

(xx) *London and Scottish Assurance Corporation v. Ridd* (1940), 65 Ll. L. R. 46. See chapter IV, *post*, p. 177.

(y) Road Traffic Act, 1934; 27 Halsbury's Statutes 534.

(z) See this question discussed *post*, pp. 214 *et seq.*

(a) Under s. 35 (1).

(b) *Ibid.*, s. 35.

(c) *I.e.* in the rules made under the Act. See *post*, p. 215.

(d) *Ibid.*, s. 36 (5).

(e) For an explanation and discussion of this section see *post*, p. 219.

would presumably not, and those of s. 10 of the Act of 1934 expressly do not (f), apply.

In *Adams v. London General Insurance Co. (g)*, SWIFT, J., considered, but did not decide, the first point. He felt that the Legislature intended that the insurance company should be bound, and that it should not be open to them afterwards to say, when they had once given a certificate which entitled a person to obtain a licence, that they had not in fact insured that person.

In *Freshwater v. Western Australian Assurance Co., Ltd. (h)*, it was argued that the insurance company could not rely upon any condition in the policy which was not also stated in the certificate. Lord HANWORTH, M.R., disposed of this point by saying that he could not read s. 36 (5) of the Road Traffic Act, 1930, as making a different policy for the insurance than that which is contained in the actual terms of the policy.

In *Gray v. Blackmore (i)*, BRANSON, J., held that the insurer was not estopped by the terms of the certificate from relying upon a limitation as to user contained in the policy as against the assured.

In *McCormick v. National Motor and Accident Insurance Union (j)*, the question was raised whether the result of the Road Traffic Act, 1930, was that, by reason of the issue of the certificate that there was a policy of insurance in existence which complied with the provisions of the Road Traffic Act, the law with regard to motor insurance had been completely altered, and the insurers could not be heard to say after the issue of the certificate that they could repudiate under the policy they had issued. SCRUTTON, L.J., said that unless there were clear words in the statute depriving the insurers of that right, he could not see that it was taken away.

Lord Justice GREER (k) said :

"The effect and the need for the certificate is this, that it enables the assured to say : 'Here is my certificate of insurance, and I am not liable as long as I have got an insurance.' It is not a document which is supposed to be addressed to all the world, including people who have never seen it and may never have heard—and a great many people never have heard—either of the Act of Parliament or of the certificate (l). It is only issued for the purpose of enabling the assured to produce that document when he is on the road, which will show that he has complied with the Act to the extent of getting a policy of insurance ; but it is not intended to be a representation that the policy which he has got will in any event become a policy on which he will be entitled to recover in the event of an accident happening and damages resulting."

And Lord Justice SLESSER (m) observed :

"Finally, it is said, as I understand it, that because this man obtained a certificate that he had got a policy, that precludes the insurance company from saying it is not a valid policy. Subsection (5) of section 36 says :
 "'A policy shall be of no effect for the purposes of this Part of this Act unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate. . . .'"

(f) Road Traffic Act, 1934, s. 10 (1) ; 27 Halsbury's Statutes 544.

(g) (1932), 42 Ll. L. R. 56.

(h) [1933] 1 K. B. 515

(i) [1934] 1 K. B. 95. In that case the certificate itself incorporated or referred to the condition in the policy which limited the user. Even where the certificate is silent as to the terms of the policy it is submitted that there is still no estoppel, for the certificate must be read with the policy. See *McCormick's Case*.

(j) (1934) 50 T. L. R. 528 ; 49 Ll. L. R. 361. (k) (1934), 49 Ll. L. R., at p. 370.

(l) As to the estoppel which may be raised by a document issued to all the world, see *Bickerton v. Walker* (1885), 31 Ch. D. 151, *Kettlewell v. Watson* (1882), 21 Ch. D. 685 ; *Tsang Chuen v. Li Po Kwai*, [1932] A. C. 715.

(m) (1934), 49 Ll. L. R., at p. 370.

" The section says, a policy shall be of no effect ' until there is delivered ' ; and it does not seem to follow that because a certificate is delivered therefore the policy must be an effective one, not only for the purpose of the Act, but for all purposes whatsoever. In my view that argument cannot seriously affect this matter. If it were true it would follow that every policy obtained by fraud, where the assured obtained a certificate, or where any certificate did not agree with the policy to which it referred, would be an obstacle in the way of the insurance company from saying it was void or voidable. This subsection is solely dealing with the Road Traffic Act, and is merely giving the means of enabling a man to drive a motor car. It has no greater effect than that."

In *Spraggon v. Dominion Insurance Co.* (n) a certificate of insurance had been handed to the hirer of a car by the owner with the assurance that the car was insured when the hirer was driving. In fact, the hirer was a driver excluded by the terms of the policy, though the certificate did not refer to the conditions which in the event excluded the hirer from cover. STABLE, J., held that the insurers were not liable for the damages caused by that hirer to a third party, for the policy itself had never been issued to the hirer.

It is apparent therefore that the issue of the certificate does not in itself alter the relations between insurer and assured as limited by the terms of the policy, when there is no conflict between the terms of the certificate and those of the policy, and when the certificate is silent as to any further limiting conditions contained in the policy. The object of the certificate is to show police and other road users concerned that there is a policy in existence.

In *Egan v. Bowler* (o), a prosecution for driving uninsured in contravention of s. 35 (1) of the Road Traffic Act, 1930, a limitation as to user of the vehicle was contained in the certificate, and the defendant was clearly driving in contravention of that limitation. The policy was not produced to the Court, but a letter was written to the Court by insurers which stated that the defendant would have been indemnified by insurers on that journey. The letter was not accepted in evidence, and in the absence of evidence to the contrary, the defendant was found guilty of contravening the section. It is submitted that if the defendant had been able to show by proper evidence that the policy did in fact cover him on that occasion, the statement to the contrary in the certificate would have had no effect in the circumstances of that particular prosecution (p).

The second problem, whether a failure to issue a proper certificate to the assured prevents an injured third party from suing the insurers direct for an indemnity under s. 10 (1) of the Road Traffic Act, 1934, no longer has any application since the coming into effect of the Motor Insurers' Bureau agreements. Whether a certificate has been issued or not, an insurer will now honour any policy which covers the assured at the time of the accident, however invalid in law that policy may be (q).

(n) (1937), 59 Ll. L. R. 1.

(o) (1939), 63 Ll. L. R. 266.

(p) See also *Labrum v. Wilkinson*, [1947] K. B. 816; [1947] 1 All E. R. 824.

(q) See chapter VI, *post*, p. 378, note (f).

CHAPTER III

INSOLVENCY AND RIGHTS OF THIRD PARTIES AGAINST INSURERS APART FROM THE ROAD TRAFFIC ACT, 1934

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PART I.—INTRODUCTION

1. General.—In this chapter the Third Parties (Rights against Insurers) Act, 1930 (*a*), comes to be considered.

Its importance in Motor Insurance Law has been greatly reduced, first by s. 10 (1) of the Road Traffic Act, 1934 (*b*), and secondly by the Motor Insurers' Bureau agreements (*c*). The Act of 1934 enabled an injured third

(*a*) 23 Halsbury's Statutes 12.

(*b*) Chapter V, *post*, p. 278.

(*c*) Chapter VI, *post*, pp. 364 and 377.

party, if he came within the class of persons against whose injury insurance was compelled by s. 36 (1) (b) of the Road Traffic Act, 1930 (*d*), to claim an indemnity directly from insurers of the motorist who had caused the injury. The Motor Insurers' Bureau has undertaken to see that judgments are satisfied which are obtained in respect of Road Traffic Act liability against any motorist, whether he was insured at the time of the accident or not (*dd*).

So far as Road Traffic Act liability is concerned, therefore, the terms of the Third Parties (Rights against Insurers) Act, 1930 (*e*), is no longer useful to third parties as defined by s. 36 (1) (b) of the Road Traffic Act, 1930. It is possible, however, that a motorist may be forced into bankruptcy owing to his inability to satisfy a judgment obtained against him by his non-paying passenger in respect of personal injuries, or by a plaintiff suing in respect of damage to property (*cf.* an expensive car). Neither of these injuries is covered by the provisions of the Road Traffic Act, 1930 (*d*), which require compulsory insurance. The Third Parties Act, 1930 (*e*), therefore still has a place in Motor Insurance Law, though to a limited extent.

Bankruptcy of an individual motorist or owner of a motor car and liquidation of a company operating motor vehicles on the road may occur in three separate instances, as follows :

- (i) Before the accident on the road which gave rise to the judgment obtained against the motorist or the company.
- (ii) Between the date of the accident and the obtaining of this judgment.
- (iii) After the obtaining of the judgment.

It will be seen (*ee*) that a motor insurance policy lapses on bankruptcy or liquidation. In case (i), therefore, the motorist or the servant of the company concerned will be driving uninsured and for damage to property and injury to a voluntary passenger there will be no remedy against an owner. In cases (ii) and (iii) the Third Parties Act, 1930, will assist the plaintiff if the liability is not a Road Traffic Act liability.

If the liability arising from an accident occurring after July 1, 1946, is a Road Traffic Act liability, in case (i) the Motor Insurers' Bureau will itself satisfy a judgment obtained against the bankrupt motorist or liquidated company. In cases (ii) and (iii), the insurer concerned will satisfy the judgment on behalf of the Motor Insurers' Bureau (*f*).

The Third Parties Act, 1930, was passed to overcome the effect of *Hood's Trustees v. Southern Union General Insurance Co. of Australasia* (*g*) and *Re Harrington Motor Co., Ex parte Chaplin* (*h*), which are considered below (*i*).

After the several sections of the Third Parties Act, 1930, have been examined, the various rights of action and proceedings available to third parties under the Act are considered (*j*).

The Third Parties Act, 1930, was the first of the series of enactments (*k*) directly affecting the law of motor insurance (*l*). It was followed closely

(*d*) Chapter IV, *post*, p. 168

(*e*) 23 Halsbury's Statutes 12

(*f*) Under the Domestic Agreement, see chapter VI, *post*, p. 374

(*g*) [1928] Ch 793.

(*h*) [1928] Ch 105.

(*i*) See p. 115 *post*

(*j*) See Part 3 of this chapter.

(*k*) The others are the Road Traffic Act 1930 (23 Halsbury's Statutes 607), and the Road Traffic Act, 1934 (27 Halsbury's Statutes 534).

(*l*) Each of the series relates to other matters as well.

(*dd*) Chapter VI, *post*, p. 364

(*ee*) See p. 115, *post*

by the Road Traffic Act, 1930 (*m*). That Act, to a small but important extent, indirectly affected the application of its provisions (*n*) in so far as they apply to the motor insurance made compulsory by that Act. As has been previously pointed out, it cannot be too strongly emphasised that the Road Traffic Act, 1930, does not give any rights to third parties, and that both the Road Traffic Acts of 1930 (*m*) and 1934 (*m*) apply to motor insurance only in so far as such insurance is made compulsory by the Road Traffic Act of 1930—that is, insurance against liability (other than contractual liability) for bodily injury to or the death of third parties in a limited class. The Third Parties Act of 1930 applies to *all* kinds of insurance, *all* kinds of liability, and in motor insurance to *all* third parties in the full sense of the expression. It is equally important when reading this chapter to bear in mind the distinction between “true” indemnity and “legal” indemnity (*o*), and to remember that a Third Party Liability Policy may by its terms provide that payment is due from the company to the assured only when judgment has been recovered by the third party against the assured or the claim has been settled with the consent of the company (*p*).

Before the Third Parties Act is examined in detail it is necessary to remind or inform the reader of the effect of insolvency on a motor insurance policy.

2. Effect of insolvency on motor insurance policy.—It becomes important at this juncture to determine the exact effect of the assured's bankruptcy or insolvency upon a contract of insurance against third party liability. The effect of insolvency of the insurers is considered in a later chapter (*q*). Although the Third Parties (Rights against Insurers) Act, 1930 (*r*), has to some extent settled the point, it remains nevertheless, as will be later shown, of more than academic interest in motor insurance cases.

At the outset a distinction must be drawn between the effect of insolvency of a company insured under such a contract, on the one hand, and the effect of the bankruptcy of an individual on the other. In winding-up the rights and liabilities of the company do not pass to or vest in the liquidator, but remain vested in the company unless the Court by order specifically decrees otherwise (*t*). The liquidator is entitled to take proceedings and act in the company's name, and in such capacity, subject to the Third Parties Act, 1930, he may enforce rights arising under the company's contracts of insurance (*u*). The effect of bankruptcy is fundamentally different. There the “property” (*v*), including things in action (*i.e.* rights and liabilities arising out of contracts and causes of action) belonging to the debtor, vests in his trustee in bankruptcy (*w*). While the case of *Hood's Trustees v. Southern Union General Insurance Co. of Australasia* (*x*) is authoritative for the proposition that the benefits of the debtor's contracts of third party

(*m*) 23 Halsbury's Statutes 607; 27 Halsbury's Statutes 534. *Post*, chapter IV.

(*n*) By s. 38. See *post*, chapter IV, p. 218.

(*o*) *Ante*, pp. 71 *et seq.*

(*p*) See *post*, chapter IX, “Right to Payment.”

(*q*) Chapter IX, *post*, “Termination of Policy.”

(*r*) 23 Halsbury's Statutes 12.

(*t*) Companies Act, 1948, ss. 243, 244.

(*u*) *Ibid.*, s. 245; *Re Farrow's Bank, Ltd.*, [1921] 2 Ch. 164; *Re Harrington Motor Co.*, *Ex parte Chaplin*, [1928] Ch. 105.

(*v*) Bankruptcy Act, 1914, s. 167 (1 Halsbury's Statutes 705).

(*w*) *Ibid.*, ss. 37, 38.

(*x*) [1928], Ch. 793.

liability insurance pass to his trustee in bankruptcy and entitle him to indemnity, it appears not inopportune to examine the law prior to that decision.

As has been pointed out, rights arising under contracts of third party liability insurance are, like fire insurance, highly "personal" in nature (y). It follows that, unlike contracts of marine, life and security insurance, they are not assignable *inter partes* (z). The question as to whether these types are assignable by operation of law has been determined affirmatively—although there is no direct authority to this effect—in the case of fire insurance contracts (a), and by *Hood's Case* (b), relating to third party liability insurance.

There appears, however, in this respect to be an important distinction between the two types. Despite their "personal" character fire insurance contracts nevertheless relate to the assured's property; inasmuch as his property—the subject-matter of the insurance—passes to and vests in the assured's trustee in bankruptcy, it is only reasonable to suppose that the benefit of fire insurance contracts relating to the debtor's estate, passes with the estate which it insures so as to entitle the trustee in bankruptcy to enforce the rights arising thereunder. Further, the trustee clearly has an insurable interest sufficient to support the validity of such a contract after assignment to him. In the case of third party liability insurance the position is otherwise. While the debtor's motor car may pass to his trustee in bankruptcy, together with the benefit of contract insuring the car against loss or damage, his contracts of third party liability insurance do not relate to or insure the car against loss or damage (c). On the other hand, they cover the debtor against the risks of liability to others arising out of the use of his property. These risks are incurred *only* by the assured debtor personally. Third party liability insurance appears, then, to be a contract which affects the debtor personally, and not his estate unless judgment for damages has been obtained against him before bankruptcy, thereby becoming a provable debt (d). It is well settled that the benefits of contracts affecting the personality of the debtor only, and not his estate, do not pass to the trustee in bankruptcy but remain vested in the debtor (e). Apart from the decision in *Hood's Case* (f) it would have appeared that the benefit of the debtor's contracts of third party liability insurance did not pass to his trustee in bankruptcy. It is interesting, in this connection, to note that *Hood's Case* was decided on analogy with *Re Harrington Motor Co., Ex parte Chaplin* (g) which, as it involved the enforcement by a liquidator of a company's rights under an insurance contract, would seem to have been initially distinguishable.

(y) *Lynch v Daltell* (1729), 4 Bro Parl Cas 431; *Sadlers' Co v Badcock* (1743), 2 Atk 554; *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1938] 2 All E. R. 267. See *ante*, chapter II, pp 93 *et seq.*

(z) *Ibid.* Contracts of marine and life insurance are assignable by statute for "security" insurance see *Liverpool Mortgage Insurance Co's Case*, 1914; 2 Ch. 617.

(a) *Gouldstone v. Royal Insurance Co.* (1858), 1 F. & F. 276, *Re Carr and Sun Fire Insurance Co.* (1897), 13 T. L. R. 186.

(b) See *post*, p. 117.

(c) *Mundy's Trustees v. Blackmore* (1928), 32 Ll L. R. 150. A case in which the trustee in bankruptcy sued upon a contract to insure the bankrupt's car against loss and damage.

(d) Bankruptcy Act, 1914, s. 30 (1 Halsbury's Statutes 636). See 2 Halsbury's Laws, 2nd Edn., 263.

(e) See *Wilson v. United Counties Bank, Ltd.*, [1920] A. C. 102.

(f) [1928] Ch. 793. See *post*, p. 118.

(g) [1928] Ch. 105.

Assuming, as *Hood's Case* decides, that the benefits of contracts of third party liability insurance pass, as "property," to the assured debtor's trustee in bankruptcy, a further difficulty arises. Third party liability insurance is in its nature indemnity (*h*). It is well established that the obligation of the insurer under such a contract is one to indemnify against liability and not against loss as such (*i*).

It has been decided in a series of cases that the benefit of a contract of indemnity vests by operation of law in the debtor's trustee in bankruptcy. But the cases in which this proposition has been developed and sustained are all concerned with circumstances in which the trustee in bankruptcy was also under the liability against which the indemnity was enforceable (*j*). Apart from *Hood's Trustees v. Southern Union General Insurance Co. of Australasia* (*k*), there appears to be no authority that the trustee in bankruptcy is entitled to get pecuniary benefits under a contract of indemnity where he is not under any liability in respect of which that indemnity is enforceable. The trustee in bankruptcy is unaffected by rights of action in tort against the bankrupt. He is not liable to third parties for injuries or damage which they have sustained by the bankrupt's wrongful acts save in the exceptional case when the debtor's liability has been turned into a liquidated or provable amount by a judgment before bankruptcy (*l*), or the claim is under the Law Reform Act, 1934 (*m*).

The Third Parties (Rights against Insurers) Act, 1930 (*n*), has to some extent solved the difficulty created by the rule that liquidators and trustees in bankruptcy were entitled to enforce contracts of third party liability insurance and retain the proceeds or a part of them. But while it has put right the apparent injustice which arose from the decisions in the *Harrington Co. Case* (*o*) and in *Hood's Trustees v. Southern Union General Insurance Co. of Australasia* (*p*), it has nevertheless created other difficulties.

The position of liquidators was in law quite simple and essentially different from the position of trustees in bankruptcy. The essential differences from the point of view of third party liability between the liquidator and the trustee in bankruptcy are—

1. That the property, including rights under contracts, of the company does not vest in a liquidator in winding-up, and that the company remains bound by its subsisting obligations unless the liquidator with the sanction of the Court disclaims them. The company remains in existence in law as long as the liquidation is in process, and when the liquidation terminates with the dissolution of the company, the rights and liabilities of the company have no further existence.

2. In case of liability for personal injury to third parties this is extremely important; such liability constitutes a provable debt against the company in a liquidation but not against an individual in bankruptcy, except where he has died and his estate is administered (after 1934) in bankruptcy (*m*).

(*h*) *Ante*, p. 71.

(*i*) *Castellain v. Preston* (1883), 11 Q. B. D. 380; and *British Union and National Insurance Co. v. Rawson*, [1916] 2 Ch. 476.

(*j*) *Re Perkins, Poyser v. Beyfus*, [1898] 2 Ch. 182, and cases therein cited. See also *British Union and National Insurance Co. v. Rawson*, *supra*.

(*k*) [1928] Ch. 793.

(*l*) *Wolmershausen v. Gullick*, [1893] 2 Ch. 514. And see *Re Law Guarantee Trust and Accident Society, Ltd., Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617.

(*m*) S. 1 (6) (27 Halsbury's Statutes 221).

(*n*) 23 Halsbury's Statutes 12.

(*o*) [1928] Ch. 105.

(*p*) [1928] Ch. 793.

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A consideration of the decisions in *Re Harrington Motor Co., Ex parte Chaplin* (q) and in *Hood's Case* (r) in the light of these two propositions shows quite clearly the essential differences between them.

While the liquidation of a company (s) seems to have little effect upon the company's contracts of insurance unless there is a disclaimer, and now by the Third Parties Act (t) the position of injured third parties is secured against getting only a dividend upon the amount of their claim, the effect of bankruptcy upon contracts of motor insurance and the rights of third parties in respect of them raises a host of problems which the Third Parties Act leaves largely unsolved. For clearness it is desirable to formulate some of these problems.

(1) According to the decision in *Hood's Trustees v. Southern Union General Insurance Co. of Australasia* (r), bankruptcy divests the insured debtor of his rights under the contract of third party liability insurance. After the bankruptcy, therefore, the insured would have to take out a new policy to cover him under the Road Traffic Act (u). He would not be covered by the old policy, which no longer belonged to or protected him, and if he used or caused or permitted his car to be used on the road without being covered by the necessary third party liability insurance he would be guilty of a criminal offence (v). While on this view bankruptcy divests him of the future benefits of third party liability insurance, those benefits could not be enjoyed by the trustee in bankruptcy, who has no insurable interest in the risks attached to the bankrupt's driving, and to whom the policy is not assignable without the consent of the company (w).

(2) If the decision in *Hood's Case* were not correct, then the benefits of the insurance would not vest in the trustee in bankruptcy but remain in the bankrupt, in which case he would be entitled to enforce the indemnity against liability, and it would appear that as far as individuals are concerned the Third Parties Act would not have been so necessary as has been thought.

So long as the law remains as decided in *Hood's Case*, the effect of the bankruptcy of the assured upon a policy of motor insurance is to determine the policy as from the date of such bankruptcy. The consequences of this state of the law upon the position of a person insured under a motor policy who becomes bankrupt, and upon his rights and liabilities in respect of driving a motor car, are considered in their appropriate context hereafter (b). It is sufficient to summarise here the following points. Of these, the first three briefly describe the position in law as it still is to-day, whilst the last two illustrate the position of a third party before the Third Parties (Rights against Insurers) Act, 1930 (c), was passed.

1. In the first place the assured is not, after he becomes bankrupt, covered by his policy if he drives his insured car (or any other car (d)) on the road (e).

(q) [1928] Ch. 105.

(r) [1928] Ch. 793.

(s) I.e. of an assured company: *alter of insurers*—as to which see fully *post*, chapter IX, p. 658.

(t) 23 Halsbury's Statutes 12.

(u) As to this, see *post*, chapter IV.

(v) *Monk v. Warbey*, [1935] 1 K. B. 75.

(w) See *ante*, pp. 55 *et seq.* Insurable interest is to some extent no longer necessary, but by *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1931), 146 L. T. 26, if the assured parts with the subject-matter of the policy, the policy thereupon lapses.

(b) *Post*, pp. 130 *et seq.*

(c) 23 Halsbury's Statutes 12.

(d) Cf. *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1930), 47

T. L. R. 46; affirmed (1931), 48 T. L. R. 17.

(e) As to this generally, see *post*, pp. 658 *et seq.*

2. All rights acquired by him under the policy before its determination pass to his trustee in bankruptcy, presumably as from the date of the commencement thereof. Thus if the assured or his wife had lost a limb in a motor accident, the right to claim the compensation for this loss which the policy provides would be lost to the assured, and would be enforceable by his trustee in bankruptcy for the benefit of the general body of his creditors (*f*).

3. Although the bankrupt assured has no rights (past, present or future) under his policy, these do not all pass to his trustee, who only acquires :

(1) Accrued rights both in respect of damage to or loss of the insured car, however caused (*g*) ;

(2) Possibly future rights in respect of damage to or loss of the insured car caused otherwise than by the driving thereof (*e.g.* fire, theft, etc.) (*h*).

Future rights in respect of third party liability were not, it is submitted, acquired by the trustee, since he had no insurable interest in the subject-matter of the insurance—namely, the driving of the insured car by the assured (*i*), and the policy being of a personal nature and therefore incapable of assignment, could not be assigned to him (*j*).

The lack of insurable interest does not now, by reason of section 36 (4) of the Road Traffic Act, 1930 (*k*), prevent this right from passing to the trustee in so far as it concerns the insurance made compulsory by that Act ; but the unassignable nature of the policy remains, and it cannot therefore pass to the trustee.

4. An injured third party, who had settled his claim with the bankrupt, would be liable to refund monies paid him to the bankrupt unless he could show that his transaction was "protected," by reason of his lack of knowledge of the commission of an act of bankruptcy (*l*). Even without such knowledge, where no money was actually paid but there was merely an agreement to pay, or where in any case the settlement was transacted after the receiving order, the third party would gain nothing (*m*). Before the Third Parties Act, 1930, this would equally apply to a settlement with the bankrupt's insurance company, since any such settlement is in law a settlement between the third party and the insured bankrupt (*n*).

5. Before the Third Parties Act was passed a third party had no rights under a motor insurance policy effected by the person who caused him injury or damage. If the person who caused the damage were an individual and became bankrupt, the third party could only prove in the bankrupt's estate if he had, before the bankruptcy, recovered judgment against him in respect of the injury (*o*). If the third party was injured or damaged by a company which went into liquidation he could, whether or not he had first recovered judgment, claim in the liquidation in respect of the liability to him (*p*) ; in no case could a third party ever obtain any direct rights under

(*f*) *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch 793. *Sed quære* as to the wife : might the assured be held to be trustee for her ?

(*g*) *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch 793 ; *Mundy's Trustees v. Blackmore* (1928), 32 Ll. L. R. 150.

(*h*) *Sed quære* : can part of the policy survive extinction of the rest ?

(*i*) See *ante*, pp. 70 *et seq.* (*j*) *Ante*, pp. 93 *et seq.*

(*k*) 23 Halsbury's Statutes 607 ; see chapter II, *ante*, pp. 89 *et seq.*

(*l*) Bankruptcy Act, 1914, ss. 45-46 (1 Halsbury's Statutes 650, 651).

(*m*) *Ibid.*

(*n*) Such agreement would appear to be made by the insurers on behalf of their assured.

(*o*) See *ante*, p. 115. Only in such event would the debt be a provable one in the bankruptcy.

(*p*) See *ante*, p. 115. Companies Act, 1948, s. 316.

an insurance policy effected by the person or company by whom he had suffered injury or damage (q), except by assignment from the assured (r).

The remarkable fact that, whilst the case of *Re Harrington Motor Co., Ex parte Chaplin* (s) decided one thing, *Hood's Trustees v. Southern Union General Insurance Co. of Australasia* (t), which purported to follow and be bound by it, decided something entirely different, has already been pointed out (u).

For a proper understanding of the Third Parties (Rights against Insurers) Act (v) it is necessary fully to comprehend the essential difference between these two cases. For whilst it has been generally supposed that the Act was passed for the purpose of altering the law laid down therein (w), the Act itself purports to assimilate the positions of an individual in bankruptcy and of a company in liquidation so as to give to third parties rights which they would otherwise never have had (a).

One more point may be noted: *Hood's Trustees v. Southern Union General Insurance Co. of Australasia* (b) does not, as has been supposed, decide that after an assured becomes bankrupt nothing he does or omits to do can affect the rights of his trustee or of the company under a motor policy. This question remains open (c), except to the limited extent to which it has been closed, in regard to motor policies (d), by section 38 of the Road Traffic Act (e). But the case is also of considerable importance as being an illustration of the kind of difficulties which arise when an assured becomes bankrupt. These difficulties are intensified (f) by the Third Parties (Rights against Insurers) Act, 1930 (g), and still further complicated by the provisions of Part II of the Road Traffic Act, 1934 (h).

PART 3.—THE THIRD PARTIES ACT, 1930

In this part of this chapter each section of the Third Parties (Rights against Insurers) Act, 1930, comes to be examined in turn.

The Preamble to the Act is as follows:

"An Act to confer on third parties rights against insurers of third-party risks in the event of the insured becoming insolvent, and in certain other events."

I.—SECTION 1

1. Subsection (1).

Rights of third parties against insurers on bankruptcy, etc., of the insured

"1.—(1) Where under any contract of insurance a person (hereinafter "referred to as the insured) is insured against liabilities to third parties which he may incur, then—

(q) Because he was not party to such policy. See generally, chapter I, pp. 4, 6, *ante*

(r) See as to this, *post*, p. 158.

(s) [1928] Ch. 793.

(t) 23 Halsbury's Statutes 67.

(u) The seeming incongruity between the two decisions referred to was discussed at some length in the first edition of this book, to which the reader is referred. In view of the decreased importance of the Third Parties Act, 1930, in Motor Insurance Law the detailed examination of these two cases retains only an academic interest, and it is therefore omitted in this second edition.

(b) [1928] Ch. 793.

(c) See *Re Carr and Sun Fire Insurance Co* (1897), 13 T. L. R. 186.

(d) Ss. 35, 36, 38 (23 Halsbury's Statutes 636, 637, 639), and see *post*, chapter IV.

(e) For this see chapter IV, *post*.

(f) 23 Halsbury's Statutes 12.

(g) 27 Halsbury's Statutes 730; and see *post*, chapter V.

(h) See *post*, pp. 130 *et seq.*

(i) See *post*, pp. 130 *et seq.*

- " (a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or
- " (b) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, with respect to the company, or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge;
- " if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was incurred."

1. "*Any contract of insurance.*"—It should be noted that this is not limited to motor insurance. On the other hand, the Act apparently does not apply to a security issued in lieu of an insurance policy (*i*) under sections 36 and 37 of the Road Traffic Act, 1930 (*j*). Herein is one of the many respects in which the operation of this Act differs from that of Part II of the Road Traffic Act, 1934 (*k*).

2. "*A person.*"—This word in its legal signification included a corporation (*l*) or company (*m*). It would include a firm or partnership which is not a legal entity apart from its members (*n*), and has no separate existence in law apart from them (*o*).

3. "*Is insured.*"—There is no doubt here, as there is in regard to the insurance provisions of the Road Traffic Acts, 1930 (*p*) and 1934 (*q*), as to the meaning of "insured" (*r*). It clearly means *insured subject to and in accordance with the terms of the policy* (*s*). On the other hand, there is nothing which limits the operation of this Act to any particular form of insurance contract (*t*). Under the Road Traffic Act, 1930 (*u*), a policy of insurance is ineffective for the purposes of Part II of that Act unless it has been issued by an "authorised insurer" (*v*), and unless and until there is delivered by the company to the assured an insurance certificate in the form and containing the matter prescribed (*w*) by that Act and the Regulations made thereunder (*x*). Nor under this Act is it a condition precedent to the acquisition of rights against the company that the company shall have first delivered to the assured a certificate of insurance (*y*) or

(i) As to which, see *post*, chapter IV.

(j) 23 Halsbury's Statutes 607.

(k) 27 Halsbury's Statutes 534; Interpretation Act, 1889, ss. 2, 19 (18 Halsbury's Statutes 992, 1001).

(l) See *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857. And see Stroud's Judicial Dictionary, 2nd Edn., p. 1463, and *op. cit.* Supplement to 2nd Edn., p. 685.

(m) But not an unincorporated company.

(n) See *Re Sawers, Ex parte Blain* (1879), 12 Ch. D. 522 (C. A.); *Re Vagliano Anthracite Collieries, Ltd.* (1910), 79 L. J. Ch. 769.

(o) For the law of Partnership, see 24 Halsbury's Laws, 2nd Edn. 393 *et seq.*, and Lindley on Partnership, 9th Edn., *passim*.

(p) 23 Halsbury's Statutes 607.

(q) 27 Halsbury's Statutes 534.

(r) The doubts as to this meaning are set forth and considered *post*, chapter IV, p. 189.

(s) This must follow since the Act gives to the third party only such rights as the assured has under the policy. See the remarks of Lord HEWART, C.J., in *Ocean Accident and Guarantee Corporation, Ltd. v. Cole*, [1932] 2 K. B. 100, at p. 104.

(t) *I.e.* it need not be a policy issued in accordance with the terms of any statute. Cf. the provisions of the Road Traffic Act, 1934, ss. 10, 12 (27 Halsbury's Statutes 544, 546).

(u) 23 Halsbury's Statutes 607.

(v) *Ibid.*, s. 36 (1).

(w) *Ibid.*, s. 36 (5).

(x) As to which see *post*, p. 239.

(y) See *post*, chapter IV, p. 239.

indeed any other document (z). Under the Road Traffic Act, 1934 (a), the third party acquires no rights against the company unless and until an insurance certificate has been delivered to the assured (b).

The question as to who, under a motor policy, is the "insured" has already been mentioned (c), and it is clear that this means the person named in the policy who pays the premium, and any person or classes of persons whom the policy purports to cover (cc).

4. "*Liabilities.*"—The generality of this is very wide. It extends from liability in respect of the death of or bodily injury to any person caused by or arising out of the use of a vehicle on the road (d), which is the limited form of cover made compulsory in motor policies by the Road Traffic Act, 1930 (e), to liability incurred by a solicitor to his client in respect of a breach of contract. It would, therefore, cover any contractual liability (f) which the owners of railway trains (g) or public service (h) vehicles might incur to their passengers (i). It also includes such various matters as insurance against the consequence of publication of a libel (j), employers' liability insurance (i), or any class of marine insurance (k).

It is important to note that liability does not mean "liability established by a judgment" (l). Liability is complete at the moment when the act or omission which gives rise to it occurs (m).

Thus in a motor accident the liability of the insured driver is complete as soon as the accident takes place. The liability, once in existence, continues until it is extinguished in one or more of the ways described in an earlier chapter (n).

But it should also be noticed that, whilst the liability to the third party arises immediately upon the happening of the accident, it does not necessarily follow that this is the liability covered by the insurance policy. This may only be "liability which has been established in a court of law." It is

(a) Not even, apparently, a cover note. (a) 27 Halsbury's Statutes 534.

(b) *Ibid.*, s. 1. Now by reason of the Motor Insurers' Bureau agreements (for which see chapter VI) such a third party, although in law he acquires no new rights thereby, will have his just claims settled by the insurers directly he has obtained a judgment against the assured, so long as there is a policy of insurance in existence. The issue of a certificate to the assured, in accidents which occur after July 1, 1946, no longer has any effect, so far as the third party is concerned.

(c) *Ante*, chapter II, p. 121; see also p. 180 *post*.

(cc) *Latterall v. Drysdale*, 1935, 2 K. B. 174; *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, 1943, A. C. 121; 1942, 2 All E. R. 319; *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, 1944, 2 All E. R. 243, affirmed, 1945, K. B. 250; 1945, 1 All E. R. 319.

(d) As to the meaning of "road" see *post*, p. 176.

(e) This, with certain exceptions, is the liability required to be insured against by the Road Traffic Act, 1930, s. 36 (23 Halsbury's Statutes 637), as amended by Road Traffic Act, 1934, s. 16 (27 Halsbury's Statutes 547).

(f) Save liability in respect of a contract of re-insurance, which is expressly excepted by sub-s. 5 of this section.

(g) Or of steamboats or any other form of public or private conveyance.

(h) For definition of these see s. 61 Pt. IV of the Road Traffic Act, 1930.

(i) This liability is, in so far as it may arise out of contractual rights, expressly excluded from the cover made compulsory by Pt. II of the Road Traffic Act, 1930. See that Act, s. 36 (1) (b) (ii).

(j) See *Hulton (L.) & Co., Ltd. v. Mountain* (1921), 37 T. L. R. 869; *Smith (W. H.) & Son v. Clinton and Harris* (1908), 99 L. T. 840.

(k) See generally the Marine Insurance Act, 1906 (9 Halsbury's Statutes 851), the Merchant Shipping Act, 1894, s. 506 (18 Halsbury's Statutes 357), and Chalmers on Marine Insurance.

(l) For consideration of the meaning of the word "liability" in motor policies, see *post*, chapter IV.

(m) See *per TOMLIN, J.*, in *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, 1924, Ch. 793 at p. 800.

(n) *Ante* chapter I, p. 67.

doubtful whether a contract of motor insurance covering only such liability would comply with the requirements of section 36 of the Road Traffic Act, 1930, but any other insurance would be perfectly valid in this form, as would all motor insurance to which this section does not apply.

The point arose in *Re Nautilus Steam Shipping Co., Ltd., Ex parte Gibbs & Co. (o)*, and was considered by MAUGHAM, L.J., in these words (p) :

" I would only add this, that under the present policy the liability strictly does not arise upon the accident happening, for the liability in strictness applies if the assured becomes not only liable to pay, but shall in fact have paid by way of damages certain sums in question. But for the construction which we have seen our way to put upon the Act, there might be considerable difficulty in treating the Act as intelligible in reference to such a case as this."

5. "*To third parties.*"—The meaning of " third parties " is not defined by the Act and remains obscure. Does it, for example, include a person to whom the assured becomes liable under a fidelity bond or guarantee ?

In the words used by TOMLIN, J. (as he then was), when interpreting the phrase in a contract of life insurance (q) :

" Taking the question of the natural and primary meaning of the words, it seems to me that the third party there is a third party by reference to those who are concerned in the contract of assurance. In other words, I think the phrase means a third party with reference to the assurer and the policy holder and possibly the assured, because the policy holder and the assured may conceivably be different persons" (r).

It is submitted that this is the meaning which should be given to the phrase in the Act, which would therefore apply to such liability as that of an employer to his employee covered by an employers' liability insurance policy, although in another sense of the phrase " third party " would not include persons in direct contractual relation with each other.

If the above interpretation of it is correct, the phrase " third party " would also include the husband or wife of the assured, between whom and the assured there could be no liability in respect of a tort (s), unless it be in respect of a tort affecting the wife's separate property committed by the husband (t). A husband and wife can, however, freely sue each other in respect of any breach of contract (a).

And since the Act applies to any liability, including contractual liability (b), a husband or wife might in certain circumstances (c) be able to avail him or herself of its provisions. This would rarely occur in connection with a motor insurance policy. But it might. Under the ordinary form of such policy (d), the cover in respect of damage to property by implication extends to damage to the property of the assured's wife (e). The benefits which the policy secures for the assured in respect of personal injuries are

(o) [1930] Ch. 17.

(p) *Ibid.*, at p. 31.

(q) In *Royal London Mutual Insurance Society v. Barrett*, [1928] Ch. 411, at p. 414.

(r) They may be different persons under a motor policy—for example, the assured and a person driving the insured vehicle with his consent.

(s) See *ante*, chapter I, p. 45.

(t) E.g. damage to or loss of the assured's wife's clothing or jewellery in a motor accident caused by the negligence of the assured.

(a) See *ante*, chapter I, p. 45.

(b) Except re-insurance : as to which see *post*, p. 140.

(c) As, for example, if the husband had insured against liability arising out of the pursuit of his profession, and acted for his wife professionally.

(d) See *post*, chapter VIII.

(e) Unless it is held in trust by or in the custody or control of the assured.

often expressly made available for his wife (f). But it is doubtful whether the wife could by herself enforce this provision since she is not a party to the policy (g). If a motor accident were caused by the negligent driving of the assured, his wife could sue him in respect of any damage which it caused to her separate property (h), but the husband would be under no liability to his wife in respect of any personal injuries which she might receive (i). In such circumstances, if the husband became bankrupt the wife might be deprived of any benefit which the policy purported to give her. This would, it is apprehended, be the position since any sum which the policy purported to give the assured's wife in respect of her injury would be at most (j) a debt due from the company to the bankrupt assured (j), and would therefore (k) fall for distribution amongst the body of his creditors (l). The position is not altered by the Law Reform (Married Women and Tortfeasors) Act, 1935 (m).

6. "*Which he may incur.*"—These words were construed by ROMER, L.J., in *Re Nautilus Steam Shipping Co., Ltd., Ex parte Gibbs & Co* (n) as follows:

"Section 1 (1) of the Act begins as follows: 'Where under any contract of insurance any person . . . is insured against liabilities to third parties which he may incur.' It is perfectly plain that the word 'is' there does not mean at the date of the Act. So to hold would be to prevent the Act applying to any insurance effected after the Act came into force. Plainly that word 'is' refers to the state of affairs existing at the happening of the events which are immediately afterwards mentioned. . . . The subsection must therefore be read as follows: 'Where under any contract of insurance a person at the happening of the events next hereinafter mentioned is insured against liabilities to third parties which he may incur.' There *prima facie* it means 'which he may incur after the happening of the event.' But then we come to the words 'if either before or after that event any such liability as aforesaid is incurred by the assured'—that shows at once that the words 'which he may incur' must be read as 'which he may incur or may have incurred.'"

That is to say, the Act must be held to apply to cases where bankruptcy or liquidation supervenes after the liability has been incurred.

7. "*Becoming bankrupt.*"—This either means committing an act of bankruptcy or the commission thereof plus an adjudication. In *Fawcett v. Fearn* (o) it was held that in regard to bankruptcy proceedings "becomes bankrupt" means the commission of an act of bankruptcy. But in *Re Weibking* (p) it was held that in a clause of a building contract involving forfeiture if the builder should "become bankrupt" that phrase meant

(f) See *post*, chapter VIII.

(g) See chapter I, *ante*, p. 45, and *post*, chapter IX.

(h) See p. 45, *ante*.

(i) *Ante*, p. 45; *Gottisffe v. Edelston*, 1930, 2 K. B. 378.

(j) It is questionable whether the company would be legally liable to pay this sum at all. For a discussion of this question see *post*, chapters IV and IX.

(k) Unless the husband's claim for such sum were held to be enforceable as trustee for his wife. Bankruptcy Act, 1914, s. 38 (1 Halsbury's Statutes 643). The position in this case would be the extremely doubtful one as to whether the trust passed to the trustee in bankruptcy.

(l) Bankruptcy Act, 1914, s. 38 (1 Halsbury's Statutes 643). And see *Re Harrington Motor Co., Ex parte Chaplin*, [1928] Ch. 105 (C. A.); and *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793 (C. A.).

(m) 25 & 26 Geo. 5, c. 30.

(n) [1936] Ch. 17, at p. 28.

(o) (1844), 6 Q. B. 20; followed in *Re James, Ex parte Harris* (1874), L. R. 10 Eq. 253. See also *Re Munday, Ex parte Allam* (1884), 14 Q. B. D. 43; *Re Reis, Ex parte Clough*, [1904] 2 K. B. 769; affirmed *sub nom. Clough v. Samuel*, [1905] A. C. 442.

(p) [1902] 1 K. B. 713.

"be adjudicated bankrupt." The basis of this construction by WRIGHT, J., was that, as the clause involved forfeiture, it must be construed strictly (q). This principle of strict construction also applies to a statute which imposes new burdens unknown to the Common Law upon an insurance company (r). Moreover, if the phrase means "commits an act of bankruptcy" the practical application of the Act would become in many cases extremely difficult (s). An act of bankruptcy is defined by section 1 of the Bankruptcy Act, 1914 (t). It need only be noted here that one of the various matters defined by that section is making a conveyance or assignment of property for the benefit of creditors generally (u). It should be observed that all matters of bankruptcy law are entirely the creatures of statute (v), and that the status of bankruptcy is unknown to the Common Law (w). Moreover, an act of bankruptcy, which is an act given legal significance solely by and for the purposes of the Bankruptcy Act, is barren of any effect upon the status of the debtor until it is consummated by some further proceeding under that Act. To change the metaphor an act of bankruptcy remains in a state of suspended animation until it is brought to life by proceedings under the Bankruptcy Act, and dies a natural death unless such proceedings are taken within a prescribed time (x). But, when once the assured has been adjudicated bankrupt, or, being a company, has suffered the making of a winding-up order, or the appointment by the Court of a receiver, or has passed a resolution for voluntary winding-up, the date of these events relates back to and is deemed to have commenced at an earlier date. Whether under this subsection the rights of a third party acquired in the event of the assured becoming bankrupt, etc., are deemed to have been acquired at the date on which in fact he becomes bankrupt, etc., or on the date to which his bankruptcy (or, etc.) relates back is a difficult question which is more conveniently discussed below (y).

It must be remembered that infants (z) can never, and foreigners (z) and lunatics (z) can only in certain circumstances, become bankrupt.

8. "*Making a composition or arrangement with his creditors.*"—It is submitted that this means making a composition or arrangement in accordance with the Bankruptcy Act (a) under the supervision of the Court (b). In *Bradfield v. Cheltenham Guardians* (c) it was held that where a guardian of the poor obtained an administration order under section 122 of the Bankruptcy Act, 1883 (d), providing for the payment of less than 20s. in the pound in respect of his debts, he has made a composition or arrangement with his creditors within the meaning of that phrase in section 46 of the Local Government Act, 1894 (e), and is disqualified from office.

In the course of the judgment delivered by him in that case, BUCKLEY, J. (as he then was) (f), observed that he conceived that the words "has made

(q) [1902] 1 K. B. 712.

(r) *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A. C. 70.

(s) For example, how is it to be determined whether an act of bankruptcy has in fact been committed?

(t) 1 Halsbury's Statutes 600.

(u) Sub-sect. (1) (a).

(v) The statutes now in force are the Bankruptcy Acts, 1914 (1 Halsbury's Statutes 600) and 1926 (1 Halsbury's Statutes 716), and certain unrepealed portions of earlier enactments.

(w) For a full account of the whole law of bankruptcy the reader is referred to 2 Halsbury's Laws, 2nd Edn. 4 *et seq.*

(x) Bankruptcy Act, 1914, s. 4 (1 Halsbury's Statutes 696).

(y) *Post*, p. 147.

(z) See 2 Halsbury's Laws, 2nd Edn. 4 *et seq.*

(a) 1 Halsbury's Statutes 600.

(b) *Ibid.*, s. 16.

(c) [1906] 2 Ch. 371.

(d) 1 Halsbury's Statutes 581.

(e) 56 & 57 Vict. c. 73, s. 46, sub-s. (1) (c).

(f) Later Lord WRENBURY.

a composition or arrangement with his creditors" were wide enough to cover every composition howsoever made by the debtor with his creditors *Bradfield v. Cheltenham Guardians* (g).

In Stroud's Judicial Dictionary, (h) it is stated that a composition with creditors is an arrangement between a debtor and his creditors whereby the latter agree with the debtor (and mutually amongst themselves) to receive, and the debtor agrees to pay, an agreed proportion less than 20s. in the pound.

No authority is cited for this proposition, but reference is made to *Sharp v. Cosserat* (i). In that case it was held that, under a deed of settlement involving forfeiture, if the remainderman should make a composition with his creditors (for the payment of his debts), although a commission of bankruptcy should not issue against him the forfeiture was incurred by a composition with some of a larger number of creditors. Whilst the above two cases are no doubt good authorities for the points which they actually decided, it is submitted that the dicta of BUCKLEY, J., and the wide terms of the dictionary definition which go far beyond those points, would not apply to this Act and cannot be supported on any authority.

In *R. v. Cooban* (j), DENMAN, J., thought (k) that "composition with creditors" in a disqualifying rule under the Public Health Act, 1875 (l), referred to a composition under the Bankruptcy Act (m), whilst HAWKINS, J. (n), in the same case, inclined to the view that it included also a "private composition" with creditors. But the point was not decided (o).

It seems clear that any interpretation of the words "composition or arrangement with creditors" other than that submitted would lead to hopeless confusion. If it were as wide as suggested by BUCKLEY, J. (f), in *Bradfield v. Cheltenham Guardians* (p), or by STROUD (q), a third party would acquire the rights which the Act gives him against the company as soon as, for instance, a person insured under a motor policy who had negligently run him down made an arrangement with his tailor, bootmaker, and wine merchant to pay his debts to those gentlemen by instalments.

On the other hand, the submitted interpretation of these words may be tested by the author's interpretation of the words "become bankrupt" (r). If that interpretation be correct, it is reasonable to conclude that the intention of the Act is that a third party shall not be prevented from acquiring his rights under it because the assured, although in fact insolvent, succeeds in avoiding the status of bankruptcy by making a composition or arrangement under the Bankruptcy Act (s) before adjudication. This was held to be the result of such a composition in similar circumstances in *Lowe v. Lorne, Wakefield Municipal Election Petition* (t).

It should be observed that neither of the above interpretations would involve any hardship upon the third party who could obtain a judgment (u)

(g) [1906] 2 Ch. 371, at p. 375.

(h) 2nd Edn., p. 358, sub tit. "Composition."

(i) (1855), 20 Beav. 470, 3 W. R. 473.

(j) (1880), 18 Q. B. D. 269.

(k) *Ibid.*, at pp. 272, 273.

(l) Schedule II, 13 Halsbury's Statutes 767.

(m) Bankruptcy Act, 1869.

(n) (1886), 18 Q. B. D. 260, at pp. 274, 275.

(o) See also *Aslatt v. Southampton Corporation* (1880), 16 Ch. D. 143, and for the many cases in which similar phrases in statutes and contracts have received judicial application, see English and Empire Digest, sub tit. "Bankruptcy" and "Local Government."

(p) [1906] 2 Ch. 371, at p. 375.

(q) Stroud's Judicial Dictionary, 2nd Edn., p. 358, sub tit. "Composition."

(r) *Aule*, p. 124.

(s) S. 16 (1 Halsbury's Statutes 616).

(t) (1902), 18 T. L. R. 553.

(u) Whether or not the assured had made a private composition or arrangement with his creditors.

in respect of the liability to him, and, except in small cases (v), proceed to petition thereon (w).

It should be remarked that, if "composition or arrangement" is held to be any composition or arrangement, the doubtful question arises as to whether an infant can make a valid composition or arrangement with his creditors (x), or one sufficient for the purposes of the Act (a).

9. "*In the case of the insured being a company.*"—It is to be presumed that this means a company incorporated (b) under the Companies Acts (c), or by Charter (d), or Act of Parliament (e). If so, it is doubtful how far the provisions of the Act would be available in the case of a foreign company (f). They would clearly not apply to a members' club (g), or to any form of unincorporated association (h). For the general law here applicable relating to companies, which is entirely statutory (i), the reader is referred to Halsbury's Laws of England (j) and to the previous section of this chapter and the leading text-books on the subject (k). It need only be noted here that a company is in law a separate entity, distinct from its members (l).

10. "*In the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, with respect to the company.*"—The meaning of this is quite clear. It means an order by the Court or a resolution by the company. For the circumstances in which such an order or such a resolution can or must be made, the reader is referred to the previous section of this chapter and to Halsbury (m) and the standard works on Company Law (n). It should be noted that it applies regardless of the solvency or insolvency of the company, and the only exception is that specified in subsection (6), where the voluntary winding-up is for the purposes of reconstruction or amalgamation with another company.

11. "*A receiver or manager of the company's business or undertaking being duly appointed.*"—The meaning of this is not quite so clear. What does "duly" (o) mean? Does it refer only to an appointment by the Court, or only to an appointment by debenture holders (p), or to both? It is submitted that the last is the correct interpretation (q), although grammatically appointment is limited to appointment by or on behalf of debenture holders.

(v) Cases in which the judgment is less than £50. Bankruptcy Act, 1914, s. 4 (1 Halsbury's Statutes 606).

(w) For the correct procedure, see 2 Halsbury's Laws, 2nd Edn. 1 *et seq.*

(x) It is thought that he could, provided that all his debts were such as could be recovered from him by action, as, e.g. for necessities. See *ante*, p. 45.

(a) The Third Parties (Rights against Insurers) Act, 1930 (23 Halsbury's Statutes 12).

(b) (*I.e.* not an unincorporated association, a mere association of persons such as a club). See 5 Halsbury's Laws, 2nd Edn. 1 *et seq.*

(c) The Acts referred to are the Companies Act, 1908; the Companies Act, 1902; the Companies Act, 1929, and the Companies Act, 1948.

(d) 5 Halsbury's Laws, 2nd Edn. 12, note (f), e.g. the London Assurance Company.

(e) *Op. cit.*, loc. cit. 12; e.g. a railway company.

(f) See *op. cit.*, loc. cit. 800.

(g) *Op. cit.* vol. 4, 481 *et seq.* And see *Re St. James's Club* (1852), 2 De G. M. & G. 383.

(h) *Re St. James's Club* (1852), 2 De G. M. & G. 383.

(i) The principal statute now in force is the Act of 1929.

(j) 5 Halsbury's Laws, 2nd Edn. 1 *et seq.*

(k) E.g. Buckley, 11th Edn.

(l) *Salomon v. Salomon & Co.*, [1897] A. C. 22.

(m) 5 Halsbury's Laws, 2nd Edn. 1 *et seq.*

(n) E.g. Buckley, 11th Edn.

(o) Cf. note (s), *infra*.

(p) A "manager" is not generally appointed by the Court, except at the instance of debenture holders. See 5 Halsbury's Laws, 2nd Edn. 1 *et seq.*

(q) There is nothing that requires this limitation, since a receiver or manager may be appointed equally by the Court or by debenture holders; *ibid.*

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On the other hand, if the interpretation suggested is correct, possession is not limited to possession *duly* taken (r). But this, it is assumed, must be implied (s). It should be noted that a receiver or manager may be appointed in certain circumstances (t), although the company is in a perfectly sound financial position (u).

12. "*Possession being taken.*"—This presumably means duly taken. That is to say, possession wrongfully taken, or purported to be taken, would not bring the Act into operation.

Difficulties, it is conceived, may easily arise in cases where the validity of the debenture holders' possession is contested by the company (v).

13. "*By or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge.*"—The construction of these words is plain (w). It should be noted that

A. The Act applies only to possession by holders of debentures secured by a *floating charge*.

A floating charge is one under which the company whose property is subject to it can deal with that property until the charge is crystallised by the debenture holders taking some step to enforce their security when the debt which it covers becomes due.

B. It does not apply to possession being taken by the holders of any other form of security such as mortgages (a) or trust deeds.

14. "*Either before or after that event.*"—These words are of great importance. Their meaning is plain. "Event" means any of the events referred to in sub-paragraphs (a) and (b) of the subsection.

Their effect in law is obscure. In a case where any of the events referred to happened *before* the liability is incurred by the assured, it appears that the third party gets no rights if the assured is an individual, since, as has been seen, bankruptcy brings this policy to an end (b). On the other hand, in cases where those events occur after the Act which creates the liability the third party acquires his rights at the date of such event. Whether that date is to be deemed the date on which it naturally occurs, or the earlier date to which in law it is deemed to relate back does not, as pointed out above (c), affect the position of the third party, having regard to the provisions of subsection (3) of this section and those of section 3 of this Act (d).

But if the date at which the transfer of rights to the third party occurs is not deemed to be the date to which the bankruptcy (or, etc.) relates back, it would seem that, in cases where the assured commits an act of bankruptcy (or, etc.) before committing the act which gives rise to this liability

(r) Which it would be if "appointment" were limited to appointment by debenture holders

(s) This point is referred to below. Under the Companies Act, 1948, and the Companies (Winding-up) Rules (No. 223), no formal defect nor any irregularity will invalidate any proceeding thereunder, and in particular the appointment of a receiver. See 5 Halsbury's Laws, 2nd Edn. 748.

(t) Where, for example, the affairs of the company cannot be carried on because of the lack of, or disputes between, directors

(u) *Featherstone v. Cooke* (1873), L. R. 16 Eq. 298, *Trade Auxiliary Co. v. Vickers* (1873), L. R. 16 Eq. 303; *Stanfield v. Gibbon*, [1925] W. N. 11.

(v) As it frequently is.

(w) For the general law relating to debenture holders and their rights, see Topham's Company Law, 11th Edn. chapter XII, pp. 145 *et seq.*, and 5 Halsbury's Laws, 2nd Edn. 1 *et seq.*

(a) As to which see Topham's Company Law, 11th Edn., chapter XII, pp. 151 *seq.*, and 5 Halsbury's Laws 2nd Edn. 1 *et seq.*

(b) *Ante*, pp. 115.

(c) See *ante*, p. 125.

(d) See *post*, p. 148, for the discussion of s. 3.

to the third party, the third party is in an extremely doubtful position, since by virtue of section 37 of the Bankruptcy Act, 1914, the rights of the assured under his policy passed in law at the earlier date to his trustee in bankruptcy. In such a case, would the third party, if he had notice of an act of bankruptcy, be entitled to settle and receive payment for his claim against the assured? If so, is such settlement to be binding, to be made with the assured, or with the company? (e).

Thus, if A injures B's car by the negligent driving of a car in respect of the driving of which he is properly insured (e), B is able to console himself with the reflection that if A becomes bankrupt or makes a composition or arrangement with his creditors he (f) will have his rights under this Act (g).

15. "Any such liability as aforesaid is incurred by the insured."—"Such liability as aforesaid" means liability to third parties insured against in the policy.

"Incurred by the insured" means presumably what it says. The meaning is illustrated by the hypothetical example given above. But if the third party acquires his rights under the Act immediately upon the occurrence of the event giving rise to the liability, how is he to establish those (h) rights against the insurers? In some cases, as where the liability involved a fixed sum of money (as, for example, under a fidelity insurance) the position might be simple. But where the policy covers liability in respect of the negligence of the assured, the assured has as a rule no right to payment under the policy until his liability to the third party has been proved in a court of law in an action against him, or admitted by the company (i), or in some cases until the assured has himself discharged or satisfied such liability. In such a case the third party could not enforce any payment against the insurance company without first obtaining judgment in an action against the assured (j). The difficulties inherent in these words considered in sub-paragraphs 14 and 15 were brought to light in the case of *Re Nautilus Steam Shipping Co., Ltd., Ex parte Gibbs & Co.* (k). The facts of that case were as follow:

On September 21, 1925, a policy of insurance was taken out by a company insuring it against third party risks. On October 6, 1925, a collision took place at sea, and the company thereupon became liable to the third parties in respect of the accident. On July 10, 1930, the Third Parties Act came into operation. On October 13, 1931, an order was made for the compulsory winding-up of the company. In *Ward v. British Oak Insurance Co., Ltd.* (kk), in similar circumstances, but where the liquidation of the company had taken place before the Third Parties Act had come into existence, it had been held that the Act did not enure to the benefit of the third party. In *Re Nautilus* the Court of Appeal held that as the winding-up of the company occurred after the Act came into operation, s. 1 of the

(e) See these questions discussed *post*, pp. 131 and 147

(f) But that if A is an individual and has already become bankrupt he has probably no existing policy.

(g) Unless A is a criminal and has neglected to observe the provisions of the Road Traffic Act, 1930 (23 Halsbury's Statutes 607).

(h) As to when the liability arises, see *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793, at p. 800.

(i) See *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793. And see *Carr v. Roberts* (1833), 5 B. & Ad. 78, at pp. 84, 85, and *Re Law Guarantee Trust and Accident Society, Ltd., Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617.

(j) See further, *post*, pp. 148 et seq. Cf. s. 36 (4) of the Road Traffic Act, 1930.

(k) [1936] Ch. 17. (kk) [1932] 1 K. B. 392.

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Act became operative to transfer the rights of the company under the policy to the third party. In *Re Nautilus Steam Shipping Co., Ltd., Ex parte Gibbs & Co.*, the rights of the general creditors of the company had not, while in *Ward's Case* they had, already accrued at the time the Act was passed.

In *Re Nautilus Steam Shipping Co., Ltd., Ex parte Gibbs & Co. (l)*, the liability of the insurer strictly did not arise under the policy until judgment had been obtained against the assured, and no such judgment had been obtained at the date of the hearing of the action to determine the position under the Third Parties Act.

Lord HANWORTH, M.R., used these self-explanatory words *(ll)* :

"Let me read two sentences again of section (1) : 'Where under any contract of insurance a person is insured against liabilities to third parties which he may incur,' then in the event of bankruptcy or liquidation, 'if, either before or after that event, any such liability as aforesaid is incurred by the insured'—that must mean that 'has been or is or shall be incurred,' because in dealing with the case before the event of bankruptcy the word 'is' is necessarily inappropriate if it is to connote the existing moment of time. Something that had taken place before the event of bankruptcy and before the event of liquidation can be only introduced by giving a wide interpretation and meaning to that word 'is.'"

16. "*Notwithstanding any Act or rule of law to the contrary*"—The Act referred to is the Bankruptcy Act, 1914 *(m)*, which provides that, upon the adjudication of a person who has become bankrupt his rights under the policy are transferred to and vest in his trustee in bankruptcy for the benefit of his creditors *(n)*, and the Companies Act, 1948 *(o)*, which makes various provisions for the distribution and control of a company's assets upon liquidation and upon possession thereof being taken by a receiver on behalf of debenture holders.

The Bankruptcy Act also indirectly prevents the transfer in so far as a person who has committed an act of bankruptcy cannot thereafter divest himself of any property which would be available for the benefit of his creditors *(n)*.

The rules of law referred to are presumably the rules that a third party has no rights under a contract, and that he can only acquire such rights by means of agreement, by assignment or by operation of law. By operation of law a person may in various circumstances *(p)* acquire rights under a contract to which he is not a party. But such law is exclusively Statute Law *(q)*.

17. "*His rights against the insurer under the contract in respect of the liability shall . . . be transferred to and vest in the third party to whom the liability*

(l) [1936] Ch. 17.

(ll) [1936] Ch. 17, at p. 24.

(m) S. 16 (1); s. 37 (1) (1 Halsbury's Statutes 610, 642). And see 2 Halsbury's Laws, 2d Edn. 123.

(n) See *Re Harrington Motor Co., Ex parte Chaplin*, [1928] Ch. 105, and *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793.

(o) 11 & 12 Geo. 6, c. 38.

(p) E.g. on death, or bankruptcy.

(q) For example, the Administration of Estates Act, 1925 (8 Halsbury's Statutes 300 *et seq.*). See also *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243, in which TUCKER, J., held that all persons whom the policy purports to cover are given a right to be indemnified by s. 36 (4) of the Road Traffic Act, 1930, against all liabilities referred to in the policy, and not only those which are made the subject of compulsory insurance by s. 36 (1) of that Act. This judgment was affirmed *in toto* by the Court of Appeal, [1945] K. B. 250; [1945] 1 All E. R. 316.

was incurred."—This, taken together with subsection (3) (r), means that whatever rights the assured has under and in accordance with the terms and conditions of his policy are transferred to the third party. The only rights transferred are those in respect of the liability (s). But the third party gets no more than the assured had (t).

Thus a clause in the policy (in the *Scott v. Avery* form) making an arbitration award a condition precedent to a claim by the assured against the company would in most cases (u) have to be fulfilled before the third party can claim (a). In the only cases under this Act (b) in which the point could have been raised as to whether the third party was by reason of this Act in any better position than the assured, it was not even suggested.

As SCRUTTON, L.J., has said (c) :

"The position of the plaintiffs who were suing was this. They could not have sued at all except for the Act of 1930 (d) conferring upon third parties rights against insurers of third-party risks in the event of the insured becoming insolvent. That is the only statute that gives them any right to sue, and the statute says that if the defendant becomes bankrupt the rights of the defendant against the insurer under the contract in respect of any liability shall be transferred to and vest in the third party to whom the liability was so incurred. Now, what is transferred? The rights under the contract. You cannot take the rights under the contract separate from defences under the contract. You cannot say: 'I claim indemnity from you and I do not care what conditions there are in the contract which relieve you from having to indemnify.' What are transferred are whatever rights there are between the two parties, insurer and insured, under the contract. Consequently the rights which the statute has given to a person who is injured, on the defendant becoming bankrupt, are the rights between the two parties; and if at that time—the time of the judgment—the insurer had a defence to the claim under the policy, namely: 'I am not bound by the policy because you have made material misrepresentations, because you concealed material facts from me when the policy was issued,' then that defence is entitled to be used by the insurance company."

It is clear therefore that the third party (with two exceptions) (e) can be in no better position than the assured. If the assured has obtained the policy by failing to disclose (f) or misrepresenting (g) a material (h) fact, or

(r) See *post*, p. 137.

(s) All others, such as personal accident benefits, or indemnity for damage to the vehicle, pass to the assured's trustee or liquidator (see *ante*, p. 119).

(t) *Hassett v. Legal and General Assurance Society, Ltd.* [1930], 63 Ll. L. R. 278; *Smith v. Pearl Assurance Co., Ltd.*, [1930] 1 All E. R. 95; *Dennehy v. Bellamy*, [1938] 2 All E. R. 262. *Post*, p. 154.

(u) See *post*, p. 154. This, it is submitted, is not yet absolute: in some cases the third party may under this Act be able to avoid the arbitration clause, chapter VIII, pp. 611 *et seq.*, *post*.

(a) *Freshwater v. Western Australian Assurance Co., Ltd.*, [1933] 1 K. B. 515; *King v. Phoenix Assurance Co.*, [1910] 2 K. B. 606; *Wales v. Iron Trades Employers' Association, Ltd.* (1928), 21 B. W. C. C. 316; *Stevens & Sons v. Timber and General Mutual Accident Insurance Association* (1933), 102 L. J. K. B. 337; 45 Ll. L. R. 43; *Dennehy v. Bellamy*, [1938] 2 All E. R. 262; *Smith v. Pearl Assurance Co., Ltd.*, [1930] 1 All E. R. 95.

(b) *Freshwater v. Western Australian Assurance Co., Ltd.*, [1933] 1 K. B. 515 (C. A.); *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 50 T. L. R. 528.

(c) In *McCormick v. National Motor and Accident Insurance Union, Ltd.* (*supra*).

(d) *I.e.* Third Parties, etc., Act, 1930 (23 Halsbury's Statutes 12).

(e) The exceptions are created by s. 38 of the Road Traffic Act, 1930, and s. 12 of that of 1934, but will not in practice come into play under this Act.

(f) *Adams v. London General Insurance Co.* (1932), 42 Ll. L. R. 56.

(g) *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361.

(h) As to what is a material fact, see Road Traffic Act, 1934, s. 10 (5) (27 Halsbury's Statutes 545), *post*, p. 314.

by fraud (i), or has committed any breach of condition (k) or warranty, the third party's claim against the company can be defeated (l).

In *McCormick v. National Motor and Accident Insurance Union, Ltd.* (m), McCormick and Auty brought an action against one Dickson, in respect of damage sustained by them as a result of a motor accident caused by his negligent driving. At the time of this accident Dickson was in possession of a policy of insurance covering third party liability issued by the National Motor Union. After the writ in this action was issued against him Dickson became bankrupt. Although (according to the judgment of SCRUTTON, L.J.) (n) McCormick and Auty subsequently told their counsel in answer to a leading question by him that they would not have gone on with the action if they had known that Dickson was a bankrupt, it appears that they in fact learned of this a few days before the trial commenced, but in spite of it continued their action against him. In the meantime the National Motor Union had learned that Dickson's real name was Dadswell, and that he had concealed this material fact from them when proposing for the policy in question. The trial of the action by McCormick and Auty proceeded, and the National Motor Union continued to represent him by solicitors and counsel.

At the last moment, just before the jury gave their verdict, the National Motor Union discovered a further fact which might entitle them to repudiate the policy. Nevertheless, they still continued by their legal advisers to represent Dickson/Dadswell, and it was not until some days after the action against him had concluded that the National Motor Union informed McCormick and Auty that they repudiated liability under Dickson's policy. Thereafter McCormick and Auty brought an action against the National Motor Union, claiming that :

" (a) They were entitled to rights transferred from Dickson/Dadswell to them by reason of the operation of the Third Parties Act, 1930 ;

" (b) Although Dickson/Dadswell never had any rights (or if he had had forfeited them) under his policy, since he had obtained it by a material misrepresentation, the National Union were estopped from relying upon this because they had, by not at once declaring to McCormick and Auty that they repudiated the policy, induced them to continue the action against Dickson/Dadswell."

SWIFT, J., held that a good estoppel had been made out and that the National Motor Union ought not to have continued to assist Dadswell in the action against him after they learned of facts which would have entitled them to repudiate the policy.

On appeal to the Court of Appeal it was held that there was no estoppel. SCRUTTON and SLESSER, L.JJ. (o), appear to have based their judgments on the ground that in the particular circumstances of the case the National Motor Union acted reasonably in not declaring their repudiation until they did, whilst GREER, L.J. (o), appears to have thought that no estoppel could be raised in favour of the third party in any such circumstances by the insurance company's continuing to represent their assured after learning

(i) *Jones v. Birch Brothers, Ltd.*, [1933] 2 K. B. 597.

(k) *Gray v. Blackmore*, [1934] 1 K. B. 95; *Hassett v. Legal and General Assurance Society, Ltd.* (1939), 63 Ll. L. R. 278.

(l) *Freshwater v. Western Australian Assurance Co., Ltd.*, [1933] 1 K. B. 515; *Jones v. Birch Brothers, Ltd.*, *supra*.

(m) (1934), 50 T. L. R. 528; 49 Ll. L. R. 361.

(n) As reported, 49 Ll. L. R., at p. 364.

(o) See the judgments as reported 49 Ll. L. R. 361.

facts which entitled them to repudiate liability under the policy to him (q).

It is submitted that whilst clearly there was no estoppel in the particular facts of this case, the more general ground upon which GREER, L.J., may be said to have relied is equally clear. Although the case of *Vandepitte v. Preferred Accident Insurance Corporation of New York* (r) does not seem to have been cited in *McCormick's Case*, in that case the same point was raised in similar circumstances. Lord WRIGHT (s), in delivering the judgment of the Committee, pointed out that any such estoppel would be a matter between the insurance company and their assured.

"The only estoppel alleged was a matter between (the insurance company) and the person said to be insured—the (company) took up and conducted (such person's) defence in the claim for damages, and it was said that in doing so they conclusively admitted that she was insured. Even, however, if that were so that would not benefit the (third party) because she was not a party to any such estoppel . . . their Lordships do not think, however, that any such estoppel is made out even as between the (person said to be insured) and the (company)."

In *Hassett v. Legal and General Assurance Society, Ltd.* (t), the plaintiff, a steel erector, was injured in April, 1935, while working as a sub-contractor for the insured company, Messrs. Lilleys, owing to the collapse of some scaffolding. He issued a writ against Lilleys and judgment by default was given to him. In July, 1935, Mr. Hassett applied to the defendant insurance company for payment under the policy, but liability was denied. In November, 1935, on Hassett's petition, an order was obtained for the winding-up of Messrs. Lilleys, and Hassett then proceeded by arbitration against the insurers under the Third Parties Act, 1930. The arbitrator found that owing to the presence of a condition in the policy requiring notification to insurers of any accident by the insured, which condition had not been complied with, the insurers were not liable. A special case was stated, and ATKINSON, J., confirmed the arbitrator's decision.

On the other hand, although the third party upon a transfer under this section gets no more rights than the assured had, it is submitted that the assured's liabilities are not transferred to and vested in him. These presumably go to the assured's trustee in bankruptcy (or, etc.). Thus, if the insurers have a claim against the assured in respect of a previous accident, for example under the proviso to section 12 of the Road Traffic Act, 1934 (u), or by virtue of the proviso to section 38 of the Road Traffic Act, 1930 (v), they could not enforce this claim against the third party, although they might use it as a defence or set-off (w).

The word "shall" is important.

These words must, for the the purposes of the point about to be discussed, be read together with subsection (4) of this section. The material words of that subsection are for this purpose as follows:

"Upon a transfer under subsection (1) . . . of this section, the insurer shall . . . be under the same liability to the third party as he would have been under to the insured, *but* . . .

(q) The solicitors and counsel could not, as SCRUTTON, L.J., pointed out, have withdrawn from the case since they represented the assured and not the company. This however, is not the point: the point is, did the insurance company do anything or make any representation which could give rise to an estoppel?

(r) [1933] A. C. 70.

(s) *Ibid.*, at p. 82. See also *Etchells, Congdon and Muir, Ltd. v. Eagle Star and British Dominions Insurance, Co., Ltd.* (1928), 72 Sol. Jo. 242.

(t) (1939), 63 Ll. L. R. 278.

(u) See *post*, chapter V, p. 316.

(v) See *post*, chapter IV, p. 219.

(w) See more fully, *post*, p. 316.

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"(b) if the liability of the insurer to the insured is less than the liability of the insured to the third party, nothing in this Act shall affect the rights of the third party against the insured in respect of the *balance*."

These subsections, taken together, must, it is submitted, have this effect, that the operation of the Third Parties Act, 1930, does not extinguish the liability of the assured to the third party. Indeed, as regards Road Traffic Act liability, the Road Traffic Act, 1934, seems to have intended by section 11 to confirm this reading of these subsections. How far the Act of 1934 has achieved this object, or how far it has the opposite effect, will be considered later.

It is, however, submitted that, untrammelled by section 11 of the Act of 1934, the Court would construe the Third Parties Act, 1930, so as not to effect the extinction of the rights of the third party against the assured in respect of the original liability but to give him two rights and two remedies in respect thereto instead of one—viz. against the assured in respect of the assured's liability to him, and against the insurance company in respect of the company's liability under the policy. (For the purpose of convenience of comparison, section 11 of the Act of 1934 is appended as a footnote (a).)

The question here occurs whether these rights and remedies are alternative or collateral. It is submitted that, for the reasons which are set forth under a later subsection, they are not alternative but collateral and cumulative (h).

2. Subsection (2)

"(2) Where an order is made under section one hundred and thirty of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), for the administration of the estate of a deceased debtor according to the law of bankruptcy, then, if any debt provable in bankruptcy is owing by the deceased in respect of a liability against which he was insured under a contract of insurance as being a liability to a third party, the deceased debtor's rights against the insurer under the contract in respect of that liability shall, notwithstanding anything in the said Act, be transferred to and vest in the person to whom the debt is owing."

1. "Where an order is made under section 130 of the Bankruptcy Act, 1914, for the administration of the estate of a deceased debtor according to the law of bankruptcy."—The important part of the section of the Bankruptcy Act, 1914 (c), is as follows:

"Section 130 (1).—Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against the debtor, had he been alive, may present to the court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy."

It will readily be seen that the effect of an order made under section 130 of the Bankruptcy Act, 1914, is to provide for the administration of the

(a) Section 11.—*Bankruptcy, etc., of insured persons not to affect certain claims by third parties*—Where a certificate of insurance has been delivered under subsection (5) of section thirty-six of the principal Act to the person by whom a policy has been effected, the happening in relation to any person insured by the policy of any such event as is mentioned in subsection (1), or subsection (2), of section one of the Third Parties (Rights against Insurers) Act, 1930, shall, notwithstanding anything in that Act, not affect any such liability of that person as is required to be covered by a policy under paragraph (b) of subsection (1) of section thirty-six of the principal Act, but nothing in this section shall affect any rights against the insurer conferred by that Act on the person to whom the liability was incurred.

(b) See *O'Flaherty v. M'Donnell* (1857), 6 H. L. Cas. 142; *Steward v. Greaves* (1842), 10 M. & W. 711; *post*, p. 140.

(c) 1 Halsbury's Statutes 600.

deceased person's estate in the same way as it would have been realised and distributed if he had lived and been adjudicated bankrupt in the ordinary way. But there is this important distinction between the two cases to be observed when considering this subsection of the Third Parties Act.

1. Apart from the operation of the Third Parties Act, when a person becomes bankrupt his accrued (*d*) rights under a contract of motor insurance are transferred to and vest in his trustee in bankruptcy (*e*).

2. When a person dies his accrued (*d*) rights under a contract of motor insurance are transferred to and vest in his personal representative (*f*).

3. Consequently, when an order is made under section 130 of the Bankruptcy Act, 1914 (*g*), for the administration in bankruptcy of a deceased person's estate, his accrued (*d*) rights are transferred from his personal representative to the trustee of his estate in bankruptcy (*i*).

4. In a case in which the Third Parties Act comes into operation (*j*), where an order is made for the administration of a deceased person's estate in bankruptcy, his accrued (*d*) rights under a motor insurance policy pass from his personal representative to the third party (*k*).

2. "*If any debt provable in bankruptcy.*"—In cases of motor insurance, such a debt would formerly invariably have been a judgment debt (*l*), or an agreement finally settling and liquidating the assured's liability, but now by the Law Reform Act, 1934 (*m*), an unliquidated claim for tort is provable in the administration of a deceased insolvent's estate (*n*).

3. "*Owing by the deceased in respect of a liability against which he was insured under a contract of insurance as being a liability to a third party.*"—The meaning of the word "insured" has already been explained (*o*), as has that of liability (*p*) and third party (*q*).

4. "*The deceased debtor's rights against the insurer under the contract in respect of that liability shall, notwithstanding anything in the said Act, be transferred to and vest in the person to whom the debt is owing.*"—These are the operative words in this subsection. Several points call for comment :

It is remarkable that this subsection is expressed to act "*notwithstanding anything in the said Act*"—i.e. the Bankruptcy Act—whereas the previous subsection operates *notwithstanding anything in any Act or rule of law to the contrary*. This presumably is a draftsman's error, since the rules of law and the Acts which, but for this Act, would prohibit the transfer of

(*d*) His future rights are extinguished (see as to the effect of the assured's death on his policy of motor insurance, *post*, chapter IX, p. 661).

(*e*) *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793.

(*f*) See *ante*, p. 119.

(*g*) 1 Halsbury's Statutes 600.

(*h*) The Official Receiver, by subsection (4) of section 130 of the Bankruptcy Act, 1914 (*ibid.*).

(*j*) I.e. where an assured incurs liability in respect of which he is insured under his policy.

(*k*) See sub-section (2) above.

(*l*) I.e., a debt in respect of which the third party had obtained a judgment, prior to the order for administration in bankruptcy, either against the assured or, if the cause of action were one which did not become extinguished by the insured's death, against his personal representatives.

(*m*) Section 1 (6).

(*n*) It seems doubtful whether this makes such a claim 'a debt provable in bankruptcy' within the meaning of the above subsection, but it is submitted that it would be so held.

(*o*) *Ante*, p. 121.

(*p*) *Ante*, p. 122.

(*q*) *Ante*, p. 123.

the assured's rights to a third party in the events specified in subsection (1) would equally prevent their transfer in the event specified in subsection (2). Those rules of law and Acts have been enumerated in dealing with subsection (1) (r). It is, however, submitted that, having regard to the positive words of subsection (2) and those of subsection (4), there is no question that the error indicated would have no effect upon the interpretation of the former subsection, which would be that it had, *mutatis mutandis*, exactly the same effect in law as that of subsection (1). The effect in law of that section has been set forth, and no further remarks upon this subsection are necessary save one (s). That is, that whereas in subsection (1) the rights are transferred to the third party to whom the liability was incurred, in this subsection they devolve upon "*the person to whom the debt is owing.*" The distinction is important. Its importance is illustrated by the following :

1. Where before the Law Reform Act, 1934, was passed (t), or in cases to which it does not apply (u), the liability owed by the assured to the third party was in respect of a tort (or a breach of statutory duty), which had neither injured the third party's nor benefited the assured's estate, and the third party died before he had recovered judgment against the assured, but after the assured had become bankrupt, the deceased third party's representatives would, it is submitted, have had no rights by virtue of subsection (1) either against the insurance company or against anybody else (a).

2. Subsection (2), by the words "*the person to whom the debt is owing,*" makes it clear that in similar circumstances, but where the third party had recovered judgment before he died, the rights given by the subsection would survive in the deceased third party's personal representatives, as they would also were the liability contractual—and this whether the order under section 130 of the Bankruptcy Act is made before or after the third party's death.

3. Where the liability of the assured was contractual, or in respect of a tort which had either injured the third party's or benefited the assured's estate, it is doubtful whether, before August, 1934 (b), if the third party died, the rights which can be acquired by him against an insurance company under subsection (1) would pass to his personal representatives. It is submitted that they would not where the third party died before the event which under the subsection produces the transfer (c).

But where the assured dies after the Law Reform Act, 1934, and an order is made for the administration of his estate in bankruptcy, it is apprehended that if, whether before or after that event, the third

(r) *Ante*, p. 130.

(s) *Ante*, pp. 130-134.

(t) *I.e.* the Law Reform (Miscellaneous Provisions) Act, 1934 (*ante*, chapter I).

(u) *E.g.* libel.

(a) But even this is doubtful. If the nature and effect of a third party liability policy is as has been suggested in several leading cases (see pp. 52 *et seq.*, *ante*), the position would seem to be this: A (insured) libels B. Thereupon he incurs liability to B, and his right to an indemnity under his policy arises. At this stage the amount of the indemnity is not yet determined. A becomes bankrupt and his rights under his policy pass to B. B dies, and A's liability to him ceases. But A's right to an indemnity remains, and can be assessed as being the amount which the Court would have awarded B if B had lived and sued A. If this be so, then might not B's representatives be entitled to enforce the indemnity under the policy?

(b) See *ante*, pp. 53 *et seq.*

(c) For example, on August 12, 1933, A (insured) runs down B, injuring him and damaging his car. On August 15, B dies as a result of the accident. On August 20, A becomes bankrupt. Did subsection (1) operate to transfer A's rights against his insurers to B's personal representatives? This is doubtful since B's personal representatives are not "*the person to whom the liability was incurred.*"

party died also, the rights transferred by the subsection would vest in the persons to whom the debt is owing—namely, the third party's personal representatives.

4. It would seem also that where the liability owed by the assured to the third party is in respect of a judgment, or is contractual, the third party could assign his rights in respect of such liability to another, and that other, the assignee, would, as the person to whom the debt would then be owing, acquire rights against the insurance company under subsection 2 in the event therein specified.

3. Subsection (3)

"(3) In so far as any contract of insurance made after the commencement of this Act in respect of any liability of the insured to third parties purports, whether directly or indirectly, to avoid the contract or to alter the rights of the parties thereunder upon the happening to the insured of any of the events specified in paragraph (a) or paragraph (b) of subsection (1) of this section or upon the making of an order under section one hundred and thirty of the Bankruptcy Act, 1914, in respect of his estate, the contract shall be of no effect."

1. "*Purports*."—This means "by its terms attempts to provide."

2. "*Whether directly or indirectly*."—This means whether the terms of the contract expressly provide, or whether, although there are no express terms making such provision, it must necessarily be implied from the other terms.

The circumstances in which a term in a policy can be implied are set forth in detail later (*d*): it is sufficient to observe here that no term which is prohibited by statute can in any circumstances be implied (*e*). The words "whether directly or indirectly" were therefore presumably inserted from an excess of caution.

3. "*To avoid the contract*."—This means to "render the whole contract void."

The word "void" is often used indiscriminately in a variety of senses (*f*). These are:

- (i) "never in existence"—this is sometimes expressed as "void *ab initio*" (*g*).
- (ii) "barren of all effect" (*h*).
- (iii) "unenforceable" (*i*).
- (iv) "barren of all future effect as from the date when the avoidance occurs" (*j*).

It is submitted that the word "avoid" in this subsection (at any rate if taken by itself), includes all the meanings enumerated above save the last (*k*).

4. "*Or to alter the rights of the parties thereunder*."—The construction of these words presents great difficulty. The effects apart from this Act upon the rights of the parties under a contract of motor insurance upon the happening of the events specified in subsection (1) have been considered (*l*).

(*d*) *Post*, chapter IX, pp. 639 *et seq.* (*e*) See Maxwell, 7th Edn., pp. 300 *et seq.*

(*f*) See *per* SCRUTTON, L. J., in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 50 T. L. R. 528, and *per* READING, C. J., in *Stebbing v. Liverpool and London and Globe Insurance Co., Ltd.*, [1917] 2 K. B. 433.

(*g*) *E.g.* Sale of Goods Act, 1893, s. 6 (17 Halsbury's Statutes 615).

(*h*) *E.g.* Gaming Act, 1845, s. 18 (8 Halsbury's Statutes 1152).

(*i*) *E.g.* Statute of Frauds, 1677, s. 4 (3 Halsbury's Statutes 583).

(*j*) *E.g.* instances in which a contract is affected by subsequent impossibility. See chapter I, *ante*, p. 7.

(*k*) See also *post*, chapter V, pp. 280 *et seq.*, and chapter IX, "Repudiation."

(*l*) *Ante*, pp. 115 *et seq.*

It was submitted that, at any rate in the case of bankruptcy, the assured's rights under the policy would automatically cease as from the actual date of bankruptcy (but without relation back to an earlier date), in respect of any claim which had not accrued at that date. If this be the true position in law before or apart from the operation of the Third Parties Act, 1930 (m), then the only way in which a policy would purport to alter the rights of the parties thereunder would be by providing that those rights should continue after and in spite of the bankruptcy (or, etc.) of the assured. But such provision is precisely opposed to the mischief at which this subsection is obviously intended to aim. It is therefore submitted that the subsection would not be held to prohibit a clause in a policy which provided that the policy should continue in full force in spite of bankruptcy (or, etc.) (n). It is submitted that the words "alter the rights of the parties thereunder" must be read together with the words "upon the happening to the assured of any of the events specified . . ." and must mean that any provision in a policy purporting to avoid the contract so as to deprive a third party of the rights which he acquires under subsections (1) or (2) or to alter such rights shall be prohibited. It is realised that this is not a strictly grammatical (o) or even perhaps a logical construction: but if it is not adopted the section becomes of limited value.

If the literal (and strictly logical) interpretation be correct, the meaning and limited effect of this subsection would be as follows:

1. Any clause in a policy the effect of which was to provide that in the event of the bankruptcy (or, etc.) by the assured he lost all rights, whether past, accrued or future, and that the company was thereby released from any liability under the policy, would be null and void;

2. A clause providing that notwithstanding that he should become bankrupt (or, etc.) the assured's policy should thereafter remain as fully in force and effective as if there had been no bankruptcy would be void (p);

3. A clause providing that upon the bankruptcy (or, etc.) of the assured the policy should be surrendered and cancelled, or deemed so, would be invalid.

A motor policy, however, if the author's view is correct (q), may be automatically determined by operation of law in the event of the assured's becoming bankrupt. If so, such a clause in a policy as this would in any case be superfluous and its avoidance by the Act a barren victory.

The intention of this subsection is obviously to prevent the making of policies which will defeat the object of the Act: this intention could have been expressed by the addition of the two words "or contract" after the words "notwithstanding anything in any Act or rule of law" in subsection (1). It is submitted that this is the sense in which subsection (2) will be construed. It must also be remembered that where a statute is passed to effect an object of public policy, a contract which is designed to defeat that object is frequently held to be void, although not expressly prohibited by the Statute (r).

(m) 23 Halsbury's Statutes 12.

(n) Though such a clause would be of doubtful validity under the bankruptcy laws.

(o) Since the third party is not a party to the contract of insurance.

(p) Though such a clause might be void in any case under the bankruptcy laws.

(q) *Ante*, pp. 115 *et seq*.

(r) *Victorian Daylesford Syndicate, Ltd. v. Doll*, [1905] 2 Ch. 624; *Brightman & Co. v. Tule*, [1919] 1 K. B. 463, and see chapter I, *ante*, p. 4, and cases there cited.

5. "*The contract shall be of no effect.*"—This does not mean that the contract as a whole shall be without effect. These words are governed by those at the beginning of the subsection, "in so far as," and mean, therefore, that any contract which purports to provide what is prohibited by the subsection shall be *pro tanto* void.

4. Subsection (4)

"(4) Upon a transfer under subsection (1) or subsection (2) of this section, the insurer shall, subject to the provisions of section three of this Act, be under the same liability to the third party as he would have been under to the insured, but—

"(a) if the liability of the insurer to the insured exceeds the liability of the insured to the third party, nothing in this Act shall affect the rights of the insured against the insurer in respect of the excess; and

"(b) if the liability of the insurer to the insured is less than the liability of the insured to the third party, nothing in this Act shall affect the rights of the third party against the insured in respect of the balance."

1. "*Upon a transfer.*"—This means after a transfer. The transfer referred to is the transfer in the circumstances specified in subsections (1) and (2) to a third party of the assured's rights under his policy in respect of third party liability.

2. "*Subject to the provisions of section three of this Act.*"—Section three provides that no arrangement made between the assured and the company to compromise the assured's rights shall be effective to defeat the third party's rights if made after a certain date.

3. "*The insurer shall be under the same liability to the third party as he would have been under to the insured.*"—The effect of these words has already been described (rr) in dealing with the general position upon a transfer under subsection (1), and it has been pointed out that it does not necessarily follow that the insurer will be under the same liability to the third party as the assured was (or is) to him (s).

4. "*(a) If the liability of the insurer to the insured exceeds the liability of the insured to the third party, nothing in this Act shall affect the rights of the insured against the insurer in respect of the excess.*"—The meaning of these words is fairly plain: it is that, although by a transfer of his rights under subsections (1) or (2) the assured (or his representatives) is divested of all rights under the policy in respect of the third party liability, he retains any rights which the policy gives him to an indemnity in excess of the amount for which he becomes liable. The practical utility of the paragraph of the subsection in motor insurance is doubtful since insurance companies do not regularly issue a third party liability policy providing that the indemnity thereunder shall exceed the liability of the assured to the third party. But such a policy might be perfectly legal and valid and no doubt could be obtained upon payment of a sufficient premium. For example, a motor policy might provide that the indemnity thereunder should exceed by 10 per cent. the amount of the assured's liability to the third party as compensation to the insured for worry and loss of time caused by the third party's claim. No doubt this paragraph was inserted to make it clear that, upon a transfer of his rights under subsections (1) or (2) the assured did not lose such rights as the policy may give to be indemnified in respect of expenses which he incurs in defending the third party's claim.

(rr) See note (a), p. 130, *ante*.

(s) They may be under no liability to the assured, or have a heavy counterclaim exceeding the amount thereof.

In practice, at any rate, under a motor insurance policy, the insured is not as a rule (d) entitled to any indemnity in respect of the costs of defending a third party claim unless these are incurred with the consent of the company. The company itself directly incurs all legal expenses and costs, and no question of indemnity for these could arise, since the assured is not liable to anybody to pay them (a).

But where the insurers wrongfully repudiate the policy, and refuse to consent to the assured's incurring any legal expenses in defending the third party's claim, the assured is sometimes entitled to indemnity under the policy in respect of expenses reasonably incurred by him in respect of that claim (b). In such a case, it is apprehended, this paragraph of the subsection might become important.

5. "(b) *If the liability of the insurer to the insured is less than the liability of the insured to the third party, nothing in this Act shall affect the rights of the third party against the insured in respect of the balance.*"—This paragraph has been noticed, and its relation to the words in subsections (1) and (2) with which it must be read has been emphasised. It has been suggested that the effect of this paragraph is to compel the construction of subsections (1) and (2) in the sense that upon a transfer thereunder the third party (or the person to whom the debt is owing) does not lose his rights against the assured. If those subsections are interpreted in that sense, it may be that this paragraph is unnecessary. In any case, it is effective to provide that where upon a transfer under subsections (1) or (2) the third party elects to proceed against the insurance company, he is not by such election debarred from recovering the balance from the assured.

The cause of action which the third party has against the assured is a cause of action for damages for tort, for breach of contract, or for breach of statutory duty. The cause of action which the third party would have against an insurance company which refused to satisfy the rights transferred to him by the Third Parties Act would presumably be a special action on the case (c) and therefore the rule would not apply that the law does not allow two bites at a cherry.

5. Subsection (5)

"(5) For the purposes of this Act, the expression 'liabilities to third parties,' in relation to a person insured under any contract of insurance, shall not include any liability of that person in the capacity of insurer under some other contract of insurance."

This subsection needs no comment. It says that the Act shall not apply to contracts of re-insurance (d). The reader need only be reminded of

(f) For the exceptions, see *post*, chapter X, and *cf.* newspaper libel policies which provide indemnity for costs.

(a) This is, of course, subject to the terms of the assured's agreement with the insurers under which they undertake the conduct of his action. The solicitor instructed by the insurers, although on the record as representing and owing a duty to the assured, is not as a rule entitled, subject to the conditions of his retainer, to look to the assured for his costs and disbursements. The solicitor in these circumstances may be in a difficult and sometimes an impossible position, when his duties to his own client and to the insurers become conflicting. As to this, see further, *post*, chapters VIII and X, and the cases there cited.

(b) As to when see *post*, chapter X, "Costs."

(c) *Atkinson v Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. D. 441; *Groves v. Wimborne* (Lord), [1898] 2 Q. B. 402; *Lochgelly Iron and Coal Co., Ltd. v. M'Mullan*, [1934] A. C. 1.

(d) Re-insurance is where one insurer insures with another against the risk of loss under policies issued by the first.

the meaning of the word "insurance" and of the distinction between insurance and guarantee (e).

6. Subsection (6)

" (6) This Act shall not apply—

" (a) where a company is wound up voluntarily merely for the purposes
" of reconstruction or of amalgamation with another company;
" or

" (b) to any case to which subsections (1) and (2) of section seven of
" the Workmen's Compensation Act, 1925 (15 & 16 Geo. 5,
" c. 84), applies."

This subsection also needs no comment, save that as the Workmen's Compensation Act, 1925, has been repealed *in toto* by the National Insurance (Industrial Injuries) Act, 1946 (f), subsection (b) will no longer have any application after the latter Act has come into force (ff).

II.—SECTION 2

1. Subsection (1)

Duty to give necessary information to third parties

" 2.—(1) In the event of any person becoming bankrupt or making a
" composition or arrangement with his creditors, or in the event of an order
" being made under section one hundred and thirty of the Bankruptcy Act,
" 1914, in respect of the estate of any person, or in the event of a winding-up
" order being made, or a resolution for a voluntary winding-up being passed,
" with respect to any company or of a receiver or manager of the company's
" business or undertaking being duly appointed or of possession being taken
" by or on behalf of the holders of any debentures secured by a floating
" charge of any property comprised in or subject to the charge it shall be
" the duty of the bankrupt, debtor, personal representative of the deceased
" debtor or company, and, as the case may be, of the trustee in bankruptcy,
" trustee, liquidator, receiver, or manager, or person in possession of the
" property to give at the request of any person claiming that the bankrupt,
" debtor, deceased debtor, or company is under a liability to him such
" information as may reasonably be required by him for the purpose of
" ascertaining whether any rights have been transferred to and vested in
" him by this Act and for the purpose of enforcing such rights, if any, and
" any contract of insurance, in so far as it purports, whether directly or
" indirectly, to avoid the contract or to alter the rights of the parties there-
" under upon the giving of any such information in the events aforesaid or
" otherwise to prohibit or prevent the giving thereof in the said events
" shall be of no effect."

This subsection need not be examined in detail. It should be contrasted with section 13 of the Road Traffic Act, 1934 (g). The events which bring it into operation are precisely those specified in subsections (1) and (2) of section 1 of the Act as operating to transfer the rights of the insured to a third party to whom he has incurred liability. But there is this difference between section 2 and section 1. Section 1 only operates if the insurer has in fact and in law incurred liability to the third party.

Section 2 apparently operates in the events specified, where the claimant merely claims that the assured is under some liability to him, although that liability may not exist in fact or in law. Moreover, the claim put forward

(e) See chapter 11, *ante*, p. 71.

(f) 39 Halsbury's Statutes 322.

(ff) On July 5, 1948.

(g) Which imposes upon an assured the duty of giving a claiming third party full information as to his insurance (see *post*, chapter V, pp. 329 *et seq.*).

by the claimant need not apparently be a claim in respect of which the bankrupt (or, etc.) might be insured. But it is submitted that no proceedings under this section would succeed unless the claim put forward was one in respect of which the bankrupt (or, etc.) might reasonably be supposed to be insured. The duty which the subsection imposes is two-fold :

1. *To give such information as is reasonably required by the claimant for the purpose of ascertaining whether any rights have been transferred to and vested in him under subsections (1) or (2) of section 1 of the Act.*

2. *To give all such information as may reasonably be required by the claimant for enforcing the rights, if any, which he has acquired under subsections (1) or (2) of section 1.*

The following important point should be observed. Although no rights can be transferred to the claimant under subsections (1) or (2) of section 1 of the Act, unless and until liability to him has been incurred by the assured, and although no such rights can be enforced by the third party unless he can prove that such liability exists, it is apprehended that the subsection now under consideration does not, as it appears to do, impose a duty upon the bankrupt insured (or, etc.) to furnish any information to the claimant required by him for the purpose of enforcing or proving *this liability*.

Although the duty to give information is expressed, in subsection (3) of this section, to *include* the matters therein specified, it is submitted that the enumeration of those matters is not exhaustive. It would also, it is apprehended, include the following :

(1) Information as to whether the assured had obtained his policy by a material non-disclosure or by a false representation, and, if so, full particulars thereof.

(2) Information as to whether the insurer had committed any breach of the terms of his policy, and, if so, full particulars of such breach.

(3) Generally, all such information as would reasonably be required by a solicitor from his client for the purpose of advising that client as to his position in law.

It is submitted that, upon the happening of the events specified in subsections (1) or (2) of section 1 the bankrupt (or, etc.) assured, or his trustee in bankruptcy (or, etc.) as the case may be, becomes a trustee for the claimant of all relevant information in his possession.

It only remains to be noticed that the subsection contains the same provision as that in subsection (3) of section 1 to prevent its object being defeated by the terms of any contract of insurance. This provision is no doubt primarily aimed at the type of condition which used to be found in a motor insurance policy to the effect that the company shall not be liable in respect of any third party claim if the assured shall have made any admission to the third party or disclosed the fact that he is insured.

2. Subsection (2)

" (2) If the information given to any person in pursuance of subsection (1) of this section discloses reasonable ground for supposing that there have " or may have been transferred to him under this Act rights against any " particular insurer, that insurer shall be subject to the same duty as is " imposed by the said subsection on the persons therein mentioned."

The duties which, it is submitted, would be held to be imposed by subsection (1) have been adumbrated. It is submitted that subsection (2) does not impose an obligation upon the company to disclose any information at all which the claimant (i.e. the third party or the person to whom the debt is owing) might require for the purpose of assisting him to establish or prove

the liability to him of the assured. It is submitted that such a duty, which would impose an obligation unknown to the Common Law, could not be created except by words far more plain than those of this subsection.

One further remark upon this subsection is necessary: it is upon the phrase "*reasonable ground for supposing*." This, it is conceived, must mean reasonable in relation not merely to the information supplied, but to the whole circumstances of the case. The extent and nature of the duty which this subsection may impose upon the company is more conveniently dealt with when considering the general effect of the whole section (h).

3. Subsection (3)

"(3) The duty to give information imposed by this section shall include
"a duty to allow all contracts of insurance, receipts for premiums, and other
"relevant documents in the possession or power of the person on whom the
"duty is so imposed to be inspected and copies thereof to be taken."

It has already been suggested that the enumeration in this subsection of the duties imposed by the previous subsections is merely descriptive and not exhaustive (i). It merely makes the previous subsections more completely effective.

1. "*Relevant documents*."

"Every document relates to the matters in question . . . which it is
"reasonable to suppose contains information which *may*, not *must*, either
"directly or indirectly enable the party requiring it either to advance his
"own case or to damage the case of his adversary" (j).

2. "*Possession or power*."—It is doubtful whether the phrase has here the limited meaning with which it is applied to an order for production of documents in a civil action in the High Court under Order 31, Rule 14 (k). In that sense it might not include any document such as a proposal form filled in by the assured when applying for insurance with another company and borrowed by the company from whom its inspection is claimed for the purpose of proving, *e.g.*, the fraud of the insured. It is submitted, however, that the phrase here bears the wider sense in which it is used in connection with an application for discovery of documents under Order 31, Rule 12. In this sense possession or power includes possession or power of the person jointly with another, or possession or power of the person's agent (l).

4. **General effect of section 2.**—The general effect which, it is suggested, the section operates to produce is best explained by the following illustration:

Thus: A's car is badly damaged in a collision with a car driven by B; B subsequently becomes bankrupt; A can compel B to supply such information as A reasonably requires for either (or both) the following purposes:

(i) To ascertain whether B was covered by any policy of insurance in respect to his possible liability to A arising out of the accident.

(ii) To ascertain with whom that policy was made and what the terms of it were.

(h) See *infra*.

(i) See *R. v. Kershaw* (1856), 6 E. & B. 909; *Dilworth v. Stamps Comr.*, [1899] A. C. 99, at pp. 105, 106; *R. v. Hermann* (1879), 4 Q. B. D. 284; *Ex parte Ferguson* (1871), L. R. 6 Q. B. 280; *The Gauntlet* (1871), L. R. 3 A. & E. 381; on appeal, *sub nom. Dyke v. Elliott*, *The Gauntlet* (1872), L. R. 4 P. C. 184; *Nutter v. Accrington Local Board* (1878), 4 Q. B. D. 375; *London School Board v. Jackson* (1881), 7 Q. B. D. 502.

(j) *Per BRETT, L.J.*, in *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 Q. B. D. 55, at pp. 62, 63.

(k) See Annual Practice Notes to Order XXXI.

(l) *Norton & Co. v. Lamport, Holt & Co.* (1886), 2 T. L. R. 630; *Swanston v. Lishman* (1881), 45 L. T. 360; *Price v. Price* (1879), 48 L. J. Ch. 215; *Jones v. Andrews* (1888), 58 L. T. 601.

When A has obtained the above information from B, then, if the information was positive, it is submitted, A could compel either B or B's insurance company or both of them to furnish him with all information reasonably required by him for the following purposes :

(iii) To ascertain whether the company is bound by the policy to indemnify B in respect of any liability incurred by him to A, and if so to what extent (m) ; if not, exactly why not ;

(iv) To ascertain whether there are any, and if so exactly what, grounds upon which the company might (rightly or wrongly) repudiate liability.

It may be, of course, that A would, in certain circumstances, be entitled to the information under all four heads in response to his first request therefor.

This subsection puts a third party in a remarkably advantageous position. It is a position believed to be unique in English Law (n). In it a person who claims that another who has become bankrupt (or, etc.) is under any liability to him can, before commencing any action against anybody in respect of the liability, compel that person (or his trustee in bankruptcy or liquidator) to tell him whether an insurance company (o) is not also liable to satisfy that liability ; then if he is told that an insurance company is or may be also liable, he can compel that company (and still without taking proceedings against anybody) to supply him with all information reasonably necessary to enable him to decide whether or not he shall take proceedings against them, against their assured, or against both. In other words, the section gives a third party the advantage, before committing himself to a costly action, of finding out precisely what case he may have to meet—of considering not merely his own case, but also the case of his opponent. This position is not so startling in the case of the claimant's rights against the bankrupt (or, etc.) or his trustee in bankruptcy, since the right which the claimant acquires under the Act would be a barren right were not the means of enforcing it transferred to him also. It would be useless to give the third party the assured's arrow without also giving him the bow with which alone it can effectively be shot : but when this has been done there seems no reason why the third party should also be given the opportunity of going behind the insurance company's shield, to enable him to test the strength of that shield and find out whether the insurance company has any weapon concealed behind it. This clearly gives to the third party rights which the assured never had. There would perhaps be a sufficient explanation for this if the operation of section 1 of the Act destroyed the third party's rights against the assured in respect of the liability to him, or even if the additional remedy given by the section were alternative and not

(m) *I.e.* to what amount of money.

(n) In passing it may be remarked that there is a peculiar rule of discovery in actions upon marine insurance policies which entitles the party seeking it not only to a much fuller discovery than that usually ordered, but also to obtain discovery from persons not parties to the actions. See *West of England Bank v. Canton Insurance Co.* (1877), 2 Ex. D. 472 ; *China S.S. Co. v. Commercial Assurance Co.* (1881), 8 Q. B. D. 142 ; *Rayner v. Rulson* (1865), 6 B. & S. 888 ; *Goldschmidt v. Marryat* (1809), 1 Camp. 559 ; *China Traders' Insurance Co. v. Royal Exchange Assurance Corporation*, [1898] 2 Q. B. 187 ; *Boulton v. Houlder Brothers & Co.*, [1904] 1 K. B. 784 ; *London and Provincial Marine and General Insurance Co., Ltd. v. Chambers* (1900), 5 Com. Cas. 241. But this rule has never been allowed to be extended to actions on other classes of insurance policy. See *China Traders Insurance Co. v. Royal Exchange Assurance Corporation*, [1898] 2 Q. B. 187, at p. 189 ; *Daily Express (1908), Ltd. v. Mountain* (1916), 32 T. L. R. 592.

(o) Or underwriters.

cumulative (p). As has been suggested above, section 1 ought not to be interpreted in this sense. It is apprehended, therefore, that the rights given by subsection (2) against the insurers will be held to be less extensive than those given by subsection (1) against the assured (or his trustee, etc.). Both subsections are governed by the words "may reasonably be required," and it is submitted that what may be reasonably required by a claimant from the insurers (or, etc.) is not necessarily the same as what may reasonably be required from the insurance company (q).

Thus whilst it is submitted that the assured (or his trustee, or, etc.), being in the position of trustee for the third party of the relevant information, could be compelled under subsection (1) to give such information as would be required by a solicitor from his own client for the purpose of advising that client, it is suggested that the company, being a potentially hostile party, could be required to give only such information as can be obtained by means of discovery in a high court action.

In other words, so far as the insurers are concerned, the section merely gives the third party the power to obtain before commencing an action the information which he could, apart from the section, obtain only during an action against the company. The action referred to is, of course, an action on the policy and on the rights acquired under section 1.

If this be so, and the principles relating to discovery be applicable, it is submitted that not only would "reasonably require" be tested by the positive rules relating to discovery in an action, but also by the negative rules which give protection to the party against whom discovery is sought. This, of course, is subject to the qualification that the method of enforcement would be different.

The positive rules of discovery in a High Court action may be briefly stated as follows :

1. Discovery and all the rules thereof apply equally to :

- (i) Discovery of facts ;
- (ii) Discovery of documents.

2. The general rule is that discovery can be obtained by one party to an action from his opponent therein for the purposes of obtaining any information which will disclose " anything which can fairly be said to be material to enable (the party seeking discovery) either to maintain his own case or to destroy the case of his adversary " (r).

3. The general rule is subject to the limitation that a party may not be compelled to disclose information in any of the following cases :

- (i) When to give it might tend to criminate the party from whom it is sought (s) ;
- (ii) When the information sought relates only to a question of law, or is otherwise irrelevant ;

(p) See *ante*, p. 140.

(q) It should also be noticed that the Road Traffic Act, 1934, which by section 13 compels an assured to give particulars of his insurance to a claiming third party, imposes no corresponding obligation upon repudiating insurers to disclose the grounds of repudiation.

(r) Per Lord Esher, M.R., in *Hennessy v. Wright* (No. 2) (1888), 24 Q. B. D. 445, n., at p. 447. See also *Hooton v. Dalby*, [1907] 2 K. B. 18, at p. 21 ; *Griebart v. Morris*, [1920] 1 K. B. 650, at 664 ; *Att.-Gen. v. Gaskill*, (1882), 20 Ch. D. 519, 528, and see the Notes in the Annual Practice to Order XXXI and the cases therein cited.

(s) *Lamb v. Munster* (1882), 10 Q. B. D. 110 ; *Allhusen v. Labouchere* (1878), 3 Q. B. D. 654 ; *Fisher v. Owen* (1878), 8 Ch. D. 645.

- (iii) When the request for information is of an oppressive or "fishing" nature (*t*);
- (iv) When the information sought relates to documents or other communications passing between the party and his professional legal advisers or other documents prepared by the party or his agents for the purposes of pending or contemplated litigation (*u*);
- (v) When the information sought solely relates to the names of witnesses who will be called or the evidence to be tendered at the trial and is otherwise immaterial (*v*).

4. The general rule is subject to the further limitation that, whilst discovery will in general be granted upon the principles and subject to the limitations stated above, discovery of facts is a matter not of right but of discretion (*w*), and the above rules and limitations are therefore applied in each case according to the discretion of the Court to whom application for discovery is made.

It should be noted, however, that there must be this distinction between application for discovery in an action and a claim for information under subsection (2) of section 2. As has been stated, discovery of facts is a matter of discretion; but the subsection apparently confers a right. The distinction is, it is apprehended, only technical, since the subsection is governed by the word "reasonable." What is reasonable is a question of fact in each case, to be decided finally by the Court which adjudicates upon that case (*a*).

For the law and practice relating to discovery, the reader is referred to the standard practice books.

Two final points may be noticed.

1. If, under subsection (1), the bankrupt assured (or, etc.) is trustee for the third party of all relevant documents and information in his possession, the academic question arises whether he is not under a correlative obligation to preserve such documents and could be made to pay damages to a third party whose claim against the company had been defeated by the lack of a relevant document which he had destroyed (*b*).

2. There is nothing in the Act to suggest that performance of the duties under subsections (1) and (2) and those under subsection (3) is conditional upon the proffer of an adequate indemnity against the costs or expenses that compliance with them might necessarily entail (*c*).

(*t*) *PER COZENS HARDY, M.R.*, in *Beadon v. Capital Syndicate, Ltd.* (1912), *Times*, 17th February, cited *Frazer on Label*, 6th Edn., p. 419.

(*u*) *Procter v. Smiles* (1886), 55 L. J. Q. B. 517; *Re Strachan*, [1895] 1 Ch. 430; *Woolley v. North London Rail. Co.* (1869), L. R. 4 C. P. 602.

(*v*) *Bombou v. Lou* (1880), 16 Ch. D. 93; *Murriott v. Chamberlain* (1886), 17 Q. B. D. 154; *Ridgway v. Smith & Son* (1890), 6 T. L. R. 275; *Humphries & Co. v. Taylor Drug Co.* (1888), 39 Ch. D. 603.

(*w*) *Heaton v. Goldney*, [1910] 1 K. B. 754, at p. 758.

(*a*) See *Postlethwaite v. Freeland* (1880), 5 App. Cas. 500; *Hick v. Raymond and Reid*, [1893] A. C. 22; *Davis v. Capper* (1829), 4 C. & P. 134; *Burton v. Griffiths* (1843), 11 M. & W. 817.

(*b*) The question is academic in so far as it would only arise in cases where the bankrupt or company in liquidation subsequently recovered prosperity—the damages would be the costs and expenses wasted.

(*c*) Cf. the obligations imposed by Statute (the Companies Act, 1948), upon companies to furnish information, documents, etc., to members and others under which, in certain cases, the company is expressly entitled to make a charge for the information, etc., supplied.

III.—SECTION 3

Settlement between insurers and insured persons.

" 3. Where the insured has become bankrupt or where, in the case of the insured being a company, a winding-up order has been made or a resolution for a voluntary winding-up has been passed, with respect to the company, no agreement made between the insurer and the insured after liability has been incurred to a third party and after the commencement of the bankruptcy or winding up, as the case may be, nor any waiver, assignment, or other disposition made by, or payment made to the insured after the commencement aforesaid shall be effective to defeat or affect the rights transferred to the third party under this Act, but those rights shall be the same as if no such agreement, waiver, assignment, disposition or payment had been made."

1. "*Where the insured has become bankrupt or where, in the case of the insured being a company, a winding-up order has been made or a resolution for a voluntary winding-up has been passed.*" . . .—It should be noted that this section does not apply, as does section 1, subsection (1), to the case of the insured making a composition or arrangement with his creditors or in the case of a company suffering the appointment of or possession being taken by a receiver on behalf of debenture holders.

2. "*After the commencement of the bankruptcy or winding-up.*"—This means after an available act of bankruptcy has been committed, or, in the case of winding-up, after the passing of the resolution or the presentation of a petition, as the case may be.

3. "*No agreement made between the insurer and the insured after liability has been incurred, nor any waiver, assignment, or other disposition made by, or payment made to the insured after the commencement aforesaid shall be effective to defeat or affect the rights transferred to the third party under this Act, but those rights shall be the same as if no such agreement, waiver, assignment, disposition, or payment had been made.*"—These words seem to make it clear that, upon the transfer to the third party of the assured's rights under section 1, subsection (1) of this Act, the doctrine of relation back does not apply so as to make the third party's rights date back to the commencement of the bankruptcy (or, etc.).

This, it is submitted, follows because if the doctrine of relation back did apply to the third party's rights (and there is nothing in this Act to suggest that it should (d)), there would be no question of their being defeated or in any way affected by any arrangement between the assured and the company. The doctrines of relation back and of protected transactions are purely special statutory rules created by the Bankruptcy Act, 1914 (e), applicable solely to the rights of the trustee in bankruptcy (f), and would have no bearing upon the position and rights of the third party. Any such release or agreement as is contemplated by section 3 would, therefore, be wholly void as being a transaction behind the back of the third party and a dealing by the assured with rights (*i.e.* the rights under his policy, which he no longer had).

It should be noted that the section is only effective to nullify agreements (etc.) made both after the liability has been incurred and after the first available act of bankruptcy, or after the resolution or petition for winding-up as the case may be. Thus it is still possible for a company,

(d) Save that "becoming bankrupt" (or, etc.), in section 1, subsection (1) begs the question of the date thereof (see *ante*, p. 124).

(e) 1 Halsbury's Statutes 600.

(f) And the creditors of the bankrupt and persons dealing with him.

by settling with the assured before he has committed an available act of bankruptcy (or, etc.), to defeat the rights which the third party acquires. For example, if the third party had obtained judgment for £1,000 against the assured in respect of the liability, the company could, by agreement with the assured, settle with him for £500, and, provided the settlement was made before a bankruptcy notice had been presented by the third party in respect of the judgment (*g*), or before a sale under an execution in respect thereof (*g*) had been effected, the third party would get nothing under the Act. This result could generally be prevented by the immediate presentation of a bankruptcy notice upon judgment being obtained (*g*). But there is no way in which such a settlement could be prevented if made before a petition on the judgment was presented by the third party against the assured (*h*) (and, of course, before any other available act of bankruptcy had been committed), and if a company, anticipating an unfavourable result in an action against its assured, managed by some means to persuade him to settle his claim under the policy, such a settlement would still be effective to defeat the rights of the third party. This, of course, cannot be done so as to defeat claims to which the Road Traffic Act, 1934, applies (*i*).

IV.—SECTION 4

Application of the Third Parties Act to Scotland

- " In the application of this Act to Scotland—
 "(a) the expression ' company ' includes a limited partnership.
 "(b) any reference to an order under section one hundred and thirty of the Bankruptcy Act, 1914, for the administration of the estate of a deceased debtor according to the law of bankruptcy, shall be deemed to include a reference to an award of sequestration of the estate of a deceased debtor, and a reference to an appointment of a judicial factor, under section one hundred and sixty-three of the Bankruptcy (Scotland) Act, 1913, on the insolvent estate of a deceased person."

PART 3.—RIGHTS OF ACTION AND PROCEDURE UNDER THE ACT

It has already been suggested that the rights given by the Third Parties Act imply cumulative and not alternative remedies (*j*). It remains to be considered how far the remedies which these rights give may be exercised concurrently. It is submitted that in any case where a person has become bankrupt (or, etc.), and either before or after that event, commits against a third party some wrong in respect of the liability for which he is insured, such third party has in law all or some of the following remedies :

1. A right of action against the assured alone.
2. A right of action against the insurance company or underwriters (subject to the effect of any arbitration clause in the policy) (*k*).
3. A right of action against both the assured and the company at the same time (subject to the effect of any arbitration clause in the policy) (*k*).
4. The right to take advantage of an arbitration clause in the policy.

The above remedies are considered in turn.

(*g*) Bankruptcy Act, 1914, s. 1.

(*h*) Or before a sale under execution.

(*i*) *Post*, chapter V.

(*j*) *Ante*, p. 134.

(*k*) As to the effect of arbitration clause, see *post*, p. 154. There is some small doubt as to whether the third party is bound by the arbitration clause to the like extent as the assured. See *post*, chapter VIII, " Arbitration Clause."

1. Action against assured alone.—As to the first remedy, no explanation is necessary and it can only be repeated that this remedy must exist unless the effect of the Third Parties Act is, in the circumstances in which it comes into operation, to extinguish the rights of the third party against the assured (*l*).

2. Action against company only.—As to the second remedy suggested more doubt must be expressed. The ability to pursue it in any given case would depend upon the particular circumstances of that case. In the first place the question would arise as to whether the company had repudiated the policy (*m*). If they had not repudiated their liability on the policy to pay whatever sum might be due to the assured (*i.e.* admitting that the policy was binding and covered whatever liability had been incurred to the third party, but not admitting that any such liability had been incurred by the assured, or not admitting the amount thereof), it is at least doubtful whether there would be any cause of action against them. This would depend upon the particular terms of the policy. In the second place the effect of the arbitration clause in the policy would have to be considered. If this was in the *Scott v. Avery* form, making arbitration a condition precedent to the company's liability on the policy, it is extremely doubtful whether any action by the third party would lie even where the company had not repudiated the policy (*n*). Where the company had repudiated liability on the policy (in the sense defined above) the question (which is discussed elsewhere) (*o*) would arise as to whether the repudiation avoided the arbitration clause or whether, in spite of it, that clause remained effective. Again, if the policy provides that the company will indemnify the assured in respect of liability incurred by him, the remedy would be available; but if the policy provided that judgment against the assured in respect of any liability insured against was a condition precedent to any obligation on the part of the company to implement the indemnity, it would not.

In view of the apparent conflict between the decisions (*p*) of the Court of Appeal as to the construction and effect of the ordinary indemnity clause in a motor insurance policy, and in view of the other difficulties suggested above, in most cases third parties desiring to obtain immediate enforcement of their rights against insurance companies under the Act will be advised to consider very carefully whether they can take any action against the insurance company without either first obtaining judgment against the assured or joining him as defendant in the action against the company. Since the Act was passed, no case has in fact been brought against the company alone.

3. Action against company and against assured joined.—The third remedy would be by bringing an action against the assured and against the company, claiming against the assured damages for the liability incurred by him and claiming against the company the benefits of the indemnity which the policy provides. The first danger in this course would appear to be that if it were held that the company's obligation under the policy did not arise until after judgment had been obtained against the assured (*q*),

(*l*) See *ante*, p. 134.

(*m*) As to repudiation and the different classes and effects thereof, see *post*, p. 664.

(*n*) If the dicta of GREER, L. J., in *Israelson v. Dawson*, [1933] 1 K. B. 301 are to be taken as of general application it would not. See *post*, p. 155.

(*o*) *Post*, chapters VIII and IX.

(*p*) See *ante*, chapter II, p. 71, and see *Israelson v. Dawson* (*supra*), *per* GREER, L. J.

(*q*) Cf. last section and *Monk v. Warbey*, [1935] 1 K. B. 75.

it would presumably follow that the action against the company was premature. This difficulty, however, might be avoided by claiming a declaration against the company. In addition some, if not most, of the other obstacles in the way of taking action against the insurers alone might be present, as, for instance, an arbitration clause.

The right to join two defendants in the same action is governed by Order 16, Rule 4, which states :

- “ All persons may be joined as defendants against whom the right to
 “ any relief is alleged to exist whether jointly, severally or in the alternative.
 “ Any judgment may be given against such one or more of the defendants
 “ as may be found to be liable, according to their respective liabilities,
 “ without any amendment.”

The rule is subject to the important qualifications that where the cause of action against each defendant is not the same, the relief claimed against them must arise out of circumstances involving common questions of law and of fact (r), and that it is discretionary in the Court to strike out any action which has been joined with another in circumstances where a joint trial would be embarrassing or inconvenient (s). The question arises as to how these qualifications would affect an action in which the third party had joined the assured and the insurers. Clearly the causes of action against them are not the same. The assured is sued in respect of his liability in tort (or otherwise) to the third party, whereas the insurers are sued in respect of their liability to indemnify the assured under his policy. But the liability of the insurers to the third party is not established until the liability to him of the assured is proved. Thus in a separate action against the insurers they would in some cases be able to raise the defence that there was no cause of action against them until the condition precedent to the liability had been proved, and in all cases they could not be made to pay the third party (unless they admitted both the assured's liability to him and the amount thereof) until the third party had established that he was entitled to a certain sum by way of damages against the assured.

There would thus generally be a common question of law and fact.

It is submitted that the position would be held to be governed by the rules relating to third party procedure (t). By means of this procedure a defendant who claims that if he is liable some other person must indemnify him may in certain circumstances bring in such other person as a third party to the action. Thus an insured person who is sued in respect of liability to another may, in certain circumstances, bring in as a third party the insurance company which has agreed to indemnify him against such liability. Third party procedure is, like the rule last referred to, governed by the discretion of the Court (u).

The limited application of the old rule that, in an action against a motorist, a jury should not be informed that the defendant is insured should be borne in mind in this form of action (v).

(r) See *Bailey v. Curzon of Kedleston (Marchioness)*, [1932] 2 K. B. 392; *Horwood v. Statesman Publishing Co.* (1929), 98 L. J. K. B. 450; *Payne v. British Time Recorder Co., Ltd. and Curtis Ltd.*, [1921] 2 K. B. 1.

(s) Order 16, rules 11, 12, and see notes thereto in the current Annual Practice.

(t) These rules are contained in Order 16A (R.S.C.), which see, and see notes thereto in the current Annual Practice.

(u) See *Swansea Shipping Co. v. Duncan* (1876), 1 Q. B. D. 644; *Carshore v. North Eastern Rail. Co.* (1885), 29 Ch. D. 344, and see notes to the rule in the current Yearly Practice.

(v) As to this rule, which has little application to the class of case which will be brought under the Third Parties Act of 1930, see chapter X, *post*, p. 749.

The question of third party procedure by an assured against his insurance company will be considered again in another chapter (*a*). But it is submitted that whatever may be the present rule in regard to it, and whether the principles of that rule would or would not be held to govern the question of joining assured and insurers as defendants in an action by a third party claiming rights under the Third Parties Act, there are other considerations which might well be held to prevent any such joinder. Only the chief of these need be mentioned. It is that although there is the common question of the liability of the assured to the third party, the other questions between the third party and the insurance company would be of an entirely different nature. They would be complicated questions of insurance law and questions of fact having no relation whatever to the issues between the third party and the assured. In these circumstances it is suggested that the trial of the two actions together would be both embarrassing and inconvenient. In the result, therefore, it must be concluded that a third party, although he might in certain cases be entitled in law to take immediate action against the insurance company, would not in practice and as a rule be able to do so unless he had first established and quantified the assured's liability to him. This he may do by obtaining judgment against the assured in respect of such liability or by a valid agreement made with him or his agent (*b*).

Although if the above conclusion be correct it would appear that a duplication of proceedings is necessary, it must be remembered that by the extraordinary rights which section 2 of the Act confers upon him (in the events therein specified), a person injured in a motor accident has now considerably more opportunity than he had formerly of deciding whether it is worth his while to take proceedings against a defendant who has become bankrupt (or, etc.). On the other hand, such a plaintiff may not know until after he has committed himself to proceedings against an insured defendant (or indeed until long after he has incurred all the expenses thereof) whether such defendant's insurance company will dispute liability on the policy; and when he does learn that the company dispute liability he may be obliged to throw good money after bad in an attempt to decide that dispute in his favour.

These defects have, to some extent, been cured by the Road Traffic Act, 1934, in the limited class of case to which that Act applies.

4. Action against the company after judgment against or settlement with the assured.—It now becomes necessary to consider the position where the third party has first recovered judgment against the assured and then proceeds to enforce his rights against the insurance company. In such an action the issues would be as follows (*c*):

1. Is the assured liable to the third party, and if so, to what amount?
2. Are the company liable under the policy to the third party, and if so, to what amount?

(*a*) *Post*, chapter IX, p. 681. On the other hand, quite apart from this special rule, third party procedure would in most cases not apply where the policy contained a clause making arbitration a condition precedent to a right of action thereon. So held in *Jones v. Birch Brothers, Ltd.*, [1933] 2 K. B. 597, reviewing previous authorities.

(*b*) As to agreements settling third party claims, see *post*, chapter X, "Settlement."

(*c*) As to the burden of proof, this would rest on the third party as far as concerns the existence of the policy, the insolvency, and the judgment or settlement—and on the insurers as to the validity of the policy, of the judgment or settlement, amount of liability, etc.

Of these in turn :

1. The question here is, in most cases (d), not whether the assured was originally liable to the third party, or the amount of such liability, but whether the assured is presently liable to the third party and the amount of such present liability (d). The existence and amount of the present liability is determined by the judgment against the assured—and it would not in general be open to the company to dispute the correctness or validity of that decision. This, it is submitted, is so because there would be no question here of *res inter alios*—the third party would not allege that the company were bound by the judgment against the assured, but that the assured was bound by that judgment. This the company could, with one exception, only dispute in cases where the assured himself could dispute it. It should, however, be observed that in *Freshwater's Case* (e) it was thought desirable to plead on behalf of the plaintiff third party that the company had defended the action brought by him against the assured (f). Nevertheless, it is submitted that in all cases save three the company could not dispute that the assured's liability to the third party was conclusively determined by the judgment obtained in the action against him.

The exceptions mentioned are :

- (a) when the judgment was obtained by fraud, and where the judgment, having been obtained in default, could be set aside by the assured himself (g) ;
- (b) where the judgment was obtained by collusion between the assured and the third party (h) ;
- (c) where the assured in allowing judgment to go by default acted unreasonably or in breach of his policy (i).

In the first two of these cases the company would not be precluded from attacking the validity of the judgment by the fact that they had conducted or controlled the conduct of the defence in the action against the assured. The fact might, however, make it much more difficult for the company to establish the facts upon which the judgment could be regarded as invalid or set aside.

2. As to the second issue, it must be clearly borne in mind that, apart from the question whether the company are liable on the policy at all (j), it does not necessarily follow that the fact and the amount of the assured's liability determine the liability of the company to the third party or the amount thereof. This can perhaps best be illustrated by an imaginary example :

(d) Under the usual motor policy which insures him against all sums which he shall become "legally liable to pay," see *post*, chapters VIII and IX. See fully, *post*, chapter IX, "Repudiation."

(e) *Supra*. See R.S.C., O. 27, r. 15.

(f) See also *Jenkins v. Deane* (1933), 103 L. J. K. B. 250, an action by an assignee third party in which the insurers agreed that the judgment and evidence in the action against the assured should stand.

(g) It seems doubtful how far the company could avail themselves of any right of the assured to obtain a new trial. If they had taken no part in the action they could not themselves apply for a new trial : but it would be the assured's duty on good grounds to do so. On the other hand, the only way of attacking a judgment obtained by fraud being by action against the successful party (see [1930] A. C. 298), the company would be in some difficulty. But they could clearly dispute the judgment on this ground.

(h) As to collusion, see further, *post*, chapter X.

(i) They will not be liable at all if the policy is voidable, etc. See p. 131, *ante*.

(j) The company will not be liable at all if the policy is voidable, etc. See p. 131, *ante*.

The third party brings an action against the assured : the company repudiates liability on the policy and refuse to take any part in the defence of the action : the assured thereupon allows judgment to go against him by default.

In an action by the third party against the company it is established that the repudiation by the company was not justified and that the policy remained binding on them.

In such circumstances, it is submitted, the company's liability under the policy would not necessarily be the amount of the default judgment and the costs thereof.

The rights and duties of an assured in cases where the company have repudiated the policy or their liability thereunder, and the duty of the assured to minimise the loss are explained more generally and more fully when considering the assured's rights and obligations under a motor policy in a later chapter (*k*). The reader is referred to that chapter, with the reminder that the position and duties of the assured there stated would affect a third party claiming under this Act as much as the assured himself (*l*). And this would apply in cases where the assured's misconduct or breach of duty occurs after his rights under his policy are vested in the third party (*m*).

In cases where the company do not repudiate liability but allow the assured to look after his own defence, the position would seem to be the same.

The position must now be considered where the third party has obtained judgment against the assured, but has by agreement with him settled the existence and extent of his liability. In this case the two issues (*n*) would be precisely the same. As to the first, the company could not dispute the validity of the agreement unless it was either :

- (a) Obtained by fraud, under influence or by some other means which would entitle the *assured* to repudiate it (*o*) ;
- (b) A collusive agreement (*p*) ; or
- (c) Unreasonable or in breach of the policy (*q*).

And if the agreement could not be attacked in either of such ways it would in most cases conclusively determine the liability of the assured to the third party (*k*).

In this case the determination of the second issue would, it is submitted, be governed by the same considerations as those applicable in regard to a judgment obtained by default. In this connection (*r*), although it will be dealt with more fully later (*s*), section 38 of the Road Traffic Act, 1930 (*t*), must be referred to. The effect of that section in the circumstances now being considered is that allowing judgment to go by default or making an agreement compromising a claim by a third party in respect of death or

(*k*) Chapter IX, "Repudiation."

(*l*) Since the third party merely stands in the shoes of the assured and is subject to all the rights and remedies available against the assured, who by his unreasonable or wrongful conduct might deprive both himself and the assured of any right to indemnity.

(*m*) See *ante*, pp. 131 *et seq.*

(*n*) *I.e.* (1) existence and extent of liability of assured to third party; (2) existence and extent of liability of insurers to third party. See *ante*, p. 152.

(*o*) See *ante*, chapter I, p. 4.

(*p*) As to such a collusive agreement, see *post*, chapter X.

(*q*) See *post*, chapter X, 'Repudiation.'

(*r*) It must always be remembered that as a rule there will never be proceedings under this Act by a third party to whose claim s. 38 applies.

(*s*) *Post*, chapter IV, p. 219.

(*t*) 23 Halsbury's Statutes 607.

bodily injuries would not release the company, in so far as it constituted a breach of an express clause in the policy, from their liability in respect of such claim under the policy.

It should be noted that an agreement such as that contemplated might be made by the assured either before an action against him had been commenced by the third party or after the commencement of such action and in compromise thereof, and either before or after the event (such as bankruptcy) which produces the transfer of the assured's rights to the third party. The same considerations would, it is thought, be relevant to such an agreement whenever made (u).

Lastly, there is the position where the judgment obtained by the third party was obtained by consent.

The same remarks apply to such a case as those referring to judgment obtained by default (a) or to an agreement (b) between the third party and the assured in settlement of the third party's claim.

5. Arbitration against the company.—It seems clear from the decision in *Freshwater v. Western Australian Assurance Co., Ltd.* (c), that not only is a third party who has acquired rights under the Act against an insurance company able to enforce those rights by arbitration, but that in most cases he must do so. In *Freshwater's Case* the terms of the arbitration clause were very wide, requiring arbitration as a condition precedent to any action on the policy by the assured or any claimant against the insurers. However, this form of arbitration clause is the one normally contained in a motor insurance policy, and the third party claiming under the Third Parties Act, 1930, will normally be bound by it, except where the repudiation of liability by the insurance company amounts to a repudiation of the whole contract of insurance *ab initio*, including the arbitration clause (d).

In *Dennehy v. Bellamy* (e), it was argued that the agreement to arbitrate was a personal covenant which did not pass under the Third Parties Act, but the Court of Appeal held that though under section 3 (4) of the Arbitration Act, 1934, the judge had a discretion to eliminate from a contract a promise that had been made with reference to a condition precedent (f), and to treat it as if it were a mere arbitration clause, yet if the judge had exercised that discretion against the plaintiff, the Court of Appeal would not interfere, unless injustice to the plaintiff had been done thereby.

In *Smith v. Pearl Assurance Co., Ltd.* (g), the third party, a poor person, sought to evade the effect of an arbitration clause contained in the policy from which the right to recover against the insurers arose, and which right to recover became vested in the third party by virtue of the Third Parties Act. By the reference of the proceedings to arbitration, the third party was debarred from the benefit of the Poor Persons rules. It was held that he was not entitled to proceed with his action, for the disability of the plaintiff, whose only title arose through the original assured, now bankrupt, could not affect the contractual right of the company to claim arbitration under the policy.

(u) *Sed quare* as to the position after the assured's rights under his policy have been vested in the third party.

(a) See *ante*, p. 152.

(b) *Ante*, p. 153.

(c) [1933] 1 K. B. 515.

(d) See on this point chapters VIII, *post*, p. 611.

(e) [1938] 2 All E. R. 262.

(f) *I.e.* to remove the *Scott v. Avery* part of the arbitration clause.

(g) [1939] 1 All E. R. 95.

PART 4.—OTHER PROCEEDINGS BY THIRD PARTIES AGAINST INSURERS

1. Garnishee proceedings against insurers.—The cases of *Re Harrington Motor Co., Ex parte Chaplin* (h) and *Hood's Trustees v. Southern Union General Insurance Co. of Australasia* (h), which were litigated before the passing of the Third Parties Act, have already been noted (i). Since the Act several cases have arisen where third parties had recovered judgment against the assured in respect of damage sustained by them in motor accidents, but could not take any proceedings under the Act against the insurance company, none of the events specified in section 1 of the Act having occurred (j).

In these cases advantage was sought to be taken of what is known as garnishee proceedings. Garnishee procedure is a statutory remedy whereby any person who has obtained a judgment for the payment of money may at once apply to the Court for an order that all debts accruing or owing by a third person (called the garnishee) to the person against whom the applicant has obtained judgment shall be attached to answer the judgment obtained by the applicant. The procedure provides for an order *nisi* being made, whereupon the garnishee has the opportunity of disputing the contention that he owes any debt to the person liable on the judgment. If he does not dispute it, or disputes it unsuccessfully, an order absolute is made, whereof the effect is that the applicant can immediately and by the summary process of execution enforce payment of the debt direct to him (k). Garnishee proceedings, however, are only applicable where the relation of debtor and creditor exists between the garnishee and the person against whom judgment has been obtained.

In *Adams v. London General Insurance Co.* (l) A was injured by a car driven by B, who had an insurance policy covering the consequences of such an accident with the insurance company. A recovered judgment in respect of her injuries against B for £494 10s. 8d. (including costs). She then applied for and obtained a garnishee order *nisi* and an issue was directed to be tried between her and the insurance company, the garnishees. The company did not dispute that, if they owed B anything, they owed him a debt of £494 10s. 8d., but contended that they were not liable to B in any sum as he had obtained the policy by false representations. The issue was tried by SWIFT, J., who decided that the insurance company had failed to make out the defence of misrepresentation and gave judgment to A for the amount claimed.

In *Israelson v. Dawson* (m) Israelson recovered judgment in respect of damages sustained in a motor accident against Dawson, who was insured with the Port of Manchester Insurance Company. Dawson's policy with that company provided that the company would "indemnify the assured as regards all sums which the assured . . . shall become legally liable to pay in respect of accidental bodily injury to any person or damage to property. . . ."

Israelson obtained a garnishee order *nisi* against the company and it was subsequently ordered by CHARLES, J., that an issue should be tried between him and the garnishee company. CHARLES, J., considered that he was

(h) [1928] Ch. 105, and [1928] Ch. 793.

(i) *Ante*, pp. 115 *et seq.*

(j) No bankruptcy, liquidation or, etc.

(k) See R.S.C., O. 45, r. 1 *et seq.*, and see the notes thereunder in the current Annual Practice.

(l) (1932), 42 Ll. L. R. 56.

(m) [1933] 1 K. B. 301.

bound by the decision of SWIFT, J., in *Adams v. London General Insurance Co.* (n) to make the order.

Upon appeal to the Court of Appeal (o) SCRUTTON and GREER, L.J.J., held that there was, under the terms of Dawson's policy, no debt owing by the company to him which could be attached in garnishee proceedings.

It appears to have been agreed that *Adams'* Case had nothing to do with the point because, in the words of GREER, L.J.,

"Very clearly that case is not an authority because in that case there was "no dispute as to whether there was not a debt, and there being no such dispute, of course the order was made" (p).

In *France v. Piddington* (Co-operative Insurance Society Garnishees) (q) precisely the same point arose as in *Israelson v. Dawson* (r), and the same Court decided that there was no "debt" owing by the insurance company to its assured in respect of the liability incurred by him to the applicant.

GREER, L.J., said:

"It is clear that the liability of the garnishee to the assured is not a "liability for a debt but a liability for damages."

In *Loftus v. Port of Manchester Insurance Co.* (s) exactly the same point again came before CHARLES, J., upon the trial of an issue as to whether there was a debt owing by the company to its assured against whom judgment had been obtained by the plaintiff in respect of liability covered by the policy.

No reference appears to have been made to the decisions of the Court of Appeal quoted above, and CHARLES, J., appears to have decided that there was no debt by reason of the fact that the assured had lost his rights under the policy by neglecting to observe a clause therein which provided that any claim must be made within twelve months.

Upon whatever basis this last case may have been decided it seems hard to reconcile the two decisions noted of the Court of Appeal with the decisions on the one hand of that Court in *Hood's Trustees v. Southern Union General Insurance Co. of Australasia* (t) (and in those other cases which have determined the nature of a contract to indemnify (u) the assured "against all sums which he may become legally liable to pay," etc.), and on the other with such cases as *Johnson v. Diamond* (v) and *O'Driscoll v. Manchester Insurance Committee* (a).

In *Johnson v. Diamond* the facts were that Diamond had agreed with X that he would pay Johnson all sums which X might become liable to pay Johnson in respect of costs in an action brought by X against Johnson. The obligation was secured by a bond providing that if Diamond failed to perform his agreement he should forfeit the sum of £200 by way of penalty. By reason of the provisions of the Statute 8 & 9 William 3, c. 11, the provision for payment of a penalty was void and the only right which Diamond's breach of his obligation gave to X was the right to sue on the bond for a sum of unliquidated damages to be assessed by a jury. It was held that the obligation corresponding to this right was not a "debt" which could be attached by garnishee proceedings. But Baron PARKE in the course of his judgment made it clear that if the bond had been conditioned for the payment of a sum certain, or a sum capable of being ascertained

(n) *Supra*.

(p) In the case cited as reported (1932), 43 Ll. L. R., at p. 403.

(q) (1932), 43 Ll. L. R. 491.

(r) (1933), 45 Ll. L. R. 252.

(s) See *ante*, pp. 71 *et seq.*

(t) [1915] 3 K. B. 499.

(o) [1933] 1 K. B. 301.

(p) *Supra*.

(q) [1928] Ch. 793; and see *ante*, pp. 115 *et seq.*

(r) (1855), 11 Exch. 431.

without the intervention of a jury, the debt would be one which could be garnisheed.

The contract between Diamond and X was one which only obliged Diamond to pay, not X, but Johnson. A motor policy obliges the company to pay the assured, and according to the view of it taken in *Chaplin's Case* the assured has a right to demand payment to him. If Baron PARKE's view was correct, it would therefore have seemed that a contract to indemnify against liability incurred to another would, when the amount of such liability became ascertained, be a "debt" provided that the nature of the contract was as considered in *Chaplin's Case*.

The observations of GREER, L.J., in *Israelson v. Dawson (b)* and in *France v. Piddington (Co-operative Insurance Society Garnishees) (c)*, to the effect that under a motor insurance policy covering third party liability the obligation of the company is to indemnify the insured against such payment as he may have to make, which obligation they can discharge by payment direct to the third party to whom the assured is liable (and the breach whereof would give the assured only a right to claim nominal damages), must, it is submitted, be taken to have been made with reference to the particular policies under consideration in those cases. Those policies each contained arbitration clauses which not only made an arbitration a condition precedent to any right of action against the company, but provided that any claim by the assured under the policy should be referred to arbitration. Moreover, as appears from the report of *France v. Piddington (Co-operative Insurance Society Garnishees) (c)* there was in both cases some question of the insurance company's disputing liability to the assured, in which circumstance, of course, the company's liability would not be a "debt" until the amount thereof had been determined in the arbitration. On the other hand, in *Adams v. London General Insurance Co. (d)* the question was whether the policy was not void *ab initio (e)*, and there was no dispute that if it was not, a debt of the amount claimed was owing to the assured. Moreover, in that case there does not appear to have been any point as to the terms of the policy. The result is, it is submitted, that in some cases a third party who has obtained judgment against the assured can garnishee the sum due to him under his policy, whilst in others he cannot. Each case must depend upon the facts and the terms of the policy.

It is also submitted that the decisions referred to (*f*) must not yet be taken as of general application, or as in any way detracting from the proposition laid down by the Court of Appeal in *Re Harrington Motor Co., Ex parte Chaplin (g)* and in the earlier *Re Law Guarantee Trust and Accident Society, Ltd., Liverpool Mortgage Insurance Co.'s Case (h)*—namely, that, in the words of BUCKLEY, L.J., in the former (*i*), approved by ATKIN, L.J., in the latter case (*j*):

"The party to be indemnified can call upon the party bound to indemnify
"him specifically to perform his obligations, and to pay him the full amount
"which the third party is entitled to receive."

It should also be noted that the above proposition was specifically applied by ATKIN, L.J., in *Re Harrington Motor Co., Ex parte Chaplin (k)* to a motor policy in which the company's obligation to pay an indemnity was

(b) [1933] 1 K. B. 301.

(c) (1932), 43 Ll. L. R. 491.

(d) (1932), 42 Ll. L. R. 56.

(e) As to the meaning of this, see *ante*, p. 137, and *post*, chapter IX, "Repudiation."

(f) *Israelson's, France's, Loftus' Cases*, all *supra*.

(g) [1928] Ch. 105.

(h) [1914] 2 Ch. 617.

(i) *Ibid.*, at p. 633.

(j) [1928] Ch. 105, at p. 119.

(k) [1928] Ch. 105.

expressed in terms almost identical to those of the policies in the garnishee cases (*l*), although it does not appear from the report in *Chaplin's Case* whether the policy in that case contained a similar arbitration clause, and, if so, whether its effect upon the nature of the company's liability was considered.

2. Assignment by assured to third party.—One more method by which a third party may acquire rights against an insurance company in respect of a liability arising out of a motor accident may be mentioned. This method is one which has always been possible, and has no doubt been adopted in many cases where the insured person against whom a third party had recovered judgment desired to avoid the consequences of being unable to satisfy the same (*m*).

Thus in *Jenkins v. Deane* (*n*) the third party had recovered judgment in respect of damages sustained in a motor accident against an insured firm. The members of the firm had not yet become bankrupt, and the third party had (as yet) no rights against the insurers under the Third Parties Act (*o*). The third party made an agreement with the assured against whom he had obtained judgment, whereby the assured assigned to him all his rights under his policy against the insurers. The third party thereupon sued the insurers for the amount of the indemnity due from them to their assured and in the result succeeded in recovering this sum. The same transaction took place in *Barrett v. London General Insurance Co., Ltd.* (*p*). In *Jenkins v. Deane* it was agreed that the judgment and evidence in the third party's action against the assured should be treated as binding on the insurers (*q*). It may be assumed, however, that where the third party takes an assignment in this fashion, he will be subject to all defences available against the assured in exactly the same way as when he claims under the Third Parties Act, 1930 (*o*).

(*l*) *Israelson's, France's, Loftus'* Cases, all *supra*.

(*m*) It is often thought by insurers and others that an indemnity, or the benefit of an indemnity, is in its nature incapable of assignment. This may be so, but as has been pointed out previously, what is assigned is not the indemnity or the right thereto, but the ripe fruits thereof. When the liability against which the indemnity is given is incurred, the indemnity is superseded by the right to claim a sum of money. The right to claim a sum of money can (with a few special exceptions such as, e.g., Crown pensions) always be freely assigned, unless there is some clause in the contract to prevent it, which, in motor policies, there sometimes is (see *post*, chapter IX, "Right to payment" and "Assignment").

(*n*) (1933), 103 L. J. K. B. 250.

(*o*) The Third Parties (Rights against Insurers) Act, 1930 (23 Halsbury's Statutes 12).

(*p*) [1935] 1 K. B. 238, and in *Taylor v. Eagle Star and British Dominions Insurance Co.* (1940), 67 Ll. L. R. 136.

(*q*) Cf. *Freshwater v. Western Australian Assurance Co., Ltd.*, [1933] 1 K. B. 515, where it was thought necessary to plead that the insurers had conducted the assured's defence in the action by the third party against him.

CHAPTER IV

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PART I.—INTRODUCTORY

I. GENERAL

This statute, in so far as it affected motor insurance law, made completely new law. It is wholly unlike statutes such as the Sale of Goods Act, 1893 (*a*), or the Marine Insurance Act, 1906 (*b*), which merely codify or declare the existing law, in the interpretation of which the main difficulty is that there is often an embarrassment in the wealth of judicial authority from which assistance may be drawn. The Act was therefore fruitful of much litigation, and the meaning of its terms had to be made clear by judicial decisions, the flow of which was reduced to a trickle only at the time at which the Motor Insurers' Bureau was formed in 1946 (*c*). It will be remembered that although the agreements entered into by the Motor Insurers' Bureau (*c*) vitally affect and enlarge the scope of insurers' liability to third parties under motor insurance policies, they have not the force of a statute. The provisions of the Road Traffic Act, 1930, remain in full force, therefore, and must be examined in detail.

That the 1930 Act is not one of the best examples of legislative precision appears to have been the view of the late Lord Justice SCRUTTON, whose perspicuity and clarity of judgment in matters of legal perplexity need no comment. He seems to have agreed (*d*) with the doubts expressed by Mr. Justice SWIFT, who has said (*e*) of this enactment that whilst he was

(a) 17 Halsbury's Statutes 612.

(b) 9 Halsbury's Statutes 851.

(c) See chapter VI, *post*.

(d) See *Jones v. Birch Brothers, Ltd.*, [1933] 2 K. B. 597, at p. 610, and *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361, at p. 366.

(e) See *Adams v. London General Insurance Co.* (1932), 42 Ll. L. R. 56, at p. 58.

sure of what was the intention of the legislature, he was not at all certain that they had carried out that intention by the language employed in the Act of Parliament.

Before proceeding to consider what is the general object and intention of Part II of the Road Traffic Act, 1930 (*f*), the reader must be reminded of Part II of the Road Traffic Act, 1934 (*g*). That enactment is entirely different from Part II of the Road Traffic Act, 1930, in the objects which it effects, although the underlying intention of the legislature may be the same. The interpretation of the 1930 Act is, however, not largely affected by the meaning which the relevant provisions of Part II of the Act of 1934 have been held to bear, nor is it different from what it would have been, had the later Act never been passed. The vital difference between the objects affected by the two Acts is that whilst the 1930 Act gives no direct rights to third parties injured by insured persons to take advantage from such person's insurance, the 1934 Act is primarily designed for this very purpose.

Before proceeding to examine in detail the several sections of Part II of the Road Traffic Act, and before describing the arrangement in which that is done, it is desirable to set forth briefly a general account of the scope and object of Part II of the Act, as gleaned from evidence internal to the Act itself.

II.—PREAMBLE

The first (though not necessarily the most potent) source from which deduction may be made is the preamble to the whole Act (*h*). That preamble states that the Act is :

" An Act to make provision for the regulation of traffic on roads and of
" motor vehicles and otherwise with respect to roads and vehicles thereon,
" to make provision for the protection of third parties against risks arising
" out of the use of motor vehicles and in connection with such protection
" to amend the Assurance Companies Act, 1909, to amend the law with
" respect to the powers of local authorities to provide public service vehicles,
" and for other purposes connected with the matters aforesaid."

The Act consists of six parts :

PART I deals with the use of motor vehicles on the road, regulating the manner and method of such use, and providing penalties for driving offences and duties in case of accident.

PART II deals exclusively with motor insurance.

PART III deals with law relating to the use of and upkeep of roads, as distinct from the use of vehicles thereon.

PART IV makes provision for the running of public service vehicles, and regulates the manner in which that may be done.

PART V provides for and regulates the running of public service vehicles by local authorities.

PART VI contains general and miscellaneous enactments relating to the foregoing.

Whilst it might be thought that the reference to " provision for the protection of third parties against risks arising out of the use of motor vehicles " applied equally, if not more accurately, to the provisions of

(*f*) 23 Halsbury's Statutes 636.

(*g*) 27 Halsbury's Statutes 544 ; and see generally *post*, chapter V.

(*h*) As to the force of the preamble, see *Baden v. Pembroke (Countess)* (1688), 2 Vern. 52 ; *Gill v. Dunlop* (1816), 2 Marsh. 440 ; *Chilton v. Progress Printing and Publishing Co.*, [1895] 2 Ch. 29 ; *Salkeld v. Johnson* (1848), 2 Exch. 256 ; *St. Catharine's College v. Rosse*, [1916] 1 Ch. 73 ; *Powell v. Kempton Park Racecourse Co., Ltd.*, [1899] A. C. 143 ; *Fletcher v. Birkenhead Corporation*, [1907] 1 K. B. 205 ; *The Cairnbahn*, [1914] P. 25.

Part I, which ensure the protection of third parties by enjoining that vehicles shall be carefully driven and in a safe condition, the phrase "third parties" (i.e. instead of "pedestrians," "road users," or, etc.), and the additional words: "and in connection with such protection to amend the Assurance Companies Act, 1909," make it clear that this part of the preamble refers primarily if not exclusively to Part II.

Next comes the title (i) to Part II, which states that it is

"Provision against Third Party Risks arising out of the use of motor vehicles."

Finally, upon an investigation of the particular enactments of Part II, it will be found that the title to that Part accurately describes the objects effected thereby, but that there is nothing whatever to satisfy the hopes raised by the preamble (j). In other words, it will be found that there is nothing in Part II which directly gives any protection to third parties—using that term in the only sense which in the context it can bear, namely, persons other than the owners, users or drivers of motor vehicles—against risks arising out of the use of motor vehicles; nor is there any amendment of the Assurance Companies Act, 1909 (k), directly connected therewith. But, on the contrary, the intention of Part II as judged by the objects effected by its provisions, seems to be to protect owners, users or drivers of motor vehicles, or rather to compel them to protect themselves, against financial risks arising out of the law of tort which they may incur by the misuse of their vehicles. It is true that three weeks before it enacted Part II, Parliament had passed the Third Parties Act; it is true that that Act, although making no reference to motor insurance, did in a limited form and in certain circumstances give protection to third parties against loss (not risks) arising indirectly out of the use of motor vehicles; it is true that Part II of this Act does "in a minor point" indirectly and without reference thereto make the protection given by the Third Parties Act more effective: but there is no single provision in Part II of the Road Traffic Act which gives any right to third parties for their protection against risks arising out of the use of motor vehicles (l). There is nothing in Part II, providing as it carefully does that no vehicle shall be used on the road without effective insurance, which gives the third parties any direct benefits from that insurance. That to do so was the real intention of the legislature which passed this Act there can be little doubt (m): but it is not the intention or the effect of the Act.

The intention and the effect of the Act is to provide that nobody other than certain excepted persons shall drive a motor vehicle on the road unless he is insured against certain specified liabilities which he may incur to a limited class of third parties, or has made provision against the risk that he

(i) As to the force of the title as an aid to construction see *Re Penrhyn's (Lord) Settlement Trusts*, *Penrhyn v. Roberts* [1923] 1 Ch. 143; *Hammersmith and City Rail. Co. v. Brand* (1869), L. R. 4 H. L. 171; *Toronto Corporation v. Toronto Rail Co.*, [1907] A. C. 315; *R. v. Fulham Guardians*, [1909] 2 K. B. 504; *Martins v. Fowler*, [1926] A. C. 746.

(j) Except for the results of *Monk v. Warbey*, [1935] 1 K. B. 75; *Daniels v. Vaux*, [1938] 2 K. B. 203; [1938] 2 All E. R. 271; *McLeod (or Houston) v. Buchanan*, [1940] 2 All E. R. 179, and other cases, which confer indirect benefits upon third parties.

(k) 2 Halsbury's Statutes 724.

(l) As to the general objects of the Act as so far judicially considered see the remarks of SWIFT, J., in *Adams v. London General Insurance Co.* (1932), 42 Ll. L. R. 56, and of the Court of Appeal in *Freshwater v. Western Australian Assurance Co.*, [1933] 1 K. B. 515, in *Jones v. Birch Brothers, Ltd.*, [1933] 2 K. B. 597, and in *McCormick v. National Motor and Accident Insurance Union, Ltd.*, (1934), 49 Ll. L. R. 361, and of BRANSON, J., in *Gray v. Blackmore* [1934] 1 K. B. 95.

(m) Hence the Act of 1934, as to which see chapter V, *post*.

may be financially unable to discharge those liabilities. That is the principal object of this Part of the Act. The other objects are only auxiliary to the main object and are to provide that it shall be effectively carried out.

The treatment employed in the examination of the provisions in the Road Traffic Act, 1930, which follow in these pages, is to set out the text of each section and subsection in full, and thereunder to give an explanation of their meaning and effect, together with a full account of, and extracts from, the reported cases so far decided thereunder. It will be seen that for the sake of convenience some sections and some subsections are taken out of the order in which they appear in the Act. Thus, for instance, in this chapter section 38 follows section 36, and subsection (4) follows subsection (1) of section 36. For the rest the provisions of the Act are dealt with in the order indicated in the Summary to this chapter. It need only be added that it must not be thought that the whole of the provisions relating to motor insurance are to be found in Part II of the Act. They are to be found in that Part, in various sections of the other parts of the Act, in the Assurance Companies Acts of 1909 and 1946 (*n*), and in various Statutory Rules and Orders made under the authority of these and other (*o*) statutes.

It is hoped that this chapter, by its inclusion of all these, will at least serve the purpose of being a useful collation of the Statute Law relating to motor insurance.

PART 2.—SECTION 35

1. Section 35 (1).

Users of motor vehicles to be insured against third-party risks.

"Subject to the provisions of this Part of this Act, it shall not be
 "lawful for any person to use, or to cause or permit any other person to use,
 "a motor vehicle on a road unless there is in force in relation to the user of
 "the vehicle by that person, or that other person, as the case may be, such
 "a policy of insurance or such a security in respect of third-party risks as
 "complies with the requirements of this Part of this Act."

2. General observations.—Before entering into a detailed examination of this subsection it is necessary to make certain observations upon its general effect. Although the preamble to the statute expresses the intentions of the legislature as, *inter alia*, "... to make provision for the protection of third parties against risks arising out of the use of motor vehicles," it is noteworthy that nowhere in Part II of the Act is any right or protection specifically or directly conferred upon third parties. Such benefits as they derive from the Act are purely indirect, consequential upon the obligations imposed upon the users of vehicles to cover themselves against certain third party risks, which obligations are general in their application and are enforced by the provision of criminal sanctions (*p*). This consideration is fundamental and must be kept firmly in mind when the task of interpreting the somewhat difficult sections of Part II of the Act is undertaken.

The primary object of the subsection under immediate consideration was to provide that if any person used a motor vehicle on a road without being covered by a policy of insurance against third party risks, he, as well as others who acted as his accessories, would be guilty of a criminal offence. It is a well-established rule of construction that penal statutes are to be

(*n*) 2 Halsbury's Statutes 724.

(*o*) *E.g.* the Roads Act, 1920. See s. 39, *post*, p. 235.

(*p*) As to criminal sanctions of the Act, see pp. 242-266. *post*.

strictly construed. But this principle is not permitted to qualify the obvious and expressed intentions of the legislature. The primary factor in the construction of all statutes is that the object and purpose of the statute should be effectuated. Thus, even if the interpretation of a penal clause involves harshness, yet where the statute's intention cannot be otherwise effected the strict rules of construction must be adhered to. These considerations are paramount in considering problems which are discussed at length in the following pages, *inter alia*, whether guilty intention is a necessary element in the offence created by the subsection and whether the words "in force" used therein should receive a narrow or broad interpretation.

Before passing to the detailed examination of the subsection it becomes necessary to discuss one further point. In an earlier part of the book, in dealing with the general principles of liability affecting motor insurance law, the question of breaches of statutory duties was touched upon, and it was intimated that the matter was one of importance in the law relating to the use of motor vehicles. In common with the provisions in many other statutes, the subsection under review imposes a general duty upon persons in relation to the use of things by themselves or by others. The breach of a statutory duty may and often does result in the infliction of loss or damage on other persons, who in certain circumstances have not any individual remedy against the defaulter (r). The present subsection, as do many other sections of the Act, imposes a general duty on persons using or causing or permitting the use of motor vehicles on roads. This duty is to ensure that no vehicle is used by the person upon whom the duty is imposed or by another person under his orders or with his permission, unless the use of the vehicle by any particular person for any particular purpose at any particular moment is covered by a policy of insurance against the specified risks to third parties. The object of this "compulsory insurance" is, as far as possible, to secure that negligent drivers shall be able to meet their obligations to injured third parties, but not, save perhaps in one exceptional instance (s), to give such third parties rights additional to those which they previously enjoyed either at Common Law or, in certain limited instances, through the operation of the Third Parties Act (t). Omission to carry out the general duty is a criminal offence punishable by fine or imprisonment or both, with or without disqualification from holding or obtaining a driving licence. It was held in *Monk v. Warbey* (u), and in several later cases, that a breach of this statutory duty is a wrongful act giving rise to a claim for damages by a third party who is injured through the use of a motor vehicle in breach of the duty.

In *Monk v. Warbey* the facts were that Monk was injured through the negligent driving by one May of Warbey's motor car. Warbey's friend, Knowles, had borrowed the car from Warbey and had asked May to drive for him. Neither May nor Knowles were covered by third party liability insurance, nor did Warbey's policy cover the use of the car by Knowles and May, who were both without means. Monk sued Warbey (jointly with Knowles and May (v)), basing his claim against Warbey upon

(r) See chapter I, *ante*, pp. 35-37.

(s) *I.s.* under Road Traffic Act, 1930, s. 38. See p. 219, *post*.

(t) See chapter III, *ante*.

(u) [1935] 1 K. B. 75.

(v) [1935] 1 K. B. 75. The claim against May and Knowles was for negligence and interlocutory judgment had been signed against them. The claim against Warbey was for the prospective damage which Monk would suffer when, as was admitted, he found that May/Knowles had no means to satisfy the judgment against them. In this case, and in *Richards' Case* (1934), 50 Ll. L. R. 88, where not even judgment had been obtained against the driver, it was argued that the action was premature. This contention was thrown out in both cases.

an alleged breach by Warbey of his statutory duty under section 35 (1), in having caused or permitted his motor car to be used in breach of the subsection. CHARLES, J., held that Monk was entitled to succeed against Warbey on this head upon the ground that section 35 (1) imposed a duty upon the car owner towards third parties injured owing to its presence on the road, a breach of which could be relied upon as a cause of action. The learned Judge also held that the damage which it was alleged that Monk had sustained by reason of Warbey's breach of statutory duty was not too remote to be recoverable.

The decision of CHARLES, J., has been followed by GODDARD, J. (w), and upheld by the Court of Appeal (x), who dismissed the appeal in *Monk v. Warbey* without calling upon the respondents.

Between the years 1934 and 1946 a number of actions was brought by injured third parties who based their claims on the principle laid down in *Monk v. Warbey* and these are considered briefly below. In no case, however, was it decided that the insurer who had issued a policy which purported to cover any person against Road Traffic Act liability, but which did not in fact do so, was guilty of a breach of statutory duty imposed by section 35 (1) of the 1930 Road Traffic Act for causing or permitting the use of an uninsured vehicle, and was therefore liable to pay for the damage caused by the driver of the uninsured vehicle. In June, 1946, the Domestic agreement was entered into by the newly formed Motor Insurers' Bureau and the individual insurers of Great Britain. This agreement is considered in detail later (y), and here it is only necessary to state that the effect of the agreement is that where a third party, as defined by section 36 (1) (b) of the Road Traffic Act, 1930, has after July 1st, 1946, suffered personal injury arising out of the use of a motor vehicle on a road, and obtains a judgment against any defendant in respect of his injuries, that judgment will be satisfied, in default of its immediate satisfaction by the defendant, by the insurer who at the time of the accident was providing any insurance to cover Road Traffic Act liability, even though in respect of that particular claim the insurer was entitled in law to repudiate liability to the "assured" or to any person covered by the terms of the policy. Further, Road Traffic Act liability is deemed by the agreement to include liability for causing or permitting a vehicle to be used in breach of section 35 (1) of the 1930 Act, i.e. to be used on the road without proper cover from an insurance policy. The astonishing result follows that where judgment is obtained against an assured owner of a motor vehicle for permitting that vehicle to be used while uninsured on a particular occasion, the insurer concerned has agreed to satisfy a judgment which was obtained against the owner solely because he was uninsured (z). It should be added that where the owner of the vehicle concerned in the *Monk v. Warbey* action has no policy of insurance existing to cover that vehicle at all, the Motor Insurers' Bureau by virtue of the M.B.I. Agreement (y) will satisfy the third party's judgment in default of payment thereof by the defendant. The mischief against which section 35 (1) of the Road Traffic Act was aimed is now removed, in that injured third parties in a running down action will have their just claims met, either by the driver of the vehicle, its owner, the Motor Insurers' Bureau or the insurer concerned. It is submitted, however, that in so far as (1) the third party is required to

(w) In *Richards v. Port of Manchester Insurance Co.* (1934), 50 Ll. L. R. 88.

(x) [1935] 1 K. B. 75.

(y) Chapter VI, *post.*

(z) The owner who has a "*Monk v. Warbey*" judgment given against him cannot look to his insurer for an indemnity. Indeed, the insurer concerned who has satisfied the third party's judgment under the Domestic Agreement can thereafter recover the judgment debt from the owner of the vehicle.

bring his running down action against all persons responsible for the damage, (2) the two agreements referred to have not the force of a statute and do not repeal the relevant provisions of the 1930 Act, (3) neither plaintiff nor defendant in a *Monk v. Warbey* action are parties to the agreements referred to, and (4) at the hearing of the *Monk v. Warbey* action the existence of these two agreements is wholly irrelevant, therefore actions will be brought in future on the *Monk v. Warbey* principle, as before. The principles on which the case of *Monk v. Warbey* is based are still therefore of considerable interest, and must be carefully examined.

Where a plaintiff basis his claim upon breach of a statutory duty he must establish three conditions to enable him to recover :

- (i) That the defendant is in breach of a duty owed to him.
- (ii) That the breach by the defendant of such duty is the subject of a private action.
- (iii) That the defendant's breach of such duty has resulted in damage to him which is not too remote to be recoverable.

The facts in *Monk v. Warbey*, or in similar cases, may therefore be considered in the light of these three conditions.

(i) There is no doubt, in view of the language used in section 36 of the Act, that a person using or causing or permitting the user of his motor vehicle, is placed under an obligation to insure against the specified third party risks, omission to fulfil which renders such person liable to prosecution under section 35 (2). The question arises—for whose benefit and protection does this statutory duty accrue? For the present discussion it may be accepted that statutory duties are of two general types, those which are imposed for the benefit and protection of a class or classes of persons, on the one hand, and those which are imposed for the benefit and protection of the public generally, on the other (a). Of the former type the Factory and Coal Mines Acts, which impose certain duties upon employers to take precautions for the safety of their employees, are perhaps the best example (b). Of the latter class, statutes imposing general duties in relation to highways or public utility services may be taken as typical (c).

It is important to determine into which class the duties imposed by Part II of the Road Traffic Act, 1930 (d), fall, since it is only in this way that the presence or otherwise of the first essential condition can be established. As has been stated, no new rights, benefits or remedies are directly conferred anywhere in the Act upon third parties; despite that in the preamble it is stated that the Act was aimed at giving them protection, from the text of the Act it would appear that its object is rather to give persons who are liable to third parties protection against claims made upon them (e). Yet it is difficult to suggest that third parties, either in logic or in fact, can be considered or treated as a "class." One of the essential features of a "class" is that each member of it shall have some common distinguishing characteristic. Can it be said that "third parties" are a class, when every member of the public in, on or about the road, whether riding or on foot, is a third party as contrasted with the user of any particular motor vehicle at

(a) See chapter I, *ante*, p. 37, and cases there cited.

(b) *Groves v. Wimborne* (Lord), [1898] 2 Q. B. 402; *Lochgelly Iron and Coal Co., Ltd. v. M'Mullan*, [1934] A. C. 1.

(c) *Atkinson v. Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. D. 441; *Saunders v. Holborn District Board of Works*, [1895] 1 Q. B. 64.

(d) 23 Halsbury's Statutes 636.

(e) *Cf.* the Road Traffic Act, 1934 (27 Halsbury's Statutes 534), which by s. 10 does give direct rights to third parties. See *post*, chapter V

any particular moment (f)? Moreover, a person using a motor vehicle is himself a third party as contrasted with every other person using a motor vehicle on the road at the same time (g). It seems difficult, thus, to constitute a class of "third parties" who do not include, at any given moment, all users of the road, pedestrians and motorists alike. Nevertheless, although it would appear from this reasoning that the duty imposed by section 35 (1) is one owed not to any individual but to the public at large, Lord WRIGHT in *McLeod (or Houston) v. Buchanan* (h), in approving *Monk v. Warbey*, defined the class of persons whom the section is intended to protect as those who are likely to be injured by the negligent user of motor vehicles, that is *prima facie* and generally, persons using the highway. The provision, he stated, was an important element in the policy of the legislature to secure the benefit of insurance for sufferers from road accidents. That "third parties" form a class must therefore be taken as incontrovertible (hh).

(ii) If it be correct that Part II of the Act imposes a general duty upon a person using a motor vehicle towards specified members or classes of the public as distinct from a general duty towards the public, then it would follow, as a general rule, that an individual can bring an action based upon the breach of such duty (i). But breach of the duty is punishable by penalties, which in such a case are always considered to militate against there being a right in an individual to sue (j), even though he has himself sustained damage as a result of such breach. The provision of a penalty does not conclude the question of whether such an individual can pursue a private remedy against a party in breach of his statutory duty (k). That is determined by weighing certain other factors, of which the content, object and effect of the statute in question are the most important. In this connection certain additional aspects must be considered. The duty imposed by section 35 (1) is, if the conclusions arrived at above in relation thereto be accurate, an absolute one; the presence of the imperative expression, "it shall not be lawful," coupled with the absence of any indication that guilty knowledge or intention is a necessary element of the breach of duty indicate that any consideration of the mental factor in constituting guilt is irrelevant. To quote Lord WRIGHT in *McLeod (or Houston) v. Buchanan*, the section is imperative, and precisely signifies the act or default constituting the offence, which is sufficiently established by proof of the matters specified. Intention to commit a breach of the statute need not be shown. The breach in fact is enough (l). While any omission to fulfil this statutory duty, however innocent, is an offence, the Act itself empowers a tribunal adjudicating upon an offender to temper the punishment to those who, though technically guilty, are morally innocent. Can it be said that the legislature intended to expose those guilty of mere technical omission to the serious and unlimited consequences of liability in

(f) Cf. remarks of BANKES, L.J., in *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 2 K. B. 832, at p. 840: but see *Monk v. Warbey*, [1935] 1 K. B. 75 (C. A.).

(g) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539; affirmed, [1923] 2 K. B. 832.

(h) [1940] 2 All E. R. 179, at p. 186.

(hh) See also Lord PORTER's judgment in *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319.

(i) *Atkinson v. Newcastle and Gateshead Waterworks Co.* (1877), 2 Ex. D. 441; *Saunders v. Holborn District Board of Works*, [1895] 1 Q. B. 64.

(j) *Vallance v. Falle* (1884), 13 Q. B. D. 109.

(k) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539; affirmed, [1923] 2 K. B. 832, at p. 838, *per* BANKES, L.J., and at p. 841, *per* ATKIN, L.J.

(l) It will be seen, however, that *knowledge* may by the terms of the policy be made an integral factor in deciding whether or not a particular use of the vehicle is covered by the policy. See *post*, p. 175.

civil proceedings in which considerations of moral innocence or guilt would be irrelevant, when provision is expressly made to enable such persons to be treated with leniency before the criminal Courts? Nevertheless, it is now well settled law that the section provides a right to the injured individual to pursue a private remedy for breach of statutory duty (m).

(iii) Even though conditions (i) and (ii) are satisfied, the injured third party has yet a further condition to satisfy. He cannot make out his cause of action unless he is able to establish that damage has resulted to him from the breach of which he makes complaint. Two aspects of this third condition—i.e. the presence of damage—must be considered. In the first place, the damages which the party complaining has suffered must be of the class against which the statutory provision was intended to provide (n). In the second place, in accordance with the general principles of civil liability, damages must not be too remote (o).

In approaching these problems it must at the outset be submitted that the object of Part II of the Road Traffic Act, 1930, is to secure that no person shall cause the death of or injury to a third party by using a vehicle on the road who has not sufficiently provided for the satisfaction of such liabilities by one of the methods specified in the Act (p). Section 35 must be considered in the light of this conclusion, which is rendered more apposite by the fact that any duty which it imposes is quite independent of the infliction of injury upon third parties. However careful the person using the vehicle may be, however free his use of the vehicle from incident or accident, he is nevertheless in breach of his duty under the section if he uses the vehicle without cover of insurance or security and is exposed to the penalties which the Act provides.

Assuming that a third party is able to satisfy the condition last discussed, he would still be obliged to show that the damage sustained by him was caused by the defendant's breach of the statutory duty complained of. The facts of *Monk v. Warbey* (q) may be taken as typical. There Monk's injuries were sustained through the admitted negligent driving by May, under the control of Knowles, of Warbey's motor car. For this negligence Knowles, not Warbey, was in law responsible, as the right to control the driver was in him at the time when the accident occurred. At the time when Monk was injured the use of the motor car was not covered against third party risks; the owner, the borrower and the driver were thus all guilty of the offence provided in section 35 (1). May and Knowles were without means, although they were not bankrupt (r), nor had final judgment been obtained against them.

Monk's case against Warbey was based solely upon Warbey's breach of statutory duty. In all claims for damage, whether based upon breach of contract, breach of a common law duty or breach of a statutory duty, the loss in respect of which the damages are claimed must be shown to have been directly caused by the breach of duty. The rule of direct causation, or its corollary the rule of remoteness of damage, has been the subject of countless

(m) *McLeod (or Houston) v. Buchanan*, [1940] 2 All E. R. 179. As to the degree to which a Court may temper the wind to the defendant in criminal proceedings under s. 35 (1), see *post*, p. 245, and *Quelch v. Collett*, [1948] K.B. 478; [1948] 1 All E. R. 252.

(n) See chapter I, *ante*, p. 39; *Gorris v. Scott* (1874), L. R. 9 Exch. 125.

(o) As to remoteness of damage, see fully in standard text-book, e.g. *Mayne on Damages*; Clerk & Lindsell on Tort, etc.

(p) See *post*, pp. 188 *et seq.*

(q) [1935] 1 K. B. 75.

(r) Thus there was no question of the application of the Third Parties Act, 1930. See chapter III, *ante*.

judicial pronouncements in reported cases (s) and academic discussions in text-books and elsewhere (t). It is not proposed here to embark upon any investigation of these. But it may be taken as axiomatic that the distinction between what is known as *causa causans* and *causa sine qua non* must invariably be drawn and applied as a test in any given case (u). In most cases the application of this test presents many difficulties. It is these difficulties of application which have caused so much apparent divergence of opinion (v). It is easy to define the *causa sine qua non* as being some act, default or existing fact in the absence of which the loss might or might not have occurred (w). It is not so easy to define *causa causans*; this is not done by describing it as merely "the effective cause." It is submitted, however, that a sufficiently accurate definition of this phrase is that it is any cause not being merely a *causa sine qua non* between which and the loss there is a direct chain of causation (x).

It is submitted that the proper application of this test to cases such as *Monk v. Warbey* would in some instances show that the loss suffered by the plaintiff was not directly caused by the defendant's breach of duty.

In *Daniels v. Vaux* (y), the defendant was the registered owner of a car which in 1932 she lent to her son. The son used it as his own until March, 1934, when he negligently knocked down and killed a policeman. At the time of the accident, and to the knowledge of both the defendant and her son, the policy of insurance covering the car, which had formerly been renewed from year to year by the defendant, had expired, but before its expiration the defendant had informed her son and the insurers that the son must in future pay the premiums himself. No writ was issued against the son, but there were negotiations with him for the settlement of the deceased man's damages, which were not concluded in November, 1936, when the son was himself killed. In an action brought for breach of statutory duty against the owner of the car, it was held that she was guilty of permitting the car to be driven uninsured, but that she was not liable in damages, for an action could have been brought against the son during his lifetime, and any judgment obtained against him could have been satisfied out of the assets which he possessed. The damage suffered was therefore not the direct consequence of the breach of statutory duty, but was due to the accident itself, not to the defendant's failure to insure the car. Finally, it should be stressed that in order to prove damage it is not necessary for the injured third party actually to have obtained judgment against the tortfeasor before bringing his action for breach of statutory duty against the owner. It is sufficient to prove that although the damages have not been quantified, the negligent motorist could not have paid them, owing to the lack of insurance and his own want of means (z).

It is clear that the preamble to the Road Traffic Act of 1930, in so far as it stated that the Act made provision for the protection of third parties against the risks arising out of the use of motor vehicles, was largely responsible for the decision in the *Monk v. Warbey* Case that a private individual

(s) See *Re Polemis and Furness, Withy & Co., Ltd.*, [1921] 3 K. B. 560; *Hambrook v. Stokes Brothers*, [1925] 1 K. B. 141; *Great Western Rail. Co. v. Mostyn (Owners)*, *The Mostyn*, [1928] A. C. 57; *Liesbosch Dredger v. Edison S.S.*, [1933] A. C. 449, and the many cases therein cited.

(t) See Salmond on Torts, 10th Edn., p. 128.

(u) Cf. Salmond on Torts, 10th Edn., p. 134.

(v) See notes (o) and (s), *supra*.

(w) It must be a *cause* and not merely the instrument or circumstance of a cause.

(x) *S.S. Singleton Abbey v. S.S. Paludina*, [1927] A. C. 16.

(y) [1938] 2 K. B. 203; [1938] 2 All E. R. 271.

(z) *Monk v. Warbey*, [1935] 1 K. B. 75, *per* GREER, L. J.; *Richards v. Brain and Port of Manchester Insurance Co.*, (1934), 50 Ll. L. R. 88.

was given the right to sue for a breach of duty imposed by the Act. Though not strictly relevant in a discussion on the Road Traffic Act, 1930, it should be noted that in regard to other Acts concerning the use and construction of motor vehicles, which have different expressed objects, there may not be granted that same right.

To the consideration of the availability of actions for alleged breach of duties under other Acts affecting motor vehicles the result of the decision in *Phillips v. Britannia Hygienic Laundry Co.* (a) may usefully be applied. In that case the defendants had committed a breach of the regulations made by the Secretary of State governing the use and construction of motor cars on roads, in that they had innocently and without negligence taken out a vehicle with a defective axle which had broken and thus caused damage to the plaintiff's vehicle. The plaintiff based his claim, in part, upon the breach of the duty laid down in the regulations. It was held that the action was not maintainable upon the ground that the duty imposed was one towards the public generally, that the penalty by way of fine provided was designed as an exclusive remedy, and that the plaintiff did not succeed in establishing that he was entitled to sue for a breach of such regulations. In *Clark v. Brims* (b), it was held by the Court that the duty imposed by the Road Transport Lighting Act, 1927, section 1, on the driver of a vehicle to carry during the hours of darkness one lamp showing to the rear a red light visible from a reasonable distance was a public duty only, and did not in addition by its breach permit any individual aggrieved to bring an action for damages. Consequently the plaintiff, whose car ran into the back of the defendant's car as it stood stationary and unlighted, was not entitled to found a cause of action against the defendant on the ground of breach of statutory duty. The Court took the view that the test whether the duty imposed by the Act was a public duty only or a duty owed as well to the party aggrieved was so much a question of construction and of the circumstances concerning the making of the Act and of the circumstances to which it related, that authorities concerning different Acts could only assist in so far as guidance on principle was given thereby.

3. Interpretation of Section 35 (1).—These important preliminary matters having been disposed of, the wording of the section and its effect falls to be considered in some detail.

"*Subject to the provisions of this Part of this Act.*"—The whole of the provisions of Part II of the Road Traffic Act, 1930, are designed in some measure to supplement the duty which is imposed on persons using motor vehicles in section 35. In considering the effect of that section it is therefore necessary to consider in their breadth the effect of the remaining sections of Part II. Whilst the reader is thus referred to the detailed consideration of each of the sections which follows, it is convenient at this juncture to make brief comment upon the persons and the vehicles which are excluded from the operation of section 35 and, mainly, from the operation of Part II of the Act.

(a) Excepted persons.

The Crown.—The rule that the Crown is not bound by the provisions of a statute unless expressly named therein or included by necessary implication applies to Part II of the Act, the more so as a later section (c) expressly applies Parts I and III to vehicles and persons in the service

(a) [1923] 1 K. B. 539; affirmed, [1923] 2 K. B. 832.

(b) [1947] K. B. 497; [1947] 1 All E. R. 242.

(c) Section 121 (2).

of the Crown. But whereas vehicles operated on the road in the service of the Crown are not required to be insured under Part II of this Act, yet the liability of the Crown in tort for injuries inflicted by those vehicles is now governed by the Crown Proceedings Act, 1947, which has been discussed in an earlier chapter (*d*).

Government Departments and Crown Servants.—Save in so far as the provisions of Parts I. and III. of the Act are expressly applied to them (*d*), these persons and bodies enjoy the same position as the Crown. Individual servants of the Crown are liable for their own wrongful acts whether or not they are committed in the service of the Crown, but such persons whilst upon Crown business are exempted from the provisions of Part II. of the present Act (*dd*).

Persons excluded under section 35 (4).—Persons and vehicles being driven by persons specified in this subsection of section 35 are exempted from the operation of section 35 (1). These exceptions will be dealt with later (*e*).

(b) Excepted vehicles.

Section 35 (5) excludes certain vehicles, as such, from the operation of section 35 (1) and the other provisions of Part II. of the Act. Other vehicles may be excluded in the circumstances indicated in section 35 (4) (*f*).

"It shall not be lawful."—The operation of these words is to create the criminal offence which the section specifies, and which is subject to the penalties provided in the following subsection (*g*). Whether or not their effect is to create a statutory duty upon persons using or causing or permitting the use of a motor vehicle in the circumstances indicated, a breach of which is actionable at the suit of a person who has sustained injury from the use of a motor vehicle in breach of the section, is a question which has already been discussed at length above (*h*).

"For any person."—This means any person other than those excepted from the operation of the section under discussion by the express terms of section 35 (4) (*i*), or by the operation of the general law. It is probable that "person" here has the same meaning as when it is used in the Third Parties (Rights against Insurers) Act, 1930 (*k*). It includes foreign sovereigns and their representatives, although, as has been stated, such persons are not amenable to the jurisdiction of the English Courts in civil matters and cannot be sued for any wrongful act which they may have committed (*l*). Whether or not an ambassador is amenable to the criminal law is a question which has been the subject of much discussion, the better view being, however, that he is (*m*). Save where the context necessarily involves otherwise, the expression "person" includes a firm or company (*n*). Thus such persons as firms or companies may be prosecuted for non-compliance with this or other provisions of the Act.

"To use."—The criminal offence created by this subsection (*o*) contains two substantive elements, of which "use" is the first to be considered. The expressions "presence," "use" and "drive" are all employed by Part II of the Act in relation to motor cars. While the third of these necessarily

(*d*) Chapter I, p. 42, *ante*.

(*dd*) 6 Halsbury's Laws, 2nd Edn. 489-91. Where a Crown servant driver a Crown vehicle for his own business and not for the purpose of the Crown, he must be covered by a policy of insurance (*Salt v. MacKnight*, [1947] S. C. (J.) 99).

(*e*) *Post*, pp. 185-187.

(*f*) *Post*, pp. 185-187.

(*g*) See *post*, p. 244.

(*h*) See *ante*, pp. 163-170.

(*i*) See *post*, p. 185, for the treatment of s. 35 (4).

(*k*) 23 Halsbury's Statutes 12; chapter III, *ante*, p. 121.

(*l*) 6 Halsbury's Laws, 2nd Edn. 507-8.

(*m*) *Ibid.*, p. 507.

(*n*) Interpretation Act, 1889, ss. 2 and 19 (18 Halsbury's Statutes 992, 1001).

(*o*) See *post*, pp. 244-248

involves the two former and "use" involves "presence," it is difficult to appreciate the true meaning to be attached to "use" in the subsection under consideration. A motor vehicle may be "used" on a road for driving, or for other purposes, e.g. sleeping. But a motor vehicle may be present on the road without being "used"—for example, when its driver abandons it temporarily or permanently (p). Such a vehicle may be involved in an accident, whereby death or injury results to third parties, by reason of its presence on the road. Unless "use" and "presence" amount to the same thing—against which the use of the two words in different sections raises a presumption—the mere "presence" of a motor vehicle on a road cannot amount to "use" of the motor vehicle on a road so as to found a criminal charge under section 35. It is, however, possible that the legislature intended the two words to be synonymous. It should be noted that the phrase "any person to use" does not mean any owner to use (q).

The word "use" is not in any case synonymous with "drive" (qq). In *Ellis (John T.), Ltd. v. Hinds* (r) it was said that the owner of a car, who drove himself, used the car, but so he did if it was driven on his account by his servant. A person who rode in his car while it was being driven by someone else, or who sent his driver out with his car on business, "used" the car but did not drive it. In the latter case he also "caused" his driver to use the vehicle. On the other hand, contrary to the decision in *Sutch v. Burns* (s), where the driver used the car for his own purposes, as on a joy ride, the owner did not have to have a policy of insurance to cover that driver's liability, for the owner did not "use" the car in such circumstances.

"or to cause."—Not only is it an offence to use, but also to cause or to permit another person to use, a motor vehicle whilst not covered by the necessary third party liability insurance. It should be noted that causing and permitting such use are constituted separate offences. The words "causing and permitting" are common to many statutory offences and, indeed, to many of the offences created by the Road Traffic Act. The interpretation of the word "cause" involves no difficulty, applying as it does to the statutory offence the generally applicable maxim *qui facit per alium facit per se*. As Lord WRIGHT described the words in *McLeod (or Houston) v. Buchanan* (t), to "cause" the user involves some express or positive mandate from the person causing to the other person, or some authority from the former to the latter, arising in the circumstances of the case. In *Goodbarne v. Buck* (u), a motor van was purchased by one brother William Buck with money advanced by his brother Henry Buck. The van was to be used in William's business and driven by him. It was registered in Henry's name, but in fact was never his property. Henry's name was put in the proposal form as that of owner and proposer, and when the true facts were discovered, after an accident, the insurers avoided the policy (v).

The third party injured in the accident claimed from Henry the damages which the impecunious driver William could not pay, for breach of statutory duty in permitting William to drive uninsured. Not being the owner of the

(p) This amounts to using the road for the vehicle—which is not, however, an offence.

(q) *Williamson v. O'Keeffe*, [1947] 1 All E. R. 307.

(qq) As to what amounts to driving, see *Saycell v. Boal*, [1948] 2 All E. R. 83, post, p. 242, and *Wallace v. Major*, [1946] K. B. 473; [1946] 2 All E. R. 87 where the steersman of a towed vehicle was held not to be a "driver" within section 11 of the Road Traffic Act, 1930.

(r) [1947] K. B. 475; [1947] 1 All E. R. 337.

(s) [1943] 2 All E. R. 441.

(t) [1940] 2 All E. R. 179, at p. 187.

(u) [1940] 1 K. B. 771; [1940] 1 All E. R. 613.

(v) [1940] K. B. 107; (1939), 64 Ll. L. R. 115. William was impecunious, and was unable to obtain insurance cover for himself owing to his bad record.

van, Henry was not in a position to forbid William to drive, and therefore could not have permitted the wrongful user. As to his having caused the user, Henry could not be said to be responsible vicariously for William's driving. All that could be said of Henry was that he assisted his brother in getting a worthless piece of paper instead of an effective insurance policy. The Court of Appeal stated that he could not have been successfully prosecuted under section 35 (1) upon an allegation that he caused William to drive uninsured.

It would appear that in order to prove a "causing" it must be shown that an authority was given to drive, and that the person charged must be in a position to give that authority.

"or to permit any other person to use."—With the word "permit" there is some difficulty. In relation to other sections of the Road Traffic Act this word has been interpreted in the case of *Goldsmith v. Deakin (a)*. In that case, Mr. Justice AVORY used words which have often been quoted since in cases on sections which contain the words "cause or permit":

"In my opinion, if a person hires out a vehicle in circumstances in which he ought to know that it probably will be or may be used as a stage carriage, and puts his servant in charge of that vehicle to use it in any way that the hirer may choose to direct the servant to use it, then he is, within the meaning of the statute, permitting it to be used as a stage carriage without the proper and appropriate licence."

In a case under section 35 (1) (b), Lord WRIGHT said:

"To 'permit' is a looser and vaguer term (than 'cause'). It may denote an express permission, general or particular, as distinguished from a mandate. The other person is not told to use the vehicle in the particular way, but he is told that he may do so if he desires. However the word also includes cases in which permission is merely inferred. If the other person is given the control of the vehicle permission may be inferred if the vehicle is left at the other person's disposal in such circumstances as to carry with it a reasonable implication of a discretion or liberty to use it in the manner in which it was used. In order to prove permission, it is not necessary to show knowledge of similar user in the past, or actual notice that the vehicle might be or was likely to be so used, or that the accused was guilty of a reckless disregard of the probabilities of the case, or a wilful closing of his eyes. He may not have thought at all of his duties under the section."

Where to "cause" the commission of an offence implies some degree of active participation, to "permit" indicates merely a degree of passivity, a state of mind. The offence of "permitting user" arises where, to quote the words of LAWRENCE, J.: "although the respondent may not have known affirmatively the way in which the vehicle was being used, if in fact he allowed it to be used, and did not care whether it was being used in contravention of the statute or not, he did, in my view, permit the use."

In view of these definitions, it would appear that a person will be guilty of "permitting" under section 35 (1) if, (1) he parts with control of the vehicle in such circumstances that use by an uninsured driver is likely and (2) if he knows or ought to have known that such illegal use will be made of it. Constructive knowledge of the user will be attributed to him in any case where he deliberately closed his eyes to the possibility of the user, or where he failed to make suitable arrangements to prevent it (c). Finally, if a

(a) (1933), 150 T. L. 157, following *Osborne v. Richards*, [1933] 1 K. B. 283. The sections under consideration were 67 (1) and 72, Road Traffic Act, 1930.

(b) *McLeod (or Houston) v. Buchanan*, [1940] 2 All E. R. 179, at p. 187.

(c) *Newell v. Cook*, [1936] 2 K. B. 632; [1936] 2 All E. R. 203; *McCarthy v. British Oak Insurance Co., Ltd.*, [1938] 3 All E. R. 1.

definite arrangement for restricted user was made (d) or if it can reasonably be implied from the circumstances, he will not be found guilty in a prosecution under the section, on the general principles underlying the rules regarding the burden of proof (e).

"Permitting" has been further considered under other sections of the Road Traffic Act, 1930. In *Prosser v. Richings* (f), a prosecution under sections 94 and 64, where employers put their driver in a position to do certain acts, and the driver had accepted an excessive load, they were held to have permitted that excessive weight to be carried. It is probable that they were guilty of "causing" as well, on the principles of vicarious liability. So too an employer was guilty of permitting an employee to load an excessive weight even when the employee had been expressly ordered not to carry more than the legal weight (g).

In this case, HUMPHREYS, J., said that "permit" may mean no more than a failure to take proper steps to prevent. In a prosecution under section 72 (1), (10), for permitting a vehicle to be used as a stage carriage without there being a proper road service licence in force, the mental attitude of the "permitter" was considered in great detail (h). The summons was dismissed on the ground that he did not know that the vehicle was to be or was being used as a stage carriage, and had not deliberately refrained from making inquiries and had not shut his eyes to the obvious (i).

The person who is accused of permitting must be in a position in which he may give or withhold that permission. MACKINNON, L.J., in *Goodbarne v. Buck* (j), could see no ground on which anybody could be in a position to forbid another person to use a motor vehicle except in a case where the person charged is the owner of the car (k).

The last point which arises in an attempt to determine what constitutes the offence under section 35 (1) is whether the user must take place, or be caused or permitted with the knowledge that it is unlawful. Where causing or permitting has been proved in accordance with the authorities discussed above, it is immaterial whether the person charged knew or did not know that the user was unlawful or that the vehicle was in fact uninsured for the user which was caused or permitted. Whether the policy is in force for that particular user is a question of fact, and the knowledge or intention of the "permitter" is irrelevant (l). The words of the section are clear and unambiguous, and do not contain the word "knowingly." The fact that other offences under the same Act involve proof of the element of guilty intention throws light upon the construction of a section from which it is absent (m).

(d) Though this arrangement will not aid an employer who is responsible for the wrongful acts of his employee on the principle of vicarious liability. See *ante*, chapter I, p. 48, and note (f) below.

(e) *Woolmington v. Public Prosecutions Director*, [1935] A.C. 462; *R. v. Schama, R. v. Abramovitch* (1914), 84 L. J. K. B. 396.

(f) [1936] 2 All E. R. 1627.

(g) *Churchill v. Norris* (1938), 158 L. T. 255.

(h) *Evans v. Dell*, [1937] 1 All E. R. 349.

(i) See also *Newell v. Cross*, [1936] 2 K. B. 632; [1936] 2 All E. R. 203.

(j) [1940] 1 K. B. 771; [1940] 1 All E. R. 613.

(k) The same point was made in *Guardian Assurance Co. v. Sutherland* (1934), 63 Ll. L. R. 220, and *Watkins v. O'Shaughnessy*, [1939] 1 All E. R. 385. In these cases the person concerned either never had, or had completely parted with, any interest in the vehicle.

(l) *McLeod (or Houston) v. Buchanan*, [1940] 2 All E. R. 179, *per* Lord WRIGHT, at p. 186; *Provincial Motor Cab Co., Ltd. v. Dunning*, [1909] 2 K. B. 590.

(m) *Cf.* s. 112 (2) and (3). *R. v. Leinster (Duke)*, [1924] 1 K. B. 311; *Harding v. Price*, [1948] 1 All E. R. 283.

Reference should also be made to *Griffiths v. Studebakers, Ltd.* (n), where the respondents (on a case stated) were held to have been wrongly acquitted of an offence against regulations made under the Road Act, 1920 (o), committed by their driver whilst acting for their purposes. The respondents did not know of the particular breach of the regulations and had taken every possible precaution to prevent their servants from breaking such regulations. The Court held that knowledge on the part of the respondents was immaterial, and that the act of the driver of the car was the act of the respondents themselves for which they were legally liable. The view is further borne out by the decision in *Goldsmith v. Deakin* (p) in which the Court treated the presence of guilty knowledge or intent on the part of an offender against a similarly worded section of the Road Traffic Act, 1930, as irrelevant. Finally, in *Williams v. Russell* (q) it was decided that the onus of proof under section 35 (1) lies in the defence to prove affirmatively that the necessary insurance documents were in the possession of the accused. The question as to who bears the burden of proving that the policy is, or is not, in force is considered later (r). Knowledge in the defendant of the uninsured nature of the user of his vehicle may, however, become relevant owing to the particular terms of the policy in question.

The case of *Ellis (John T.), Ltd. v. Hinds* (s) is instructive on this point. The appellant company had been fined £1 by a bench of magistrates for permitting a youth under 17 years of age in their employ to use a motor vehicle when there was not in relation to his user of the vehicle a policy complying with Part II of the Road Traffic Act. The youth had told his employers that he held a licence to drive and had already driven for other firms, though by reason of his age he was not qualified to hold a licence. On appeal to quarter sessions, it was held that (1) the driver was not himself entitled to be treated as insured, (2) that if at the material time the company was covered by the policy they would have committed no offence notwithstanding (1), (3) that the company must be taken to know what a request to the driver to produce a licence and an investigation of his statement would have revealed, (4) that by reason of that knowledge they were not within the cover of the policy in respect of the present case, so that the offence was proved. The company appealed to the Divisional Court. Lord GODDARD, L.C.J., giving the judgment of the Court, stated that quarter sessions were right on points (1) and (2) above, and the question was whether the company were protected by their policy at the material time. If they were, it did not matter that there was no policy in force protecting the driver, for the company at the time were driving a vehicle by their servant and their liability for his acts was covered by the policy. Whether the company were prevented from relying on the policy because they recklessly failed to make the inquiries referred to depended on the terms of an exception clause in the policy, which exempted the insurer from liability while the vehicle was being driven with the general consent of the insured company by any person who to the knowledge of the company did not hold a licence to drive the vehicle unless that person had held and was not disqualified from holding a licence. The exception clause must receive a strict construction, in so far as it lay with insurers to prove the necessary facts to establish the exception. There was no duty laid on the insured company by the clause to make inquiries, and knowledge and means of knowledge were not in such circumstances the

(n) [1924] 1 K. B. 102.

(o) S. 12 (19 Halsbury's Statutes 95).

(p) (1933), 150 L. T. 157.

(q) (1933), 149 L. T. 190 following *Martin v. White*, [1910] 1 K. B. 665. See *post*, chapter IX.

(r) Chapter IX, *post*, "Repudiation."

(s) [1947] K. B. 475; [1947] 1 All E. R. 337.

same thing. It was satisfactory to know that in fact the insurance company here concerned had not sought to take advantage of the exception clause. No doubt they had recognised that it did not apply to the facts of the case. The conviction must be quashed (*l*).

It would appear from the judgments of GODDARD, L.C.J., and HUMPHREYS, J., in this case that where the relationship of master and servant exists between the owner of the vehicle and the person guilty of the uninsured user of that vehicle, the master-owner will not be held, in the absence of evidence to the contrary, to have permitted the use of his vehicle by his servant when the servant uses the vehicle in a manner outside the scope of his employment. The owner does not have to see that each of his servants is personally insured, whatever the user of the vehicle by the servant may be (*ll*).

"A motor vehicle."—A "motor vehicle" within the meaning of the Road Traffic Act, 1930, and as far as Part II is concerned, is any mechanically propelled vehicle intended or adapted for use on roads (*u*). The test of whether or not any vehicle is a motor vehicle, and thus within the terms of the Act, is the means whereby it is propelled. Human or animal propulsion prevents a vehicle from being a motor vehicle, but a vehicle which is ordinarily propelled or intended or adapted for non-mechanical propulsion becomes, it is submitted, a motor vehicle if in any instance it is in fact mechanically propelled (*u*). The user of the motor vehicle must also be a user of the road in the normal sense. Thus, a steam-roller is a motor vehicle (*u*), while a diesel dumper used solely in the construction of roads, is not, at any rate in Scotland (*x*). For the purposes of the Act and the regulations made thereunder motor vehicles are divided into some seven classes, heavy and light locomotives, motor tractors, heavy motor cars, motor cars, motor cycles (mechanically propelled vehicles with less than four wheels and an unladen weight of less than 8 cwt.) (*a*), and invalid carriages (*b*). Where the term "motor vehicle" is used, a vehicle of any one of these seven classes is intended, unless expressly excluded. The section under consideration does not apply to certain motor vehicles by reason of the provisions of section 35 (*y*), which are later considered (*c*).

"On a road."—The Act defines a road as meaning any highway or other road to which the public has access, and includes bridges over which a road, as thus defined, passes (*d*). A highway is a way over which all members of the public are entitled to pass and repass (*e*). Roadways over which all members of the public have no right to pass and repass are not highways in law, although all members of the public use them for passage, or although some members of the public may have rights to do so (*f*). Highways are based upon dedication and acceptance, or upon the effect of statutory

(*l*) A similar case arose in *Canadian Mercantile Insurance Co. v. Clark*, [1946] 1 W. W. R. 673, a Canadian case. In the exception clause in that policy the words "to the knowledge of the insured" were not present, and it was held that knowledge of the insured that the permitted driver was unlicensed was irrelevant. The mere fact that he was unlicensed and therefore by the terms of the policy uninsured was sufficient to allow the insurance company to evade liability for the results of his negligent driving.

(*ll*) See *post*, pp. 190-191, for the effect of this decision on a case where a servant is bedarred from obtaining damages from his employer for injuries caused by a fellow servant in common employment with him.

(*u*) S. 1 (23 Halsbury's Statutes 607). whether in fact it is being mechanically propelled or not. See also *Payne v. Allcock*, [1932] 2 K. B. 413.

(*w*) *Waters v. Eddison Steam Rolling Co., Ltd.*, [1914] 3 K. B. 818.

(*x*) *MacDonald v. Carmichael*, [1941] S. C. (J.) 27.

(*a*) *Quære* the position of motor-driven lawn mowers. If they are propelled under their own power along the road for any distance, they might become motor vehicles.

(*b*) S. 2 (1) (g) (23 Halsbury's Statutes 609).

(*c*) *Post*, p. 187.

(*d*) S. 121 (1).

(*e*) 16 Halsbury's Laws, 2nd Edn. 181, 182.

(*f*) 16 Halsbury's Laws, 2nd Edn. 181-187.

provisions (g). For the present purposes all roadways to which the public has in fact access, even though no right to access (gg), are "roads." Some bridges are legally highways, others are the private property of individual persons or bodies; the expression "road" in the section under consideration applies equally to both classes (h). Section 14 of the Act, which prohibits the driving of motor vehicles upon land not being a road, or upon a road which is a footway or bridleway, should be noted in this connection (i). Reference may also be made to section 33 of the Road and Rail Traffic Act, 1933, which replaces section 36 (2) of the Act of 1930 relating to hospital charges, and which applies to the user of motor vehicles on roads or "other places to which the public has a right of access" (k). For the purposes of the present section it may be said that "road" includes any place to which the public has access for the purpose of passage, not excluding the footway (l).

The meaning of "road" under section 1 (1) and section 15 of the Road Transport Lighting Act was considered in *Bugge v. Taylor* (m). A motor vehicle was left unlighted during hours of darkness on the forecourt of an hotel, to which the public had access though it was private property. The Divisional Court held that the defendant had been properly convicted of leaving an unlighted vehicle on a road.

In *Harrison v. Hill* (n), the road in question was private property, physically adapted for the carriage of vehicles, and led from a farm house to a main road. There were no houses adjoining it, and it was not fenced off to prevent the public having access to it. Although such members of the public who walked along it were trespassers, and had no right to access, yet because they did in fact walk along it, it was considered a road. In *O'Brien v. Trafalgar Insurance Co., Ltd.* (o), a road inside the grounds of a Royal Ordnance factory, to which the public could not gain access, and which only those at work in the factory used, was held not to be a road within the definition of section 121 (1).

"... unless there is in force, in relation to the user of the vehicle by that person, or that other person, as the case may be."—The task which is now undertaken is to interpret, considering for that purpose certain decided cases, the meaning of the phrase "unless there is in force, in relation to the user of the vehicle by that person... a policy" (p).

"In force."—At the outset it should be noted that unless and until a "certificate of insurance" or a "certificate of security" in the prescribed form and containing the prescribed particulars is issued by the insurers to the party effecting the insurance, no policy is of any effect (q). Thus

(g) 16 Halsbury's Laws, 2nd Edn 217-239. (gg) *Ibid.*, 181-187.

(h) *Ibid.*, 181-183. Most bridges are governed by special statutory provisions.

(i) S. 14 (23 Halsbury's Statutes 622).

(k) S. 33 (26 Halsbury's Statutes 898).

(l) In *Bryant v. Marx*, (1932), 147 L. T. 499, it was decided in relation to another section that "road" in the Road Traffic Act, 1930, included the footway.

(m) [1941] 1 K. B. 198.

(n) [1932] S. C. (J.) 13.

(o) (1945), 78 Ll. L. R. 223. In Scotland, the definition of a road within s. 121 of the Road Traffic Act, 1930, appears to be different. In *Purves v. Muir* (1948), 98 L. Jo. 413, the High Court of Justiciary held that the fact that the public had access to a courtyard was not alone enough to make it a road. The courtyard could not be a road unless it was also a means of vehicular communication. Compare this case with *Bugge v. Taylor*, note (m), *supra*.

(p) Including a cover note, s. 36 (6); *post*, p. 219.

(q) Section 36 (5); s. 37 (2); *post*, p. 214. There must be delivery of the certificate by the insurers to the assured, or to an agent who holds the certificate on behalf of the assured. Delivery to a hire purchase company, which holds the certificate as a matter of right, is not sufficient, and is not a compliance with the Act (*Starkey v. Hall*, [1936] 2 All E. R. 18).

where no certificate has been issued notwithstanding that a policy of insurance may be in existence, the conditions of the subsection are not satisfied and the use of the vehicle becomes criminal. In these circumstances the issue of a certificate has become the urgent and immediate interest of both assured and insurers.

The expression "in force," though one commonly found in statutes, has received little direct attention in the Courts, the cases in which its meaning has been considered involving exclusively questions under the Licensing Law (r). According to these authorities the expression means, briefly, "in existence." It is submitted that "in force" cannot be accorded the meaning which has been conferred upon the same expression in the cases alluded to, which all concerned special circumstances under the provisions of the various relevant statutes. The object and purpose of the subsection under consideration must again be borne in mind, and the expression construed in relation to the criminal sanction which the legislature provided for an owner's or user's commission to be covered by insurance or otherwise against third party liabilities.

The importance of ascertaining exactly the meaning of "in force" lies in three points which require separate consideration :

(i) The position before the insurers have become liable to indemnify the assured under the terms of an existing policy.

(ii) The position where a policy has been effected through non-disclosure or misrepresentation, and although voidable for these reasons has not been avoided.

(iii) The position where use of the vehicle is made by a person other than the assured.

(i) The first position has been incidentally considered in the case of the *Ocean Accident and Guarantee Corporation, Ltd. v. Cole* (s). In this case the insurers had issued a policy but not, apparently, a certificate of insurance against third party liability to their assured before June 3, 1931 (t). The policy contained certain conditions, one of which provided that no liability should arise under the policy until the premium had been paid. The premium due was not paid until June 11, 1931, upon which date the insurers issued a certificate of insurance containing the statement "Date of commencement of insurance June 4, 1931." The insurers were prosecuted and in the first instance convicted under s. 112 (3) for issuing a certificate of insurance false to their knowledge in a material particular. Upon appeal the insurers' conviction was quashed upon the question of "knowledge" (u).

Apart from the absence of the necessary certificate of insurance it is submitted that had the assured driven his car before the date upon which he paid the premium (June 11) he could have been convicted of the offence under the present subsection. Although there would have been a policy in existence between the relevant dates, it would have been ineffective, both by its conditions and from the absence of a certificate, during that time to protect the user against liability to third parties, the object and purpose of Part II of the Act would *pro tanto* have been frustrated, and the protection designed to be secured to injured third parties under that Act, the Third Parties Act (v), and the Road Traffic Act, 1934, avoided (w).

(r) *Hargreaves v. Dawson* (1871), 24 L. T. 428; *Freer v. Murray*, [1894] A. C. 576; *Tower J.J. v. Chambers*, [1904] 2 K. B. 903. (s) [1932] 2 K. B. 100.

(t) By s. 36 (5) of the Road Traffic Act, 1930, a policy of insurance is ineffective for the purposes of Part II of the Act unless a certificate of insurance has been issued by the insurers.

(u) See further, pp. 261-262, *post*.

(v) See *ante*, chapter III.

(w) *Norman v. Gresham Fire and Accident Insurance Co.* (1935), 52 Ll. L. R. 282.

(II) Non-disclosure or misrepresentation of material facts (x) on the part of the assured or his agents (y) in the obtaining of a policy entitles the insurers to avoid their liabilities to the assured thereunder, both past and future. Where a motor vehicle is used under the cover of a policy the grant of which the owner or user induced by misrepresentation or non-disclosure, his protection against liability is extremely precarious. A claim by the assured to enforce the indemnity against his insurers could be defeated, and the policy rescinded so as retrospectively to release the insurers from liability (a).

In such a case, therefore, the policy of insurance, although "subsisting" at the time of user, would be as little effective as the type of policy with a suspensory condition last discussed to accomplish the object and purpose of Part II of the Act. It might be objected to this submission that it necessarily involves elevating misrepresentation or non-disclosure to the rank of a criminal offence. To such a contention the Act itself provides the answer. Section 112 (2) (b) makes it an offence, punishable by fine or imprisonment or both, to make a false statement or withhold any material information for the purpose of obtaining the issue of the necessary insurance or security certificate (c). It is difficult to arrive at any conclusion other than that misrepresentation and non-disclosure are made criminal because their effect would be to avoid a policy induced by them and so derogate from the principle of "compulsory insurance," and the protection thereby conferred upon injured third parties. The position in law of cases under this point differs, however, from the cases considered under (i) above (d). Whilst in the type of case first considered the policy enjoyed a mere barren existence and no rights or remedies could arise under it by reason of its own conditions, in the second type of case not only does a policy induced by misrepresentation or non-disclosure continue to exist until it is avoided, but the rights and liabilities arising under it also have legal effect until such time as the insurers repudiate the policy or seek its rescission. Further, the insurers may never seek thus to avoid the policy, they may waive their right to repudiate and elect to treat the policy as valid, in which case the potential invalidating effect of misrepresentation or non-disclosure never operates (e). HILBERY, J., in *Goodbarne v. Buck* (f), considered the position of an assured under a voidable policy in relation to a prosecution under section 35 (1). He held that, as between the parties, the fact that the rights which were immediately created by the contract of insurance were subsequently avoided on the ground that the policy had been obtained by misrepresentation did not prevent there having been a policy in force at the time of the user of the vehicle, when it was remembered that at that time there had been no avoidance of it, and that there might never have been any avoidance at all if the insurance company had chosen to abide by the contract. On appeal (g), this view was not considered, for the appeal turned on a different point. But MACKINNON, L.J., referred to the setting aside of the

(x) See "material facts," defined in Road Traffic Act, 1934, s. 10 (5), *post*, p. 314.

(y) See this subject discussed more fully, chapter VII, *post*.

(a) See generally as to this, chapter IX, *post*. But note the changes introduced by the Road Traffic Act, 1934, s. 10. See chapter V, *post*; chapter VII, *post*.

(b) See *post*, pp. 261-262.

(c) It should be noted that "knowledge" of falsity is not an essential element in the proof of this particular offence. Thus innocent misrepresentation may be criminal within the subsection. See *post*, pp. 261-262, more fully.

(d) E.g. *Ocean Accident and Guarantee Corporation, Ltd. v. Cole*, [1932] 2 K. B. 100.

(e) See generally chapter IX, *post*.

(f) [1940] 1 K. B. 107; 64 Ll. L. R. 115.

(g) [1940] 1 K. B. 771; [1940] 1 All E. R. 613.

policy as being based on a fraudulently composed proposal, with the result that on the occasion of the accident the vehicle was being driven without an effective policy of insurance to cover it. It would appear that where a policy is avoided *ab initio* by insurers, any user of the vehicle during the currency of the subsequently avoided policy is criminal, and may be prosecuted, provided that the time-limit for bringing such a prosecution has not expired (*h*); but until the policy has been avoided in this way, it is in force for the purpose of this subsection. But the point is not finally determined.

(iii) The third type of case involves some difficulties. Motor vehicles are commonly used by persons other than their owners and by persons not themselves insured against third party risks (*i*). Frequently such user is effectively covered by the owner's third party liability insurance in circumstances in which the owner is under a legal liability towards third parties injured through the user's negligence. Within this category fall all cases of master and servant, in the widest sense, whether or not the tie of employment exists between them. Where the right of control was enjoyed by the insured owner in relation to user by another person the insured owner will in law be liable for the consequences of that other's wrongful acts (*k*). Where user under such conditions takes place, the owner's policy of insurance operates to cover *him* in respect of *his* liabilities for his servants' acts. That is to say, where the servant acts within the scope of his employment. There is no requirement that an owner of a car is bound to have a policy which would cover the liability of his chauffeur who takes out his master's car for what is commonly called a joy ride, and causes personal injury to a third party while so doing (*l*).

But there arise cases in which an assured's car is driven with his consent and permission where, owing to lack of the right of control, the relationship of master and servant does not exist and the principles of vicarious liability for the user's negligence do not come into operation (*m*). This may be the case where the car is lent to a friend of the assured or to a member of his family; should the "user" in this case be himself covered by the requisite third party insurance there is, of course, no difficulty. Often, however, such a person will not himself be insured against third party liability. Should he be involved in an accident causing injury to third parties, the third parties in such case would not be able to claim against the owner of the car, but only against the user personally (*n*).

The question therefore arises as to whether the insured owner's certificate and policy cover liabilities arising out of the user of the car by persons not being his servants or agents (*o*). Where the policy does not purport to cover such liabilities there is no doubt that such a "user" of the motor vehicle, and the owner who "causes or permits" such use is guilty of the offence under the subsection. Where the policy purports to insure persons driving with the assured's consent against third party risks, *Tattersall v. Drysdale* (*p*) has now confirmed that such authorised drivers have a right to sue the insurers for an indemnity against any such liability which they

(*h*) See s. 35 (3), Road Traffic Act, 1930, *post*, p. 248.

(*i*) E.g. members of the family of an insured person, or friends.

(*k*) E.g. a person voluntarily acting as driver for the owner; a friend who drives while the owner is in the car. Chapter I, *ante*, p. 48.

(*l*) *Ellis (John T.), Ltd. v. Hinds*, [1947] K. B. 475; [1947] 1 All E. R. 337, overruling *Swick v. Burns*, [1943] 2 All E. R. 441. See *post*, pp. 190-191.

(*m*) See this subject discussed fully at p. 48, *ante*, and the cases in the footnotes there cited.

(*n*) Subject to *Monk v. Warbey*, [1935] 1 K. B. 75.

(*o*) See *post*, p. 211.

(*p*) [1935] 2 K. B. 174.

may have incurred, and therefore there is with regard to them a policy of insurance in force, so long as the policy of him who gave his consent for them to drive is in fact valid.

Considering the meaning of "in force" in relation to these three points, it is submitted that the phrase has a wider implication than mere existence, and that, in fact, it means a valid, unavoidable policy of insurance issued by an authorised insurer (q) against the requisite third party liability, the rights to indemnity under which are vested in and can be enforced by the person using the vehicle, or someone who is in law responsible for his wrongful acts (r), and which will vest in the injured third party in the events specified in and by the effect of the Third Parties Act (s). From this submission it follows that "user" before the benefits of the indemnity have become enforceable, or where the benefits are liable to defeasance through misrepresentation or non-disclosure, and the policy has in fact been avoided on these grounds, will in every instance be unlawful (t).

This submission, which it is appreciated assimilates the expression "in force" closely to "enforceable," is supported by a dictum of Lord HEWART, C.J., in *Ocean Accident and Guarantee Corporation, Ltd. v. Cole* (u):

"I find a difficulty in understanding how a person can be said to be insured if the insurance company has no liability towards him."

Although the consequences of this interpretation may in certain cases be harsh—and from the whole of the Act it appears that the legislature intended to deal harshly with those who fail to insure themselves or who in insuring themselves have acted improperly—it is submitted that were the words "in force" given any other meaning, the result would be considerably to derogate from the object and purpose of Part II of the Act, *i.e.* the principle of compulsory insurance therein defined and delimited.

"In relation to the user of the vehicle by that person."—From the foregoing it follows logically that not only must a valid and enforceable policy of insurance against third party risks be in existence, but that policy must cover the use of the vehicle by the person using it at the time and place and in the manner in which it is being used on any particular occasion. Any other construction would frustrate the purpose of the subsection, which is designed to secure that every vehicle being used on the road at any particular time shall be covered, in relation to that particular user by that particular person, by the requisite policy of insurance. In order in any case to see whether these conditions are fulfilled it is necessary to consider the effect of the policy, as Lord HANWORTH, M.R., said in *Freshwater v. Western Australian Assurance Co., Ltd.* (a): "... one still has to look at the terms of the policy."

The whole policy in all its terms must be looked at to determine whether in relation to a particular user by a particular person the provisions of Part II of the Act are complied with. The terms of any third party liability policy may and frequently do contain a variety of conditions which must be fulfilled in order that the liability of the insurers to indemnify may arise. Apart from the limited categories of conditions made inoperative against third parties by section 38 (b), there is nothing in the 1930 Act (c) to invali-

(q) Sections 36, 42. See *post*, pp. 227 *et seq.*

(r) Cf. Lord HEWART, C.J., in *Bright v. Ashfold*, [1932] 2 K. B. 153, at p. 158.

(s) *Ante*, chapter III, pp. 120 *et seq.*

(t) *London and Scottish Assurance Corporation v. Ridd* (1940), 65 Ll. L. R. 46.

(u) [1932] 2 K. B. 100, at p. 104.

(a) [1933] 1 K. B. 515, at p. 523.

(b) See *post*, pp. 219 *et seq.*

(c) Cf. the 1934 Act, s. 12; and see chapter V, *post*, p. 316.

date the inclusion of conditions to which the parties have agreed in a third party liability policy (d). The effect of such conditions in a policy can be most usefully discussed under three heads :

(i) *Conditions relating to persons using the vehicle.*—Terms are frequently found in the policy limiting the classes of persons whose liability to third parties will be held insured under the policy. The effect of such terms is considered in detail elsewhere in this chapter (e). Again, terms are often included in the policy providing that no liability upon the insurers shall arise in the event of the use of the vehicle either by persons otherwise purported to be covered in the policy who are subject to specified disabilities, or belong to a special class (f), or by the assured himself in the event of his intoxication (g). If in the circumstances of any particular case one of such conditions comes into operation, the policy becomes, as regards that particular user, inoperative. In such event the policy cannot be said to be "in force in relation to the user of the vehicle" by the person using the same; the offence under the subsection is therefore committed. In any particular case the words of BRANSON, J., in *Gray v. Blackmore* (h) may be aptly framed into a test—is "that use by him of that motor vehicle" covered by the policy or not?

(ii) *Conditions relating to the vehicle itself (i).*—Policies commonly provide that no liability shall devolve upon the insurers in the event of the motor vehicle concerned being driven or used upon the road in a defective condition. Such conditions have several times come before the Courts, which have held that no liability arises when they are broken (k). The case of *Jones and James v. Provincial Insurance Co., Ltd.* (l), where in breach of a term of the policy the car was taken out with defective brakes, and it was held therefore that the insurers were under no liability to indemnify, may be cited by way of illustration (m).

The effect of Part II of the Road Traffic Act upon such conditions was directly discussed in *Bright v. Ashfold* (n). In that case a policy of insurance against third party risks was issued to Ashfold in respect of a motor bicycle. The policy contained a term excluding the insurers' liability "for any accident loss or damage caused or sustained while any motor cycle . . . is carrying a passenger unless a side-car is attached." Ashfold drove a motor cycle on a road with a pillion passenger and without a side-car. He was charged with the offence under section 35 (1), and, on appeal, convicted. Lord HEWART, C.J., having indicated that in his view the case was too clear for argument, said :

"The policy referred to did not cover use whilst carrying a passenger unless a side-car was attached to the motor cycle. In those circumstances, which were the circumstances in the present case, there was no policy of insurance in force in respect of third-party risks. . . . This was a condition

(d) On the other hand, s. 12 of the 1934 Act (see chapter V) and the terms of the Domestic Agreement (see chapter VI) have the effect of invalidating, as against third parties, practically all conditions contained in any policy. Nevertheless, the terms of the policy itself must still be examined to see whether on the face of it it covers the user of the vehicle, for if it does not an offence is still committed against s. 35 (1).

(e) See *post*, pp. 219 *et seq.*

(f) E.g. Jews, actors, Air Force officers, etc. See *Richards v. Brain and Port of Manchester Insurance Co* (1934), 50 Ll. L. R. 88.

(g) For the effect of s. 12 of the 1934 Act upon such conditions see chapter V, *post*, p. 316. (h) *Post*, p. 193.

(i) For the effect of s. 12 of the 1934 Act upon such conditions see chapter V, *post*.

(k) See more fully chapter VIII, *post*.

(l) (1929), 46 T. L. R. 71.

(m) For further examples of the same type see chapter VIII, *post*, p. 616.

(n) [1932] 2 K. B. 153.

" which circumscribed the operation of the policy from the beginning.
 " There was, therefore, no policy of insurance against third-party risks at
 " all in force in relation to the use of the motor cycle by the respondent,
 " where a passenger was being carried otherwise than in a side-car."

It is submitted that the same reasoning is applicable to the case of vehicles which—contrary to a condition on the policy, are used on roads in a defective condition (o).

(iii) *Conditions relating to the user of the vehicle (p).*—Almost all third party liability insurance policies in relation to motor vehicles contain conditions stipulating that in certain circumstances relating to user the risks arising from the vehicle concerned in the policy shall not be covered by the indemnity. Instances of such conditions are those stipulating that the vehicle shall not be used for certain purposes, e.g. for business, for purposes connected with the motor trade ; for the conveyance of goods, etc. ; or for the carriage of certain classes of goods (q). Where such stipulations amount to conditions of the insurers' liability there is no doubt but that their application in any particular case may cause the policy in law to be inoperative, and may lead to the committing of an offence (r).

The effect of Part II of the Road Traffic Act upon this class of condition arose for decision in the case of *Gray v. Blackmore* (s), where injuries were sustained by a third party by the use of a motor car insured in respect of private purposes only which at that time was being used for the purposes of the motor trade. Upon the insurers refusing indemnity to the assured he sued them for a declaration that they were liable to indemnify him. BRANSON, J., *dicta* from whose judgment have been quoted above, decided that the insurers were not liable since the condition restricting the user of the vehicle was valid and not rendered inoperative by the provisions of Part II of the Act. He concluded (a) :

" I Having come to the conclusion upon the facts that the car was being used
 " for a purpose which was excepted from the policy, I hold that it was not
 " covered by the policy at all at the time in question ; and I see nothing
 " in the Road Traffic Act which enables the assured, the plaintiff, to say,
 " ' Notwithstanding that I was using this car in the way in which the policy
 " says, not that I was not to use it, but that I could not use it and retain
 " ' my cover, you are still liable to pay me under the policy.' "

It is submitted that, where through breach of conditions restricting liability for third party risks the assured is not entitled to indemnity from his insurers, " user " in such circumstances by him or any other person is not a lawful user, since the necessary conditions of the subsection are not fulfilled. This has been so held in relation to certain types of conditions, and there is nothing to prevent the principle from application to all conditions of the classes discussed. Unless of any particular user it can be said that that user by that person in that manner and for that purpose is within the terms of the policy, so as to entitle the person using the same to indemnity against third party risks, then the offence has been committed.

(o) See chapter V, *post*, pp. 316 *et seq.*, as to effect of 1934 Act on such terms.

(p) Some of these conditions are unaffected by s. 12 of the 1934 Act. See chapter V, *post*.

(q) The effect of conditions as to user is fully discussed in chapters VI and VII, *post*.

(r) In some cases it has been held that words of this type are not conditions of the insurers' liability, but words descriptive of the risks covered. See *Provincial Insurance Co. v. Morgan* [1933] A. C. 240, fully discussed in chapter VII, *post*.

(s) [1934] 1 K. B. 95.

(a) [1934] 1 K. B. 95, at p. 108.

It remains, in conclusion, to allude to the position which may arise when the enforcement of an existing policy is affected by illegality. The principle remains valid notwithstanding the decisions in *Tinline v. White Cross Insurance* (b) and *James v. British General Insurance Co.* (c) that a contract to indemnify a wrongdoer against the liabilities and consequences arising out of a wilful wrong is illegal and unenforceable (d). While this rule does not render inoperative contracts to indemnify a wrongdoer for the consequences of his negligence, possible cases in which it might apply to render motor insurance policies invalid have been indicated. In any such instance, it follows from the foregoing submissions that user of the motor vehicle covered only by an illegal policy would be unlawful within the present subsection.

"*Such a policy of insurance.*"—A policy of insurance includes a covering note (e). No policy of insurance is effective unless it complies with the requirements of Part II of the Act. That is:

- (i) It must be issued by an authorised insurer; and
- (ii) It must insure the person or classes of persons (f) named therein against certain specified liabilities (g); and
- (iii) It must be made effective by the delivery of a certificate of insurance by the insurers to the person effecting the policy of insurance in question. This certificate must be in the form and contain the information prescribed for the purpose in the Regulations made and issued by the Minister of Transport in pursuance of his powers under this Part of the Act (h).

"*Or such a security in respect of third-party risks.*"—As an alternative to a policy of insurance the person using a motor vehicle or its owner may cover the risks of third party liability arising from the use of the vehicle on the road by a security under section 37 of the Act (i). Such security must be given by a proper person (j), and must consist in a specified undertaking under which the liability of the undertaker may, in contrast with liability under a policy of insurance, be limited to certain named minimum sums (j). The security is not, however, effective for the purpose of section 35 until a certificate of security has been issued to the person who has covered himself thereby. The form of this certificate of security has also been prescribed by the Minister of Transport under Regulations (k).

"*As complies with the requirements of this Part of this Act.*"—These general words again require reference to the sections of Part II of the Act and their general effect. The reader is therefore referred to the following pages in which these provisions are fully discussed. It is sufficient for the present purpose to note what must be covered by a policy of insurance or security in order that it should comply with the Act:

- (i) Liability in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road other than liability

(b) [1921] 3 K. B. 327.

(c) [1927] 2 K. B. 311.

(d) See this subject discussed in chapter II, *ante*, pp. 107 *et seq.*, and the case of *Haseldine v. Hoshem*, [1933] 1 K. B. 822, in which the principle was reaffirmed.

(e) S. 36 (6) (23 Halsbury's Statutes 639). See *post*, p. 219.

(f) See the meaning of this phrase discussed *post*, pp. 180, 211.

(g) S. 36 (1), as amended by Road Traffic Act, 1934, s. 16 (4) (27 Halsbury's Statutes 548).

(h) S. R. & O. 1941, No. 926. See *post*, pp. 214 *et seq.*

(i) See this section discussed fully, *post*, pp. 223 *et seq.*

(j) S. 37 (1), (2) (23 Halsbury's Statutes 639).

(k) S. R. & O. 1941, No. 926. See *post*, pp. 214 *et seq.*

to servants, to voluntary passengers or arising under contracts. Under a security such liability may, under a policy of insurance such liability may not, be limited (*l*).

(ii) Liability to pay a medical practitioner or hospital for emergency treatment afforded to an injured or killed third party under the provisions of the Road Traffic Act, 1934 (*m*).

Section 35 (2) and (3) are dealt with in the section dealing with criminal offences under Part II of the Act, to which the reader is referred for their consideration (*n*).

4. Section 35 (4).

"This section shall not apply to a vehicle owned by a local authority
"a police authority, or the Receiver for the Metropolitan Police District,
"or by a person who has deposited and keeps deposited with the Accountant-
"General of the Supreme Court for and on behalf of the Supreme Court
"the sum of fifteen thousand pounds, at any time when the vehicle is being
"driven by the owner or by a servant of the owner in the course of his
"employment, or is otherwise subject to the control of the owner."

The different classes of vehicles excepted from the operation of section 35 by this subsection must be separately treated. While the benefit of exception is expressly conferred upon vehicles of the various kinds and not upon the persons driving or using those vehicles, it naturally follows that persons using such vehicles are in certain circumstances relieved from the necessity of being covered by insurance or security in respect of their use of such vehicles. The subsection thus, though nominally only excepting vehicles from the operation of section 35, in practice confers the benefit of the exception upon persons using those vehicles, as it is only when a vehicle is in use that it is required to be covered by insurance or security.

"a vehicle owned by a local authority."—The meaning of "local authority" is defined by a following subsection and need not therefore be discussed here (*o*). Vehicles hired by local authorities for their purposes or vehicles which, more commonly, are engaged by local authorities on contract work, not being owned by such authorities, would not come within the exception. Inasmuch as a local authority cannot itself "use" a vehicle on a road, the use of the authority's vehicles by their members or servants is covered by the exception. By the effect of the Minister of Transport's Regulations the person using a local authority's vehicle must be furnished with the appropriate certificate of ownership (*p*). It is doubtful whether the exception would cover the use of a local authority's vehicle for unauthorised purposes or for purposes which are private to the servant or member who is using it at any particular time.

"... a police authority or the Receiver for the Metropolitan Police District. . . ."—"Police authority" is not defined in the Act, but must, it is submitted, mean the police forces established under the relevant statutes relating to the City of London (*q*), the Counties (*r*), and the Boroughs (*s*)

(*l*) Ss. 36, 37 (23 Halsbury's Statutes 637, 639), and see fully notes to these sections, *post*, pp. 188 *et seq.*, 222.

(*m*) S. 16 (4) (27 Halsbury's Statutes 548). See chapter V, *post*, p. 348.

(*n*) See *post*, pp. 244, 248.

(*o*) *Post*, p. 187.

(*p*) S. R. & O. 1941, No. 926, Rule 8 (3).

(*q*) City of London Police Act, 1839 (2 & 3 Vict. c. xciv).

(*r*) County Police Acts, 1839 and 1840 (12 Halsbury's Statutes 775, 787); County and Borough Police Act, 1856 (12 Halsbury's Statutes 812).

(*s*) Municipal Corporations Act, 1835 (5 & 6 Will. 4. c. 76); 1882 (10 Halsbury's Statutes 576).

respectively. The Receiver for the Metropolitan Police District is the holder of a special statutory office (*t*) who controls the property, funds and accounts of the police of the Metropolis (*u*). The exception from the operation of section 35 afforded by this subsection has been extended by the Road Traffic Act, 1934, by the addition of the following words to the end of the subsection (*v*) :

" or to any vehicle at any time when it is being driven for police purposes
 " by or under the direction of a police constable, or by a person employed
 " by a police authority, or employed by the said Receiver, or on a journey
 " to or from any place undertaken for salvage purposes pursuant to Part IX
 " of the Merchant Shipping Act, 1894."

Lengthy comment could be made upon this addition. Where the old subsection only excepted vehicles owned by police authorities, the new subsection covers all vehicles by whomsoever owned, provided they are being driven for police purposes by or under the direction of a police constable or other employee of the police authority. Whether or not a vehicle is being driven for "police purposes" is a question which may be productive of much argument, but which it should be noted is only relevant when the vehicle is not one owned by the police authority but owned by a private individual. The salvage purposes referred to under the Merchant Shipping Act, 1894 (*w*), are the affording of aid and assistance to vessels wrecked, stranded or in distress, and the cargoes, passengers and crews thereon (*x*).

" . . . or by a person who has deposited and keeps deposited with the Accountant-General of the Supreme Court for and on behalf of the Supreme Court the sum of £15,000, at any time when the vehicle is being driven by the owner or by a servant of the owner in the course of his employment, or is otherwise subject to the control of the owner."—The owner of a motor vehicle, instead of covering the risk of liabilities towards third parties arising out of the use of such vehicle by himself or his servants by insurance or security in accordance with the requirements of Part II of the Act, may make the deposit which is indicated in this subsection with the Accountant-General. When he has made such deposit he must then issue in respect of that motor vehicle signed by himself or his agent a certificate that the vehicle is covered by deposit (*y*). The making, administration and application of such deposits are governed by section 43, which is later the subject of separate treatment (*z*).

Where an owner makes such a deposit, the deposit will operate to cover the use of the vehicle in respect of which the deposit is made, by the owner or any other person who is the owner's servant, in the legal sense (*a*). The words "in the course of his employment" refer to the use of the vehicle by the owner's employee, not being such that the owner would escape liability for the wrongful acts of his servant while so using the vehicle (*b*).

(*t*) Metropolitan Police Act, 1829, Metropolitan Police (Receiver) Act, 1861 (12 Halsbury's Statutes 743, 825).

(*u*) 25 Halsbury's Laws, 2nd Edn. 297, 301, 302.

(*v*) Road Traffic Act, 1934, Schedule III (27 Halsbury's Statutes 568).

(*w*) Merchant Shipping Act, 1894, Part IX (18 Halsbury's Statutes 358).

(*x*) By Schedule III of the Road Traffic Act, 1934.

(*y*) S. R. & O. 1941, No. 926, Rules 8 and 11.

(*z*) See *post*, pp. 223 *et seq.*

(*a*) The Court of Appeal in *Monk v. Warbey*, [1935] 1 K B 75, considered that this part of this subsection afforded a strong indication that the Act was intended to give rights to third parties against persons who allowed others to drive their vehicle without insurance.

(*b*) Chapter I, *ante*, pp. 48 *et seq.*

The concluding words are designed to cover the case of use by a friend or relative of the owner who, in law, is in the same position as a servant of the owner when the latter has the right to control his actions (c).

5. Section 35 (5).

"This Part of this Act shall not extend to invalid carriages within the meaning of Part I of this Act or to tramcars or trolley vehicles the use of which is authorised or regulated by special Act of Parliament or by an order having the force of an Act, unless the special Act or order so provides."

As has already been indicated, certain motor vehicles are excluded from the operation of Part II of the Act. The definition and classification of the term "motor vehicle" has been discussed. It remains to indicate that by this subsection three types of such vehicles are indicated. These are:

Tramcars: i.e. any carriage used on any road by virtue of an order made under the Light Railways Act, 1896 (d). But the Special Act or Order under which such tramcars are operated may provide that they are subject to the provisions of Part II of this Act (e).

Trolley vehicles: i.e. mechanically-propelled vehicles adapted for use on roads without rails and moved by power transmitted thereto from an external source (f). These are subject to a similar provision as may affect tramcars (g).

Invalid carriages: i.e. mechanically propelled vehicles of unladen weight of not more than 5 cwt. AND which are specially designed and constructed, and not merely adapted, for the use of persons suffering from some physical defect or disability and are used solely by such persons (h).

6. Section 35 (6).

"In this section the expression 'local authority' means the council of any county, county borough or county district, the common council of the City of London and the council of any metropolitan borough, and includes any joint board or joint committee which is so constituted as to include among its members representatives of any such council."

The effect of this subsection is merely to define what bodies are local authorities within the meaning of the exception conferred upon such bodies by subsection (4) of section 35 which has been dealt with above. Local authorities are constituted and governed by the provisions of numerous Acts of Parliament (i). For the purposes of the application of section 35 to Scotland the term "local authority" is given a special significance:

7. Territorial limits of Act.—These may be taken to be, *mutatis mutandis*, the same as those of the Act of 1934, which are considered later (j).

(c) Chapter I, *ante*, pp. 48 *et seq.* The legal significance of "servant" must be clearly distinguished from the use of the term in common parlance. Whenever one person has a right to control another's actions, then that other person is his servant in law.

(d) 14 Halsbury's Statutes 252.

(e) Road Traffic Act, 1930, s. 121 (1).

(f) *Ibid.*

(g) *Ibid.*, s. 35 (5).

(h) *Ibid.*, s. 2 (1) (g). Whether such a vehicle would be excepted from the operation of Part II were it being used by a person not within the definition is a question which may some day have to be decided. Cf. also, *Payne v. Allcock*, [1932] 2 K. B. 413.

(i) E.g. Public Health Act, 1875 (13 Halsbury's Statutes 623); Municipal Corporations Act, 1882 (10 Halsbury's Statutes 576); Local Government Act, 1894; Local Government Act, 1929 (10 Halsbury's Statutes 773, 883.)

(j) *Post*, p. 276

*Application to Scotland.**Section 44.*

" This Part of this Act shall apply to Scotland subject to the following modification :—

" In section thirty-five the expression ' local authority ' means any county, town, or district council or any joint committee which is so constituted as to include among its members representatives of any such council."

Section 123 (3).

" This Act shall not extend to Northern Ireland " (k).

PART 3.—REQUIREMENTS AS TO POLICIES AND SECURITIES

I.—POLICIES

1. Section 36 (1).

Requirements in respect of policies.

" In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which—

" (a) is issued by a person who is an authorised insurer within the meaning of this Part of this Act ; and

" (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road :

" Provided that such a policy shall not be required to cover—

" (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment ; or

" (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise ; or

" (iii) any contractual liability."

It should be noted that the above subsection has been amended by subsection (4) of section 16 of the Road Traffic Act, 1934, as follows :

" (4) In paragraph (b) of subsection (1) of section thirty-six of the principal Act, the reference to liability in respect of death or bodily injury shall be deemed to include a reference to liability to make a payment under this section in respect of emergency treatment required as a result of bodily injury, and the proviso to that paragraph shall not have effect as respects liability to make a payment under this section " (l).

(k) The Northern Ireland Road Traffic Act, 1930, contains insurance provisions practically identical with the English Act of 1930, but the Northern Ireland Act of 1934 is even more stringent than the English Act of that year.

(l) See chapter V, *post*, p. 348.

1. "In order to comply with the requirements of this Part of this Act."—The requirements referred to are principally those in section 35 (m), relating to the duty not to use a vehicle on the road without there being in force in relation thereto such a policy of insurance as the Act stipulates.

2. "A policy of insurance must be a policy which (a) is issued by a person who is an authorised insurer within the meaning of this Part of this Act."—The definition of a person who is an authorised insurer is given in subsection (3) of this section in dealing with which it will be considered (n). It is submitted that the words "is issued by a person who is" an authorised insurer bear their plain and natural meaning, and that therefore not only must the policy have been issued by a person who was authorised at the time of issue, but that, subsequently, the insurer must remain authorised (o).

3. "A policy of insurance must be a policy which (p) (b) insures such person, persons or classes of persons as may be specified in the policy."—It is submitted that the word insures means "gives an undertaking to indemnify enforceable by the person (or persons) to whom it is given."

The meaning of the words "insurance" and "indemnity" has been discussed and contrasted. It has already been pointed out that, as the last section requires, the policy must be one which is "in force," and that "in force" signifies that the policy must not be avoidable on account of any non-disclosure or misrepresentation, or on account of the breach of any condition of the policy prior to the occurrence of the event which gives rise to the liability (q). It is submitted further that a policy which contained any provision whereby the insurers might refuse the indemnity at their discretion in any circumstances would not be one which "insured" sufficiently to satisfy this subsection.

Thus, "insures such persons, etc.," must mean that the policy gives to such person or persons, or to the members of the classes of persons specified in the policy, the right to enforce against the insurers the undertaking which the policy gives (r).

It must be stressed here that "person" includes companies, etc. (s), and that a policy of motor insurance issued to and effected by a company would of necessity be an insurance of the driving of the vehicle by some person on behalf of the company (t). It was argued in *Sutch v. Burns* (u) that this section of the Act was designed to secure that in respect of vehicles owned by a company (or, etc.) not only should the company be insured against liability which it might incur, but the persons driving with the

(m) See *ante*, pp. 170-187.

(n) See further as to this, *post*, pp. 227 *et seq*.

(o) *I.e.* must not become unauthorised by failure to comply with the formalities prescribed by the Assurance Companies Act, 1909 (2 Halsbury's Statutes 724), and the Assurance Companies Act, 1946 (39 Halsbury's Statutes 371), as amended by the Road Traffic Act, 1930, s. 42 (23 Halsbury's Statutes 641). Such subsequent failure also renders the "insurer" liable to a penalty under s. 2 (2) of the 1946 Act, *post*, pp. 231 *et seq*.

(p) Section 36 (1) (a), which requires a policy to be issued by an authorised insurer, is dealt with fully at pp. 227 *et seq.*, *post*.

(q) *Cf.* the provisions of Part II of the Road Traffic Act, 1934, chapter V, *post*. See also chapter IX, *post*. As to the meaning of "in force" see p. 117, *ante*.

(r) *Tattersall v. Drysdale*, [1935] 2 K. B. 174; *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319; *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243.

(s) See *ante*, p. 121.

(t) Since a company can only act through its agents or employees.

(u) [1943] 2 All E. R. 441.

permission of the company should themselves be insured (*v*), but this contention was rejected by the Divisional Court in *Ellis (John T.), Ltd. v. Hinds (w)*. The argument which succeeded in *Sutch v. Burns (uu)* was to the effect that it is the duty of a master who covers his servants by a third party insurance policy while they are driving his vehicles on the road to cover them, in order to comply with section 35 (1) of the 1930 Act, by a policy which extends insurance protection to them even while those servants are using the vehicles in circumstances in which the master would not be liable, for instance, owing to the operation of the doctrine of common employment (*v*), or because the servants are acting outside the scope of their employment. In *Ellis (John T.), Ltd. v. Hinds (u)* GODDARD, L.C.J., pointed out that where the servants are acting outside the scope of their employment in their use of the vehicle the master cannot be said to have caused or permitted that use of his vehicle, and is therefore not required by the 1930 Road Traffic Act to have a policy of insurance to cover that unauthorised use. As the decision of ATKINSON, J., in *Sutch v. Burns* was decided on hypothetical facts, the Court of Appeal (*a*) held that the Court had no jurisdiction to hear the case. And now *Ellis (John T.), Ltd. v. Hinds (w)* has reversed the decision.

There is a vital difference between the position where the driver of the car is acting as the agent or servant of the assured, and the position where he is merely driving with the assured's permission or consent. In the first case the assured is liable for any death or injury inflicted by the driver to third parties (*b*). In the other case he is not (*c*). It is submitted that when the driver of a motor vehicle is acting in such driving as the servant or agent of another person so as to make that other person vicariously responsible for any liability which he (the driver) incurs, he satisfies the requirements of section 35 (1) and section 36 (1) (b) if the person on whose behalf he is driving has in force such a policy of insurance as insures *that person* against any liability (of the kind specified in subsection (1) (b) of section 36) when the vehicle is being driven by some other person on his behalf (*i.e.* is not a policy under which only the assured is permitted to drive). Such a driver, taking the words of the above subsections, could say that he was "using a motor vehicle on a road . . . in relation to the user of which by him there was in force such a policy of insurance as complies with the requirements of this Part of this Act, namely, such as insures such person (the person on whose behalf he is driving) against any liability which may be incurred by *him* (not the driver, but the person on whose behalf he is driving) in respect of, etc." The object of the Act would not be defeated by such an interpretation, since any person injured by the driver in such circumstances, although he could not obtain advantage from any insurance if he sued the driver alone, could sue the person on whose behalf the driver was

(1) So as to prevent the third party having no rights against an insured person in cases where the servant of the company, although driving its vehicle, was not driving on its business or as its agent

(u) [1947] K.B. 475, [1947] 1 All E.R. 337. (uu) [1943] 2 All E.R. 441.

(x) In the case of *Ellis (John T.) Ltd. v. Hinds*, [1947] K.B. 475, [1947] 1 All E.R. 337, next referred to, the situation arising where a servant is debarred by the defence of common employment from obtaining damages from his employer for injuries caused by a fellow servant was not considered, and is such an event the injured servant would sometimes be prevented from obtaining satisfaction of any judgment he might obtain against the fellow servant himself. See note (d), *infra*.

(a) [1944] K.B. 406, [1944] 1 All E.R. 520, n.

(b) *Samson v. Astchison*, [1912] A.C. 844; *Reichardt v. Shard* (1913), 30 T.L.R. 81; *Pratt v. Patrick*, [1924] 1 K.B. 488; *Parker v. Miller* (1926), 42 T.L.R. 408; *Smith v. Moss*, [1940] 1 K.B. 424; [1940] 1 All E.R. 469.

(c) *Joel v. Morison* (1834), 6 C. & P. 501; *Sanderson v. Collins*, [1904] 1 K.B. 628; *Reichardt v. Shard* (*supra*).

driving, and have the advantage which the Act envisages from the insurance of that person (d).

In other words, the driver of a vehicle who, if he incurs any liability to a third party, will make some other person as well as himself responsible therefor, will satisfy the requirement of the Act if that other person is insured against the consequences of the liability so incurred. Thus paid drivers employed by a firm, individual or company need not be themselves covered by a policy, provided that their employer has such a policy as insures the employer against any liability of the specified kind which may be incurred by the employer through the driving of such drivers. The position would be the same in the case of private individuals when there is such a relationship between owner and driver as makes the former vicariously liable for any wrongful acts committed by the latter, the owner being insured (e). But the position is entirely different where the driver is merely driving a vehicle with the permission or consent of the owner. In that case, if the driver runs down and injures a third party, the liability thereby incurred is his alone, and unless he is insured the third party has no insured person against whom he can enforce the liability. In this case, it is submitted, the Act by sections 35 (1) and 36 (1) (b) clearly requires that the driver shall himself be insured by a valid contract of insurance to which he is a party and under which he can directly enforce payment of an indemnity against insurers. This result he can achieve by making sure that the policy of the person on whose permission he is driving his car has an extension clause in it covering such use.

There is no reason why a single policy should not insure two or any number of persons. At common law, however, the persons insured must be parties to the contract, must have given consideration and must be able to enforce the policy against the insurers.

There is nothing in this subsection taken by itself (f) to suggest that the well-known rule of the common law (which has survived so many contractual attempts to evade it) (g), that no person who is not a party to a contract has any rights thereunder, should be abrogated.

This conclusion at once begs the question as to what is effected by subsection (4) of this section (h). For the reasons which have been given, it would seem that when the draftsman came to this subsection a doubt arose in his mind as to whether "persons specified, etc.," were persons who could enforce a policy to which they were not parties, and framed subsection (4) for the purpose of removing that doubt. It may be assumed that that

(d) See chapter II, *ante*, pp. 70 *et seq.* But he may be prevented from obtaining a judgment against the principal by the doctrine of common employment. Where therefore an owner of vehicles, driven by servants, is likely to be faced by "Road Traffic Act" claims which arise from the use of his vehicles by his servants within the scope of their employment but which would fail against him owing to this doctrine of common employment, then that owner should see that his policy contains an extension clause in it which extends cover to his servants when they are permitted to drive by the assured owner, if he wishes his servants to obtain personal cover under his policy. This requirement will no longer be necessary so far as the doctrine of common employment is concerned, for that defence (of common employment) has been abolished by the Law Reform (Personal Injuries) Act, 1948, against claims arising after July 5, 1948. See p. 37, *ante*.

(e) As in *Pratt v. Patrick*, [1924] 1 K. B. 488; *Parker v. Miller* (1926), 42 T. L. R. 408.

(f) *I.e.* without regard to subsection (4) of this section, *post*, pp. 211 *et seq.*

(g) As, *e.g.*, in *Tweedle v. Atkinson* (1861), 1 B. & S. 393, where it was expressly agreed by the parties that the third party should have power to enforce the contract. Cf. *Melhado v. Porto Alegre Rail. Co.* (1874), L. R. 9 C. P. 503; *Dunlop Pneumatic Tyre Co. v. Selfridge & Co., Ltd.*, [1915] A. C. 847. And see *ante*, chapter II, pp. 92 *et seq.*

(h) *Post*, pp. 211 *et seq.*

subsection was designed and intended to enable persons driving the insured car with the assured's consent to have a right which they might (i), apart from the subsection, not have—namely, the right themselves to enforce the policy against the insurers in so far as it purported to give them the indemnity which the subsection now under consideration requires to be given to them.

The meaning and effect of subsection (4) will be considered fully later (j). It suffices here to state that in *Tattersall v. Drysdale* (k) it was finally decided that insurers, upon the true construction of the later subsection, were legally bound to indemnify all persons or classes of persons referred to in the policy as being insured whether they are parties to the contract or not, with the result that a person driving with the assured's consent, if the policy states that he will be indemnified, has himself a right of action direct against the insurers to enforce the policy in respect of any liability which the policy purports to cover (l).

It was further decided in *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.* (m) that an issued policy which complies with sections 35 and 36 of the Road Traffic Act, 1930, and which extends indemnity to any person driving the insured car with the policy holder's consent, in fact contains a number of contracts of insurance, one with the policy holder and one with each person driving on his order or with his consent.

4. "*Any liability which may be incurred by him or them.*"—The various classes of liability which may be incurred by the use of a vehicle on a road have been described in detail in a previous chapter (n). This phrase does not mean what at first sight it might be thought to imply (o). It means any liability which may be incurred by him or them provided it is *incurred at a time and in the circumstances covered by the policy*. In other words, although the insurance given must cover every class of liability—whether in tort (p) or in breach of a statutory duty (p)—save those expressly excepted by the proviso to the subsection, it need not cover any liability incurred outside the limits to which the insurers may choose to restrict the risk which they undertake to insure (q).

Thus, if before 1935 (r) the policy provided that it did not cover liability whilst the car was being driven by a drunken driver (s); in a manner dangerous to the public (t); by an officer of His Majesty's Air Force (u); in a dangerous or defective condition (v); at night; with an excessive load of

(i) They would only have it if they were parties to the contract—as they might be—e.g. a relative of the assured who shared in paying the premium.

(j) *Post*, pp. 211 *et seq.*

(k) [1935] 2 K. B. 174.

(l) *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243; affirmed, [1945] K. B. 250; [1945] 1 All E. R. 316.

(m) [1943] A. C. 121; [1942] 2 All E. R. 319.

(n) Chapter I, *ante*, pp. 16–42. Otherwise than in respect of hospital charges or fees for emergency treatment under the Road Traffic Acts, 1930–4, there seem to be no instances of absolute liability for injuries caused to persons by the use of motor vehicles. *Aliter*, for injuries to property under certain statutes. Cf. *Postmaster-General v. Beck and Pollitzer*, [1924] 2 K. B. 308.

(o) I.e. any liability of any extent in any circumstances.

(p) See *ante*, pp. 16–42.

(q) Cf. the provisions of the Road Traffic Act, 1934, s. 12, *post*, chapter V.

(r) As to the changes made by the 1934 Act see *post*, chapter V. Some of these restrictions are still permissible under the 1934 Act, but under the Motor Insurers' Bureau Agreements (see chapter VI) are of no avail against injured third parties.

(s) Cf. *James v. British General Insurance Co.*, [1927] 2 K. B. 311; *Tinline v. White Cross Insurance*, [1921] 3 K. B. 327. (t) See Section 11 of this Act.

(u) See *Richards v. Brain and Port of Manchester Insurance Co.* (1934), 50 Ll. L. R. 88.

(v) See, e.g., *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 46 T. L. R. 71; 35 Ll. L. R. 135; and see *post*, chapter V, p. 320 and chapter VIII, p. 606.

passengers ; for purposes of business (*w*) ; in the County of London (*x*) ; or in any particular manner, circumstance or place which the insurers saw fit expressly to except (*y*), the policy was valid and sufficient for this Part of this Act so long as the car thereby insured was being used only in such manner and circumstances as to be covered by the policy (*a*).

At first sight this interpretation would seem largely to have defeated the general scope and object of the Act (*b*). Moreover, it is an interpretation which, it is submitted, the words of the subsection do not necessarily bear. It might well be contended that "any liability" means what it seems to say—namely, "any liability caused by or arising out of any use of the vehicle on the road" and not "any liability arising out of such use of the vehicle as the insurers choose to permit." Insurers could (for example), under this subsection issue a policy insuring the vehicle only when it is being driven in Oxford Street (*c*). Nevertheless, it must be taken now to have been settled by authority that the words "any liability" in this subsection had only the limited meaning which has been indicated (*d*). This, moreover, is the interpretation of the requirements of the subsection given to it by the Minister of Transport (*e*). The general effect in this respect of this part of this subsection cannot, it is submitted, be more clearly expressed than in the words of BRANSON, J., in *Gray v. Blackmore* (*f*), where he said (*g*) :

"It seems to me that the best way of trying to understand the provisions of the Act is to look at the series of sections, beginning with s. 35, the first section of Part II. (His Lordship read the section.) If a person acts in contravention of that section he is made liable to fine or imprisonment or both. So there is an enactment prohibiting the use of the vehicle upon the road unless the person using it is covered against third-party risks in respect of that user of the vehicle. Then, s. 36 provides what the policy must contain if it is to comply with the provisions of the Act, that is, what cover a man who is using a motor vehicle upon a road must have if he is to escape the consequences of s. 35 ; and, in order to do so, he has to have a policy of insurance which is issued by an authorised person and which insures him in respect of any liability which may be incurred by him in respect of death or bodily injury caused by or arising out of the use of the vehicle on the road. That, it seems to me, is simply prescribing what cover the man must have if he is to escape the consequences of s. 35.

"Sect. 35 relates to the use by him of a motor-car upon the road, and it is that use by him of that vehicle on the road, that must be covered in order to free him from liability under s. 35. All that s. 36 does is to prescribe the kind of cover that he must have in order to escape the consequences of using the vehicle in contravention of s. 35.

"What is sought in this case is a construction of the section which should say that any policy issued in respect of any vehicle which may be used on the road must cover that vehicle whenever used on the road for any purpose for which any vehicle can be used on the road. I do not see that the statute says anything of the sort. It is defining the protection which a man must have if he is to escape the consequences of s. 35. That that is so, appears from the provisions of s. 36 itself. It is obvious from s. 36,

(*w*) See, e.g., *Gray v. Blackmore*, [1934] 1 K. B. 95. And see *post*, chapter V.

(*x*) See, e.g., *Bonney v. Cornhill Insurance Co.*, (1931), 40 Ll. L. R. 39.

(*y*) See, generally, *post*, chapter V.

(*a*) *Bright v. Ashfold*, [1932] 2 K. B. 153 ; *Gray v. Blackmore*, [1934] 1 K. B. 95.

(*b*) As no doubt the legislature thought when it passed the Act of 1934. See s. 12 thereof, *post*, chapter V.

(*c*) See further, *post*, chapter V, but subject to s. 12 of the 1934 Act, *post*, p. 314.

(*d*) *Bright v. Ashfold*, [1932] 2 K. B. 153 ; *Gray v. Blackmore*, [1934] 1 K. B. 95.

(*e*) Who has prescribed "limitations of use" as being one of the particulars of conditions to which the policy is subject to be stated on an insurance certificate. See further, *post*, p. 219.

(*f*) [1934] 1 K. B. 95.

(*g*) *Ibid.*, at p. 104.

" sub-s. 5, relating to the certificate of insurance, that the policy may contain conditions the nature of which is left completely open. So it clearly contemplates that the policy may be issued subject to certain conditions, and unless they are to be conditions limiting the liability of the underwriter what possible reason can there be for their inclusion in the certificate, the object of which is to make clear to whom it may concern the conditions, if any, subject to which the policy has been issued. But it would be an entirely different matter for the legislature to go back to a time before the accident had happened and to say that, if any one chooses to underwrite a policy in connection with a motor car, no limitations as to the time during which, or as to the persons by whom, or as to the manner in which, that vehicle can be used can have any avail to save the underwriter from liability. If that were the state of the law, it would mean that there could be no such policies as are issued at present—policies, for example, where a man insured two or three cars, warranting that only one of them shall be in use at a time, and thereby gets a reduction of premium. No underwriter would underwrite such a policy if it could be said, *ex post facto*, that that condition, being broken, could not be relied upon, and that he might be liable for the damage done by three cars out at one time, although he had only insured one; and similarly one might imagine any number of ridiculous positions which would arise. I see nothing in the statute which prevents an underwriter and an assured from agreeing to a policy with any conditions that they choose; but if the assured takes the car upon the road in breach of those conditions he cannot thereby throw a greater obligation upon the underwriter. All that happens is that he is on the road without a policy which is covering him under the Road Traffic Act, and he is liable under s. 35 as though he had never taken out a policy at all. He is using a car which is not covered by a policy which insures him under the words of s. 36, sub-s. 1 (b)."

It should be observed that the liability may be incurred to persons other than the person injured (*h*). In the case of death, of course, this would necessarily be so (*i*).

It should be noted, however, that whilst insurers may under this subsection restrict the liability to liability arising out of a specified use of the vehicle, they cannot restrict the class of liability insured against save as is allowed by the provisos to the subsection. In other words, although the insurance need not be against liability arising out of *any use* of the vehicle, it must be against *any* liability (other than such as is expressly excepted by the proviso) arising out of the use insured. Some motor policies issued under the Act contained some such clause as confines the insurance to indemnity against:

" Any liability at Common Law or under the Fatal Accidents Acts, 1846 to 1908 (*j*), or under the Road Traffic Act, 1930 " (*k*).

It is submitted that any such clause does not satisfy the requirements of the Act (*k*). Now, of course, it would have to include liability under the Law Reform Act, 1934. But besides these, there are other possible statutory liabilities in respect of the death of or injury to a third party (*m*).

The following results of the effect of this part of this subsection should

(*h*) See *post*, p. 196.

(*i*) As to this, see *ante*, chapter I, pp. 52 *et seq.*

(*j*) 12 Halsbury's Statutes 335, 340.

(*k*) Moreover, whether this be so or not, the holder of such a policy might find himself in difficulties when using his car abroad. See *post*, chapter VII, p. 555.

(*m*) Cf. *post*, p. 210, as to the legality of policies which exclude indemnity for liabilities to certain classes of persons (*e.g.* relatives of the assured), and *post*, pp. 195-6, as to limiting the indemnity given by the policy to a certain amount.

here be observed:

(A) Since liability may be incurred personally or vicariously, the owner of a car who wishes it to be driven by some person such as a chauffeur as well as by himself must not only see that he himself is properly insured under this subsection in respect of his own driving (for if he does not he will be causing or permitting the use by such person of the vehicle in contravention of section 35) (*n*), but must also insure against any liability which may be incurred by that person when acting as his agent, for which he also is responsible (*o*).

(B) The husband of a woman who (whilst living with him) drives his car should see to it that she is properly insured against liability which she may incur to third parties by running down and injuring or killing some person (*p*).

(C) There must apparently not be any limit to the *amount* of the indemnity which the insurers undertake to give. This is in curious contrast to the provisions of section 37 (*q*), relating to securities which may be used instead of and as substitutes for policies under the Act. If the indemnity is given by means of a security instead of by a policy, the insurers can limit their liability to the sum of £5,000 in the case of private cars, or £25,000 in the case of public service vehicles.

But it is not by any means clear that insurance limited to say £5,000 in respect of any one (or more) (*r*) accident would not satisfy the subsection. Although this subsection, unlike subsection (1) (a) of section 37 (*s*), contains no express permission to issue a policy "subject to any conditions," it has been held that this qualification is to be implied by reason of the provision in subsection (5) of this section that a certificate of insurance shall contain such particulars as may be prescribed of any condition to which the policy is subject (*t*). If one condition, why not another? The answer is that any such insurance limited in the amount payable by way of indemnity would not be an insurance against "any liability" (*u*). Moreover, the express permission of a limit in section 37 implies its prohibition in this section, though it is difficult to understand why a limit should be allowed in a security which is intended and prescribed to be alternative to a policy (*v*), and under which it is extremely doubtful whether third parties can acquire rights by virtue of the Third Parties Act (*w*), if it is not allowed in the case of an insurance policy. Moreover, subsection (4) of section 10 of the Road Traffic Act, 1934 (*a*), appears to contemplate that insurers can limit the amount of the indemnity given in policies issued under this section. But assuming that the section requires an unlimited indemnity, it would seem that any kind of limitation, whether by requiring the assured to bear the first £*x* of any claim, or by stipulating that the insurers will not pay more than £*x* on any claim (which in principle are equally limitations of the indemnity),

(*n*) Cf. *Monk v. Warbey*, [1935] 1 K. B. 75. And see *ante*, pp. 163 *et seq.*

(*o*) As to such liability see *ante*, chapter I, pp. 48 *et seq.*

(*p*) Since he permits his wife to drive the car within the meaning of section 35 if he knows that she may and does not forbid her to do so.

(*q*) See *post*, pp. 222 *et seq.*

(*r*) See as to this the same question discussed in reference to section 37, *post*, pp. 225-6.

(*s*) *Post*, p. 225.

(*t*) *Gray v. Blackmore*, [1934] 1 K. B. 95. And see *post*, p. 214.

(*u*) Though this answer might be said to beg the question.

(*v*) See s. 35, *ante*, p. 184.

(*w*) Since that refers to contracts of insurance. See *post*, pp. 224-26, and as to what is a "contract of insurance," see *ante*, p. 121.

(*a*) 27 Halsbury's Statutes 545, *post*, chapter V, p. 345.

or by means of a rateable contribution clause (b), would be invalid.

(D) The insurance must be against any liability, and therefore any such limitation as that the indemnity should only be payable upon judgment in respect of this liability being obtained against the assured would be void, since the assured's liability arises at the moment of the occurrence of the event from which it arises (c). For an example of such a policy, see *Re Nautilus Steam Shipping Co., Ltd., Ex parte Gibbs & Co.* (d).

5. "In respect of the death of or bodily injury to any person."—The conditions in which liability may be incurred in respect of the death of any person have already been described. It need only be repeated here that the narrow limit within which such liability could formerly be incurred was widely extended by the passing of the Law Reform Act, 1934 (e).

"Bodily injury" means, presumably, any injury to the person as distinguished from injury to the estate. The question as to what constitutes bodily injury in any given case is governed by the general law of torts to which reference has previously been made (f). It is submitted that the term "bodily injury" in this subsection includes mental injury in so far as mental injury can be the subject of a claim for damages (g). Thus severe shock sustained as the result of witnessing an accident caused by the negligence of the defendant, although apart from this he took no part in and suffered no tangible injury therefrom, might in certain circumstances entitle a person to recover damages in respect thereof (g).

"Any person" must be read subject to the exceptions contained in the provisos to this subsection, and in this context would not include any other than an animate person, i.e. a human being, though the liability might be incurred to a company, etc., as where, for instance, a company was deprived of the services of its employee by reason of his being injured (h). This phrase "any person" when contained in a policy of insurance was held in *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.* (i) to cover the policy holder or an individual insurer, if either of these two persons were to be injured by the negligent driving of the insured car by a borrower. The phrase in this section must be taken now to cover any member of the public, even though in another capacity he was a party to the contract.

(b) *Per* ROCHÉ, J., in *Loyst v. General Accident, Fire and Life Assurance Corporation, Ltd.*, [1928] 1 K. B. 359, at p. 363. Since this limits the assured's liability to a certain proportion of the total. See chapter VIII, *post*, p. 604.

(c) See *per* TOMLIN, J., in *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793, at p. 800. (d) [1936] Ch. 17.

(e) Law Reform (Miscellaneous Provisions) Act, 1934 (27 Halsbury's Statutes 220), *ante*, pp. 53 *et seq.*

(f) *Ante*, pp. 60 *et seq.* The definition of bodily injury is important, for the Motor Insurers' Bureau agreements (see chapter VI) only cover such injuries. Is damage to a set of false teeth or to a wooden leg bodily injury? With some hesitation, it is suggested that bodily injury covers only injury to the living tissue, even though such injury is intangible and invisible. Further, it might be argued that to cause a person to lose the services of his wife or servant is to cause him bodily injury. *Per contra*, it could be argued that the claim for loss of services, being originally recognised when wives and servants were in law the chattels of their lords and masters, is a claim for damage to property, and therefore is not required to be covered by insurance under this section. Since only a brave man would assert today that his wife and servant were his chattels, the point is still open to be taken.

(g) *Hambrook v. Stokes Brothers*, [1925] 1 K. B. 141; see *Pugh v. London, Brighton and South Coast Rail. Co.*, [1896] 2 Q. B. 248; *Wilkinson v. Downton*, [1897] 2 Q. B. 57; *Dulieu v. White & Sons*, [1901] 2 K. B. 669; *Janvier v. Sweeney*, [1919] 2 K. B. 316; *Owens v. Liverpool Corporation*, [1939] 1 K. B. 394; [1938] 4 All E. R. 727.

(h) *Jones v. Brown* (1794), Peake, 306; *Martinez v. Gerber* (1841), 3 Man. & G. 88; *Osborn v. Gillett* (1873), L. R. 8 Exch. 88; *Bradford Corporation v. Webster*, [1920] 2 K. B. 135.

(i) [1943] A. C. 121; [1942] 2 All E. R. 319. This case is not applicable in Scotland; see *General Accident Assurance Corporation v. Watson* (1942), 73 Ll. L. R. 189.

6. "Caused by or arising out of the use of the vehicle on a road."—"Caused by the use of the vehicle on a road" needs no explanation (*h*). "Arising out of the use of the vehicle on a road" seems at first sight more difficult to understand. It is submitted, however, that it is a mere redundancy, and adds nothing to the meaning of "caused by." For example, if the insured vehicle carries some dangerous substance such as explosive (*l*), or a dangerous animal (*m*) such as a snake which escapes (*n*) from the vehicle, causing damage to other persons on the road, such damage and the liability resultant therefrom would not, it is submitted, be damage or liability caused by or arising out of the use of the vehicle on the road. The presence of a comma in the same phrase in a later enactment gives it a wider meaning (*o*).

It may, however, be that the latter expression is intended to apply to any case where the presence of the vehicle on the road is the *causa sine qua non* (*p*) of the accident which occurs without being in any way responsible therefor. But it is submitted that the words used in this subsection refer only to liability which is directly caused by the use of the vehicle on a road, and that therefore every liability which might be incurred whilst using the vehicle on a road need not be covered. In this connection it is important to distinguish between the direct and indirect causes of legal liability (*q*). An attempt to do so will not be embarked upon here. The difficulty of the task is well illustrated in insurance cases. Thus where a life was insured against accidental death "other than death caused by or arising from natural disease," and the life insured died by drowning whilst crossing a shallow stream, it was held that although his fall into the water and inability to recover therefrom was caused by an epileptic fit, the accident was not one "caused by or arising out of" the fit (*r*). Again, where the assured, severely concussed in a motor accident, staggered out of her car and fell into a stream, death being due not to drowning but to heart failure following shock, it was held that her death was "solely" due to the motor accident within the terms of the policy (*s*). On the other hand, where goods on board ship were destroyed by fire and the owners were responsible for such loss if caused by unseaworthiness but not if arising from fire, and the fire was ignited by the intrusion of sea-water through leaks and the mixture thereof with lime in the hold, it was held that the loss arose from unseaworthiness and not from fire (*t*). It would seem, therefore, that applying the last case to the first, if the life had been insured against death if "caused by or arising from" epileptic fits but not otherwise, it would have been held that the fit was the direct, though not the proximate, cause of the death.

Nevertheless it is submitted that the subsection requires insurance only against such liability as may be directly (*u*) caused by the use of the vehicle

(*h*) See *Re Polemis and Furness, Withy & Co.*, [1921] 3 K. B. 560; *Liesbosch Dredger v. Edison S.S.*, [1933] A. C. 449, as to when damage is directly caused by a wrongful act.

(*l*) Cf. *Farrant v. Barnes* (1862), 11 C. B. (N. S.) 553.

(*m*) *Fardon v. Harcourt-Rivington*, (1932), 146 L. T. 391, and see *ante*, chapter I.

(*n*) See *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330, as to liabilities for the escape of dangerous substances, and see also on this topic generally, *ante*, pp. 34-5.

(*o*) In section 16 (1) of the Road Traffic Act, 1934. See *post*, p. 341.

(*p*) See *ante*, chapter I, and *Hadley v. Baxendale* (1854), 9 Exch. 341; *Re Polemis and Furness, Withy & Co.*, [1921] 3 K. B. 560; *Hambrook v. Stokes Brothers*, [1925] 1 K. B. 141; *Great Western Rail. Co. v. Mostyn (Owners), The Mostyn*, [1928] A. C. 57.

(*q*) See *Salmond on Torts*, 10th Edn., pp. 131 *et seq.*, where this question is discussed at great length and with copious reference to authorities.

(*r*) *Winspear v. Accident Insurance Co.*, (1880), 6 Q. B. D. 42. See further, chapter VII on this topic.

(*s*) *Smith v. Cornhill Insurance Co.*, [1938] 3 All E. R. 145.

(*t*) *Royal Exchange Assurance v. Kingsley Navigation Co.*, [1923] A. C. 235; cf. *Reischer v. Borwick*, [1894] 2 Q. B. 548.

(*u*) As to directly, etc., see the reference given in note (*f*), *ante*, p. 196.

on the road, and that in so far as they are intended only to comply with the terms of this subsection, the usual terms of a motor policy which insure against liability "caused by or through or in connection with" the insured vehicle are unnecessarily wide.

The word "use" demands some explanation; it implies something more than "driving" (v) or "being in charge of" (w), but something less than the mere "presence of the vehicle" (x). In *Ellis (John T.), Ltd. v. Hinds* (y) it was made clear that an owner of a car "used" it not only when he was driving himself but also when it was driven on his account by his servant.

The requirements of the subsection are further limited to the use of the vehicle on "a road." The expression "a road," as defined by a later section (a) of the Act, has already been explained (b). Here it need only be pointed out that insurance is not required against liability incurred by the use of the vehicle elsewhere than on a road, as, for instance, on the downs (c), on the seashore (c), or on any ground, whether a road or not, upon which the mere presence of the vehicle would constitute a trespass (d). In this sense also the usual cover provided in a private car policy is unnecessarily wide (e), if it is intended to cover Road Traffic Act liability only.

7. "Provided that such a policy shall not be required to cover (i) liability in respect of the death arising out of and in the course of his employment. . . ."

The phrase "arising out of and in the course of" has, with the qualification noted below, been given the same interpretation as that which it has been held to bear in cases under the Workmen's Compensation Acts (f).

The National Insurance (Industrial Injuries) Act, 1946 (g), which has now replaced the Workmen's Compensation Acts, introduces a much wider system of insurance against personal injury caused by accident to all those employed under a contract of service in Great Britain. Nevertheless the words under review will, it is thought, bear the same meaning as they did under the Workmen's Compensation Acts, and will not include the artificial extension of the words effected by sections 8-10 of the Industrial Injuries Act.

The proviso now under consideration might have been intended to except from the liabilities required to be insured against liability imposed by the Workmen's Compensation Act (g). It does not, however, have exactly that effect. And, if that were the intention, the plain words "liability under the Workmen's Compensation Act" would have been used.

It is not proposed here to give a detailed account of the provisions of the National Insurance (Industrial Injuries) Act. But it may be stated that the general effect thereof is that compensation is payable in respect of the death of or bodily injury caused to an insured person by any accident arising out of and in the course of that person's employment (h).

The expression "arising out of and in the course of his employment"

(v) Cf. section 40 (1); see *post*, p. 249.

(w) Cf. section 15 of this Act.

(x) Cf. section 40 (2) of this Act, *post*, pp. 252 *et seq.* and p. 172, *ante*.

(y) [1947] K. B. 475; [1947] 1 All E. R. 337.

(a) Section 121; see *ante*, p. 176.

(b) *Ante*, p. 176.

(c) Whether or not the public has right of access thereto. But cf. s. 14 of this Act, which makes such use of a motor vehicle, except in certain limited cases, an offence.

(d) *I.e.* because not a road to which the public has access. The use of the vehicle in a certain manner might amount to a trespass. See *Harrison v. Rutland (Duke)*, [1893] 1 Q. B. 142.

(e) As to whether trespass is covered by the policy, see *post*, p. 516.

(f) See Willis' Workmen's Compensation Acts, 36th Edn., for all such cases. They have now been repealed by the National Insurance (Industrial Injuries) Act, 1946 (39 Halsbury's Statutes 322), which came into force on July 5, 1948.

(g) *Ibid.*, s. 1.

(h) 39 Halsbury's Statutes 322.

constituted part of the operative words of section 1 of the Workmen's Compensation Act, 1925 (*hh*), and has as such received judicial interpretation in innumerable cases. For citation of such cases the reader is referred to Willis' Workmen's Compensation Acts (*i*). It must here be pointed out that whilst the Industrial Injuries Act applies only to insured persons as defined by that Act (*j*), the proviso now being considered applies to any class of employee. The persons insured under the Industrial Injuries Act, 1946, are all those persons employed in Great Britain under a contract of service or apprenticeship. The word employment in this section of the Road Traffic Act, 1930, is not so limited. BRANSON, J., in *Burton v. Road Transport and General Insurance Co.* (*k*), held that a similar use of the word in a policy of insurance which repeated the terms of this part of section 36 included contracts of services as well as contracts of service. So that where the principal, the assured, contracted with an agent, the driver of the assured's car, that the agent should if possible introduce a purchaser for the car, a contract of employment was entered into. The special facts of this case were being examined by the judge to discover whether the driver was driving the car at the time of an accident on the assured's order, and the case cannot be taken as authority to decide that in all cases of principal and agent there is a contract of employment within the meaning of the word in this proviso. Nevertheless, there is no reason why the word should be confined to the meaning given to it in the Industrial Injuries Act, 1946, Schedule I (*kk*). Further, it must be noticed that liability under the Industrial Injuries Act arises independently of any act, neglect or default on the part of the employer (*l*). Again, as has previously been described (*m*), the doctrine of common employment which in many cases protected an employer from liability at common law for the death of or injury to those in his employ does not constitute any defence to a claim under the Industrial Injuries Act (*n*). The Employers' Liability Act, 1880 (*o*), which also to a limited extent excluded the defence of common employment (*p*), applied only to certain specified classes of employees (*q*). In that Act, on the other hand, the liability was dependent upon some negligent act or default committed by or attributable to the employer (*r*). The relevant sections of the National Insurance (Industrial Injuries) Act, 1946 (*s*), are as follows :

PART I.—INSURED PERSONS AND CONTRIBUTIONS

" **Section 1. Persons to be insured.**—(1) Subject to the provisions of " this Act, all persons employed in insurable employment shall be insured " in manner provided by this Act against personal injury caused on or after " the appointed day by accident arising out of and in the course of such " employment.

" (2) For the purposes of this Act, every employment specified in Part I " of the First Schedule to this Act is an insurable employment unless it is " an excepted employment, that is to say an employment specified in Part II " of that Schedule :

(*hh*) 11 Halsbury's Statutes 513.

(*i*) 37th Edn. (*j*) S. 1 and Schedule I ; 39 Halsbury's Statutes 328, 401.

(*k*) (1939), 63 Ll. L. R. 253. See also *Morgan v. Parr*, [1921] 2 K. B. 379.

(*kk*) See note (*l*) on p. 200, *post*.

(*l*) *Ibid.*, s. 7.

(*m*) *Ante*, chapter I.

(*n*) *Ibid.*, s. 7. The defence of common employment has been abolished by the Law Reform (Personal Injuries) Act, 1948, see p. 37, *ante*.

(*o*) 11 Halsbury's Statutes 499 ; chapter I, *ante*, pp. 36-37. (*p*) *Ibid.*, ss. 1, 2.

(*q*) *Ibid.*, s. 8. This Act has now been repealed. See Law Reform (Personal Injuries) Act, 1948, s. 1 (2).

(*r*) Sections 1 and 2.

(*s*) 39 Halsbury's Statutes 322.

" Provided that Parts I and II of that Schedule shall have effect subject to the provision made by Part III thereof for preventing anomalies (f).

PART II.—BENEFIT

Description of benefit and general conditions thereof

" **Section 7. Right to and description of benefit.**—(1) Subject to the provisions of this Act, where an insured person suffers personal injury caused on or after the appointed day by accident arising out of and in the course of his employment, being insurable employment, then—

" (a) industrial injury benefit (in this Act referred to as ' injury benefit ') shall be payable to the insured person if during such period as is hereinafter provided he is, as the result of the injury, incapable of work ;

" (b) industrial disablement benefit (in this Act referred to as ' disablement benefit ') shall be payable to the insured person if at a time not falling within the said period he suffers, as the result of the injury, from such loss of physical or mental faculty as is herein-after provided ;

" (c) industrial death benefit (in this Act referred to as ' death benefit ') shall be payable to such persons as are hereinafter provided if the death of the insured person results from the injury.

" (2) In this Act references to loss of physical faculty shall be construed as including references to disfigurement, whether or not accompanied by any actual loss of faculty.

" (3) Subject to the provisions of Part VI of this Act relating to persons on ships and aircraft, benefit shall not be payable in respect of an accident happening while the insured person is outside Great Britain.

" (4) For the purposes of this Act, an accident arising in the course of an insured person's employment shall be deemed, in the absence of evidence to the contrary, also to have arisen out of that employment.

" **Section 8. Accidents happening while acting in breach of regulations, etc.**—An accident shall be deemed to arise out of and in the course of an insured person's employment, notwithstanding that he is at the time of the accident acting in contravention of any statutory or other regulations applicable to his employment, or of any orders given by or on behalf of his employer, or that he is acting without instructions from his employer, if—

" (a) the accident would have been deemed so to have arisen had the act not been done in contravention as aforesaid or without instructions from his employer, as the case may be ; and

" (b) the act is done for the purpose of and in connection with the employers' trade or business.

" **Section 9. Accidents happening while travelling in employer's transport.**—(1) An accident happening while an insured person is, with the express or implied permission of his employer, travelling as a passenger by any vehicle to or from his place of work shall, notwithstanding that he is under no obligation to his employer to travel by that vehicle, be deemed to arise out of and in the course of his employment, if—

" (a) the accident would have been deemed so to have arisen had he been under such an obligation ; and

(f) Sections 76-79 and Schedule I set out those classes of persons who are included in and excepted from the operation of the Act. Members of the armed forces of the Crown are outside the Act, but other employees of the Crown and the police forces come within its scope. Mariners and airmen receive special treatment. Children under school leaving age do not receive benefit. Insurable employment, for the purpose of s. 1 (2) of the Act is defined in Part I, s. 1 of the First Schedule to the Act as " employment in Great Britain under any contract of service or apprenticeship, whether written or oral, and whether expressed or implied."

" (b) at the time of the accident, the vehicle—

" (i) is being operated by or on behalf of his employer or some other person by whom it is provided in pursuance of arrangements made with his employer; and

" (ii) is not being operated in the ordinary course of a public transport service.

" (2) In this section references to a vehicle include references to a ship, vessel or aircraft.

" **Section 10. Accidents happening while meeting emergency.**—An accident happening to an insured person in or about any premises at which he is for the time being employed for the purposes of his employer's trade or business shall be deemed to arise out of and in the course of his employment if it happens while he is taking steps, on an actual or supposed emergency at those premises, to rescue, succour or protect persons who are, or are thought to be or possibly to be, injured or imperilled, or to avert or minimise serious damage to property."

It is of great importance to note that sections 8, 9 and 10 of the Act carefully provided that the phrase "arising out of and in the course of" shall extend to acts to which it would not otherwise apply. There is no such express extension to the meaning of the phrase in the subsection now under consideration (v). Nor does it follow (although this might be so held on the principle suggested in *Portsmouth Corporation v. Smith* (u)) that the extensions would be implied. In a case envisaged by sections 8, 9 or 10 there would be benefit paid under the Industrial Injuries Act, whilst the death or injury would not "arise out of or be in the course of" the employee's employment unless the extensive meaning of that phrase in the Industrial Injuries Act be applied to the proviso.

The position in relation to proviso (i) of subsection (1) (b) of section 36 may be summarised as follows:

(1) Insurance against liability which may be the subject of benefit under the National Insurance (Industrial Injuries) Act is not required, except in so far as the death or injury does not arise out of or in the course of the employee's employment (v).

(2) Insurance against liability which might be the subject of a claim under the Employers' Liability Act, 1880, is not required in so far as such liability flows from death or injury "arising out of and in the course of the employee's employment by the assured." This Act is, in any event, repealed after July 5, 1948.

(3) Insurance against liability to an employee if he is not an insured person within the definitions of the Industrial Injuries Act is not required to the extent that such liability may flow from death or injury "arising out of and in the course of" the employee's employment by the assured.

8. "In the employment of a person insured by the policy."—This at once raises the question as to who is insured by the policy. The question has been answered previously (w) in the sense that such persons are insured by the policy who can directly enforce rights thereunder against the insurers. Thus persons driving with the assured's consent are insured by the policy if there is the normal extension clause contained therein (x). Attention is

(u) (1885), 10 App. Cas. 364, per Lord BLACKBURN, at p. 371.

(v) This overlapping of the National Insurance (Industrial Injuries) Act and the Road Traffic Act, 1930, would seem to call for an amendment of this s. 36 (1) (b) (ii).

(w) *Ante*, pp. 189 et seq.

(x) *Tattersall v. Drysdale*, [1935] 2 K. B. 174; *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319; *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243; affirmed, [1945] K. B. 250; [1945] 1 All E. R. 316.

also drawn to the clause which appears in many policies to the effect that the insurers will "treat such person as though he were the insured"; it should be noted that such policies often except from the liability insured against "death or bodily injury arising out of and in the course of his employment of a person . . . in the employment of any person who is treated for the purposes of this policy as though he were the assured."

In the ordinary case the assured (*i.e.* the person to whom the policy is given and by whom it is effected) would not be liable for the death of or bodily injury to some person in the employment of a friend to whom the insured vehicle had been lent (and by whom it was being driven at the time). A possible case of such liability might occur where the driver of the vehicle was acting as the agent (*y*) of the assured and ran down and injured his own servant.

9. "*Injury sustained by such a person arising out of and in the course of his employment.*"—"Such a person" means a person in the employment of a person insured by the policy. The same remarks apply to this part of this proviso as have been made above (2).

10. "*Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment.*"—The interpretation of this part of the proviso presents many difficulties, and has been the subject of a number of decisions. Indeed it is still not quite clear to what limits the words "hire" and "reward" should extend. For convenience, this exception to the proviso is treated below by being split into its component parts, each being discussed in turn.

"*Except in the case of a vehicle in which passengers are carried . . .*"

The first point to be noticed is that the exception as a whole is intended to apply to a particular class of vehicles, namely vehicles in which passengers are *habitually* carried for hire or reward. If the construction were to be otherwise, the words "in the case of a vehicle in which" are superfluous and confusing, and the exception should have been expressed as "except in the case of passengers carried for hire," etc. The clause was interpreted in the manner suggested in *Wyatt v. Guildhall Insurance Co., Ltd.* (a), by BRANSON, J. In that case the plaintiff had been injured while riding as a passenger in a car owned by one Wilcox, who was driving his car on the occasion in question from Manchester to London for his own purposes, and had agreed beforehand to carry Wyatt as a passenger in consideration of the payment to him of the railway fare from Manchester to London. Wyatt obtained judgment, which was unsatisfied, against Wilcox for the sum of £235, and thereafter brought an action against the defendant insurance company to be indemnified under the terms of a policy issued by them to Wilcox by virtue of section 10 (1) of the Road Traffic Act, 1934. The policy defined the insured user of the vehicle as being use for social, domestic and pleasure purposes, and excluded use for hiring. In order to succeed, the plaintiff had to prove that he was a passenger in this car for reward, in so far as section 10 (1) of the 1934 Act only gave him a right to sue the defendants on the policy if it complied with the requirements of section 36 (1) (b) (ii), and secondly that the car was not excluded from the cover of the policy because it was not used for hiring purposes. In the event BRANSON, J., decided that the car was

(y) *I.e.* in the sense of attaching liability to the assured. See, as to vicarious liability generally, *ante*, pp. 48-52.

(2) *Ante*, pp. 198-201. Cf. *Stitch v. Burns*, [1943] 2 All E. R. 441, overruled in effect by *Ellis (John T.), Ltd. v. Hinds*, [1947] K. B. 475; [1947] 1 All E. R. 337.

(a) [1937] 1 K. B. 653; [1937] 1 All E. R. 792.

being used for hiring purposes outside the cover of the policy (b), and the claim failed on the second ground. But he decided the first point also in his judgment. If the first contention was right, he said, then anyone who takes a passenger in his car for anything which may be called a reward, immediately becomes liable for penalties if he has not a policy which covers that person. The subsection is really dealing with vehicles which are normally or habitually used in the way in which the exception mentions, and the mere fact that on one isolated occasion a man takes some reward—it need not even be a monetary reward—for the conveyance of a passenger in his car is not intended to render him liable to penalties if he has not got a policy which covers that passenger on that occasion. This being a statute which imposes penalties, if there are two constructions possible, it is right to adopt the one which does not turn the user of the car into a criminal user.

It is possible to see in the form of the language used the distinction between the liability in respect of persons carried in or upon (etc.) the vehicle "at the time of the occurrence" which is obviously directed to the moment of the accident, and the case of a vehicle "in which passengers are carried or hire or reward." The words at the commencement of the proviso "except in the case of a vehicle in which passengers are carried" cannot be read with the words "at the time of the occurrence."

"The effect is then that unless this is a vehicle in which passengers are carried for hire in the sense in which one would generally use that kind of expression, as for instance a house in which parties are given, or a shop in which umbrellas are kept, that is to say, habitually given or kept, I think the proviso applies without the exception, and consequently on this ground also the plaintiff would fail."

The judgment of BRANSON, J., in this case may be regarded as settled law, and the exception may be considered to have been designed to secure that liability in respect of the death of or bodily injury to paying passengers in cars designed to carry paying passengers shall be insured against. Examples of such are passengers carried in taxis, motor coaches, private hire cars, etc.

In this connection it is important to note the provisions of sections 121, 61, 72 and 97 of the Road Traffic Act, and of section 26 of the Road Traffic Act, 1934, which classify the various types of vehicles which habitually carry paying passengers. By section 121 (1) these public service vehicles become, if they are adapted to carry less than eight passengers, contract carriages. A contract carriage is defined by section 61 (c) as a motor vehicle carrying passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum. By section 61 (a) and (b) public service vehicles are further sub-divided into stage carriages and express carriages. Stage carriages are motor vehicles carrying passengers for hire or reward at separate fares, not being express carriages. Express carriages are motor vehicles carrying passengers for hire or reward at separate fares none of which is less than one shilling or such greater sum as may be prescribed. These distinctions between the various types of public service vehicles are important at this juncture only because it is made illegal to use or cause or permit the use of such a vehicle on the road unless a road service licence has been granted under the provisions of section 72 for its use in its particular class, and penalties are provided by section 72 (10) for contravention of this provision. Many qualifications relating to the payment of fares are set out in section 61, Road Traffic Act,

(b) See chapter VIII, *post*, p. 580 and *McCarthy v. British Oak Insurance Co., Ltd.*, [1938] 3 All E. R. 1.

1930, as amended by the Road Traffic Acts of 1934, sections 24, 25 and 26, and 1937, section 1 (1) and (2), to make clear the requirements for a road service licence for certain specified journeys. From all these provisions the liability is defined of the owner of a private car to prosecution for not possessing a road service licence should he carry passengers for hire or reward in certain circumstances. Thus where a private motor car was used daily by its owner and three passengers to take them to and from their place of employment, and a weekly contribution was made by the passengers for running expenses of the car, it was held to be an "express carriage" (c).

These criminal provisions and the cases decided on their construction assist in determining the meaning of the words "hire or reward" used in section 36 (1) (b) (ii), the consideration of which may now be undertaken. But the difference should be pointed out at this juncture between a contract for the hire of a car and a contract for the carriage of passengers for hire or reward.

"A vehicle in which passengers are carried for hire."

In *Wyatt v. Guildhall Insurance Co., Ltd.* (d), BRANSON, J., held that the words "hire" and "reward" were synonymous. He said that the use of the words hire or reward in the section seemed to help in the construction that he put upon the policy, because there really can be no distinction drawn between persons who are carried for hire and carried for reward. Carried for hire, of course, was something different from "hiring," and he failed to see how the legislature could be thought to have drawn any distinction between "hire" and "reward"; he saw therefore the words being used almost as synonymous in the Act, which might have led to the use of the word "hiring" alone being found in the description of use. But in so far as the whole *ratio decidendi* of this case turned on a construction which was put on the terms of the policy, and because in order to determine its proper construction, the judge took into account insurance practice in differentiating between use for social and pleasure purposes, use for business purposes and use for business purposes including hiring, the reasoning underlying his judgment does not necessarily determine the meaning of these words as used in the section. It is for insurance policies to comply with the terms of the Road Traffic Acts, and not for the Road Traffic Acts to be construed in the light of insurance practice. In *Bonham v. Zurich General Accident and Liability Insurance Co., Ltd.* (e), ATKINSON, J., agreed with BRANSON, J., that "hire" and "reward" meant very much the same thing, but his decision on this point was reversed on appeal (f). In that case, Bonham, the assured, claimed in an arbitration to be indemnified under a policy issued to him by the defendants against a liability he had incurred to passengers injured by his negligent driving. He had habitually carried three passengers from Northampton daily to the common place of employment, and two of the three passengers regularly paid him a sum representing the railway fares between the two places. The payment was made voluntarily, and had not been requested, and it was found as a fact that if the passengers had not paid him anything, he would still have carried them. The policy excluded use

(c) *East Midland Traffic Area Traffic Comrs. v. Tyler*, [1938] 3 All E. R. 39. See also *Sidery v. Evans and Peters*, [1938] 4 All E. R. 137; *Birmingham and Midland Motor Omnibus Co., Ltd. v. Nelson*, [1933] 1 K. B. 188; *Evans v. Hassan*, [1936] 2 All E. R. 107; *Osborne v. Richards*, [1933] 1 K. B. 283; *Newell v. Cook*, [1936] 2 K. B. 632; [1936] 2 All E. R. 203; *Evans v. Dell*, [1937] 1 All E. R. 349.

(d) [1937] 1 K. B. 653; [1937] 1 All E. R. 792.

(e) [1944] 2 All E. R. 573.

(f) [1945] K. B. 292; [1945] 1 All E. R. 427.

for hiring, and he had stipulated in the proposal form not to carry passengers for hire or reward.

In the Court of Appeal it was held that on these facts the passengers were not carried for hire, but that a distinction must be made between the words hire and reward. The meaning of "hire" in this context was not argued, but it would seem that it involves an antecedent agreement for the payment of money.

"A vehicle in which passengers are carried for reward."

The case (*ff*) raised a different point whether in order to prove a carriage for hire or reward, an antecedent agreement for that carriage must be shown, and on this point MACKINNON, L.J., agreed with ATKINSON, J., that it must. In the view of ATKINSON, J., great importance attached to the word "for." It suggested to him that something was being done in order to obtain reward, something which but for the reward would not be done.

"But if A says to B 'I am going into town. Can I give you a lift?' and B accepts, gets in and is taken into town, gets out, thanks A and gives him a shilling, it cannot be said that A was carrying for that shilling. It is true he got the reward. To my mind, that is not the same thing as stipulating for it and doing what he did in order to get it."

MACKINNON, L.J. (*g*), thought that contention was right. He thought carriage for hire or reward imported carriage for some monetary or other remuneration pursuant to some form of contract by which the owner of the car would be entitled legally to claim the payment of that monetary reward from the passengers. There was on the facts no such legally enforceable contract, and therefore there was no carriage of passengers for reward. The majority of the Court of Appeal, DU PARCQ and UTHWATT, L.JJ. (as they then were), took a different view, and considered that taking the word "reward" in the proposal form in its ordinary meaning there was a carriage of passengers for reward on the occasion of the accident.

DU PARCQ, L.J., used these words:

"I cannot really say, having said that I will not carry passengers for reward, that I am nevertheless at liberty to carry passengers regularly every day and to take from them over a considerable period a sum equivalent to them of travelling by the railway and I shall still be fulfilling my promise. The assured was carrying two gentlemen as passengers and he intended to accept from them a payment which he expected to be tendered and which they intended to tender when he had given them their ride in the car. It would seem plain that the assured was carrying these passengers for reward on the day of the accident."

"It appears to me that a distinction falls to be drawn between the word 'hire' and the word 'reward.' The first word necessarily imports an obligation to pay. The inclusion of the second word is not in my opinion merely for the purpose of giving an alternative word to hire, which means the same thing, but for the purpose of bringing in a subject matter which does not include hire and including (I do not say it is confined to that) cases where there is no obligation to pay."

It would seem that the phrase "carriage of passengers for reward" does not necessarily apply to every case where in fact a reward is given to the driver by the passengers. ATKINSON, J.'s, illustration of the proffer of an unexpected tip as a solatium for a solitary act of kindness would not, it is submitted, be taken as a reward within the meaning of the section. Both the Lord Justices of the majority opinion in the Court of Appeal took into account the fact that payment had been made to Bonham about 450 times

(*ff*) [1945] K.B. 292; [1945] 1 All E. R. 427.

(*g*) [1945] 1 All E. R. 427, at p. 429.

before the day of the accident. Nevertheless, it is clear that drivers of private cars must not fall into the error of receiving an expected payment from passengers with anything that approaches regularity.

Except in the case of a vehicle in which passengers are carried . . . by reason of or in pursuance of a contract of employment.

These words, until their meaning was finally settled by the decision of the House of Lords in *Izzard v. Universal Insurance Co., Ltd.* (h), gave rise to considerable speculation. Section 36 (1) (b) of the Act by its proviso stated that compulsory insurance need not be effected against liability to voluntary passengers and against liability to persons who would have a claim against the insured as their employer under the Workmen's Compensation Acts. Did the words in this exception to the proviso mean that insurance must be effected against liability to passengers who were carried by reason of or in pursuance of a contract *with the insured*, but who did not for one reason or another (i) have a claim against him under the Workmen's Compensation Acts for injuries arising out of and in the course of their employment? Or did they mean that passengers carried by reason, etc., of a contract of employment *with anyone* were to be covered? Lastly, in view of the meaning attached to the words "except in the case of a vehicle in which" in relation to the first part of the exception, that such words only applied to vehicles habitually used for such purposes, should only vehicles be envisaged by the second half of this exception which were habitually used for the carriage of such special passengers? These problems were resolved by the decision in *Izzard's Case*.

In this case the terms of a policy reproduced verbatim proviso (ii) of subsection (1) (b) of section 36 of the Road Traffic Act, 1930, that is to say :

"The Company shall not be liable in respect of death or bodily injury
"of any person carried . . . other than by reason of or in pursuance of a
"contract of employment."

The assured was, among other things, a haulage contractor. He was engaged verbally by I. B., Ltd., to do haulage work between Didcot and Coventry and to put a lorry at the disposal of I. B., Ltd., for the conveyance of workmen in the employ of I. B., Ltd., from Coventry to Didcot and from Didcot to Coventry at week ends, the terms of payment for the journeys between the two places being 35s. per journey, whether men were carried on the lorry or not. The workmen employed by I. B., Ltd., lived at Didcot, but in consideration of a higher rate of pay agreed to work at Coventry and a lorry was placed at their disposal if they desired to go home to Didcot at week ends. Now, if such workmen when travelling on the lorry were injured, they had no claim against their employers I. B., Ltd., under the Workmen's Compensation Acts by virtue of the case of *St. Helens Colliery Co., Ltd. v. Hewitson* (k). In that case, the colliery company provided facilities for their workmen to travel to and from their work at reduced fares by special train. The railway company agreed to the carriage at reduced fares and excluded any liability to the workmen arising from their own negligence as carriers. It was held that an accident sustained by a workman whilst so travelling was not one which arose out of or in the course of his employment, so that the workman in the event had no claim against his

(h) [1936] 1 All E. R. 738; reversed, [1936] 2 K. B. 555; [1936] 2 All E. R. 1565; on appeal, [1937] A. C. 773; [1937] 3 All E. R. 79 (H. L.).

(i) Because they were travelling in the circumstances which arose in *St. Helens Colliery Co., Ltd. v. Hewitson*, [1924] A. C. 59; vide *infra*, note (k).

(k) [1924] A. C. 59. S. 9 of the National Insurance (Industrial Injuries) Act specifically brings such a journey within the course of a man's employment; vide *supra*.

employer or the railway company by virtue of the exclusion of liability for negligence. The test whether the claim could be made under the Workmen's Compensation Act was that the workman must be under some duty or necessity to take the conveyance offered by the employers before it could be said that whilst travelling therein he was acting in the course of his employment (although he might be enjoying the facility thereby given "by reason of or in pursuance of his contract of employment").

The insurers contended in *Izzard's Case* that as he was not in the assured's employment he was not being carried by reason of or in pursuance of a contract of employment within the meaning of those words in the policy. MACKINNON, J. (as he then was), agreed with the arbitrator that those words in the policy and in the Act meant any contract of employment, and must not be confined to a contract of employment with the assured. Since Izzard was being carried by reason of or in pursuance of his contract of employment with I. B., Ltd., the insurers were liable under the policy.

In the Court of Appeal, GREER, L.J., agreed with MACKINNON, J., but SCOTT and SLESSER, L.J.J., held that the words under review were placed in the Act in order to overcome the absence of any claim under the Workmen's Compensation Act resulting from *Hewitson's Case*, and so the appeal of the insurers succeeded. SCOTT, L.J., went further and stated that as the description of the risk in the policy was user for general haulage and other trades, and excluded passenger risk, Izzard's death was not covered.

Lord WRIGHT delivered the judgment of the House of Lords (l) that the words "contract of employment" contained in the Road Traffic Act should not be construed as subject to the implied limitation "with the person insured by the policy." He thought that the Act was dealing with persons who were on the insured vehicle for sufficient practical or business reasons, who had taken a contract of employment in pursuance of which they were on the vehicle as an adequate criterion of such reasons. There was no reason for holding that this criterion should be limited to employees of the insured person. Such employees would normally fall under exception (1) in the proviso to the section (m), though there might be rare occasions when an employee of the assured could claim as a passenger. The most probable case was where the man killed or injured was on the vehicle in pursuance of a contract with someone other than the owner of the vehicle, for instance a person whose goods were being carried on the vehicle. The insured owner of the vehicle might come under third party liability to such a passenger, who might be described as being in the position of an invitee *vis à vis* the insured person. The facts of *Izzard's Case* afforded a further illustration of such a case. He saw every practical reason for construing the phrase "contract of employment" as including a contract with a third party, as well as a contract with the insured. The words used were apt to include both cases. The words of the statute were general and unlimited. If the words of limitation (*i.e.* "with the insured person") were intended, they could and should have been expressed, as was done in the previous paragraph (1). The judgment of MACKINNON, J., must therefore be restored.

It is to be noted that the National Insurance (Industrial Injuries) Act, 1946, by section 9 specifically includes as arising out of and in the course of his employment a journey of an employee in any vehicle to or from his place of work, if the express or implied permission of his employer has been granted, even though he is under no obligation to his employer to travel by that

(l) [1937] A. C. 773, at p. 782; [1937] 3 All E. R. 79, at p. 83.

(m) *I.e.* insurance against injury to them is not made compulsory, and their claims would be met under the Workmen's Compensation Acts.

vehicle. The vehicle must be operated by or on behalf of his employer or some other person with whom his employer has made the necessary arrangements. *Hewitson's Case* is therefore overruled, and it would appear that the employees in *Hewitson's Case* and in *Izzard's Case* would now by the Industrial Injuries Act, 1946, be entitled to claim benefit thereunder. This artificial extension of the meaning of the phrase "arising out of and in the course of employment" would seem to cause an overlapping of the scope of the Industrial Injuries Act and of the provisions of the Road Traffic Act, 1930, which compel insurance against injuries to certain passengers. This double claim to benefit and common law damages can, however, be limited by contract to the first claim (n).

As to the point whether the vehicles in which passengers are carried in pursuance of or by reason of a contract of employment are confined to those used habitually for such purposes, it is noticeable that both *Izzard's Case* and the case of *Baker v. Provident Accident and White Cross Insurance Co., Ltd.* (o), the vehicles were in fact habitually used in such a manner. The point was not taken in either case, but it is submitted that on the authority of *Wyatt v. Guildhall Insurance Co., Ltd.*, habitual user of this nature must be proved in order that the claim may succeed.

The decision in *Izzard's Case* was carried a stage further in *Baker v. Provident Accident and White Cross Insurance Co., Ltd.* (o). There the plaintiff, a laundress, was injured while being carried in her employers' laundry van at a point on her way home far beyond the place to which the employers permitted their employees to be carried as a facility for getting to and from their work. In deciding whether the plaintiff was being carried by reason of or in pursuance of her contract of employment, CASSELS, J., used these words:

"In so far as there is a difference, and there undoubtedly is a difference 'between the phrase 'in pursuance of' and the phrase 'by reason of,' I think its effect is this. A person is carried in pursuance of a contract of employment if it is a term of the contract that he shall be carried. In so far as the person may be affected 'by reason' of a contract of employment, I would say, it is with reference to a case where an employer says to 'an employee' 'Go on that vehicle' or 'Be carried on that vehicle,' and he 'is only able to give that order by reason of the fact that there is the 'relationship of employer and employee between them.'"

A little later the judge makes it clear that where an employer permits an employee to travel on his van from point A to point B as a facility for that employee's work, that is carriage by reason of his employment. But the employers are entitled to put definite limits on such facilities, and if the employee is carried beyond these limits, he has no greater rights than any other voluntary passenger. In this case the driver of the van was acting outside the scope of his employment, and without the permission of the employers, in travelling beyond these limits, and the insurers were not liable under the policy.

Finally, in the class of case likely to arise under this part of the section, the limited application of the rule of common employment should be remembered. It may well be that in certain cases, now becoming rare, and soon impossible, the plaintiff may fail at the first hurdle in that his claim may be barred against the driver of the vehicle on this ground (p).

(n) But see s. 97 of the Road Traffic Act, 1930, which forbids contractual limitation of liability to passengers carried in public service vehicles.

(o) [1939] 2 All E. R. 690.

(p) *Coldrick v. Partridge, Jones & Co., Ltd.*, [1910] A. C. 77. See chapter I, *ante*, p. 37. The cause of action must arise before July 5, 1948, for on that date and thereafter the defence of common employment is abolished.

11. "*Liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise.*"—These words appear to be wide enough to cover the case of any voluntary passenger (other than persons carried in the vehicle in pursuance of a contract of employment) on any kind of vehicle during the course and at the beginning and end of his journey. It must be observed that there seems to be no doubt that, in England at any rate, a voluntary passenger can sue the driver (or his employer or both as the case may be) for injuries sustained by the negligence of such driver (q). In addition, an employer injured by the negligent driving of his chauffeur while travelling as a passenger may sue the chauffeur in an action for damages, where this course may be thought worth while. Where the chauffeur is covered by the terms of the policy, the action would indeed be worth while, as was shown in *Digby's Case* (r).

12. (*Proviso* (iii)) "*Any contractual liability.*"—The section does not require insurance against liabilities which may be incurred by reason of any breach of contract on the part of the assured. It needs no further explanation than that which may be found in the first chapter of this book and in the remarks which follow. It should be noted, however, that liability for injury to or death of a pedestrian third party may be incurred by contract (s).

In this connection the reader should be reminded that whilst contractual liability is expressly excepted from the class of liabilities against which insurance is required, the use of a vehicle on a road will not as a rule give rise to any contractual liability which is not also a liability in tort. Thus where passengers are carried for hire or reward, the owner or the driver of the vehicle to whom the hire-money or reward is paid will, if the contract says nothing about the matter generally, be under a contractual duty to use all reasonable care in and about the driving of the vehicle to avoid causing injury to the paying passenger (t). This duty is no greater and no less than the duty imposed in such circumstances by the law of tort independently of any contractual obligation. Thus in the cases where there is a contractual liability there will as a rule be a co-extensive liability in tort. It is, however, open to the person who carries passengers for hire or reward in vehicles not public service vehicles (u) to stipulate in his contract with them that he shall be under no liability in respect of any injuries which they may sustain whilst being carried in the vehicle. But in regard to public service vehicles, section 97 of the Act, as has been seen, prohibits "contracting out." It should be noted that this section only applies to public service vehicles as defined by the Act, and if the definition of contract carriages in section 61 is to be taken as of general application, it follows that the owners of private hire cars, taxis, etc., can if they wish contract out of liability in respect of the death of or bodily injury to their passengers. In such a case, even if the liability in tort is not expressly referred to, it is deemed to be excluded, and a passenger who has by his contract abandoned his rights thereunder

(q) See *Pratt v. Patrick*, [1924] 1 K. B. 488; *Harris v. Perry & Co.*, [1903] 2 K. B. 219, *per* COLLINS, M.R., at p. 226; Beven on Negligence, 4th Edn., vol. ii, p. 1138; *Karavias v. Callinicos*, [1917] W. N. 323.

(r) [1943] A. C. 121; [1942] 2 All E. R. 319 (H. L.). For a similar Scottish case, differently decided, see *General Accident Assurance Corporation v. Watson* (1942), 73 Ll. L. R. 189.

(s) See *post*, chapter IX, "Motor Traders' Risks."

(t) *Kelly v. Metropolitan Rail. Co.*, [1895] 1 Q. B. 944; *Taylor v. Manchester, Sheffield and Lincolnshire Rail. Co.*, [1895] 1 Q. B. 134; *Foulkes v. Metropolitan District Rail. Co.* (1880), 5 C. P. D. 157. See also chapter I, pp. 66, 67, as to concurrence of breaches of contract and liability in tort.

(u) Since in the case of these s. 97 (*ante*, p. 203) prohibits "contracting out."

is not allowed to impose the same rights by means of an action in tort (a).

Provided, therefore, that the person who carries passengers for hire or reward in a private service vehicle, takes care always to exclude by his contract any liability which may be incurred by him to his passengers, it would seem that he need not insure against this liability since it could not be incurred by him.

The interesting question arises here as to what is the position of a passenger carried in a vehicle for hire or reward who, by his contract with the owner of the vehicle, has abandoned any rights against him and sustains injury whilst being carried in the vehicle owing to the negligent driving of the owner's servant? In such a case, although the law cannot by any means be said to be settled, the better opinion appears to be that the protection given to the owner would enure to the benefit of his servant (b).

The point is of importance in connection with the exception to proviso (ii) as above considered (c), since if the contract with the owner did not also relieve his servant from liability to passengers, insurance against such liability would be necessary, and the owner who, relying on the fact that he had excluded all liability to passengers by his contract, failed to see that any person driving the vehicle was so insured would be in breach of section 35 (d) of the Act. Moreover, there seems no reason why an employer who gratuitously carries his servants in such circumstances as in *Hewitson's Case* (e) should not contract out of any liability which he might thereby incur to them, although as a rule there would be no liability out of which he could contract. On the other hand, in such a case it might well be said that, as far as the driver was concerned, the passengers were not being carried for hire or reward.

2. Exclusion of liability to relatives, etc.—It must be carefully noticed that, with the exception of the classes of person expressly excluded by provisos (i) and (ii) the Act requires insurance against the specified liability being incurred to *any* third party. In some policies issued under the Act some such clause as follows is sometimes to be found:

" . . . Indemnity against the assured's legal liability for death or bodily injury to any person *other than* the driver of the insured car, a person in the service of the assured, a *relative of the assured or a person residing with him*, or a member of his household " (f).

In so far as such a clause excludes insurance made compulsory by section 36 (1) (b) of the Road Traffic Act, 1930, against liability to relatives of the assured or persons residing with him, it is, it is submitted, clearly in contravention of the requirements of the Act, and persons driving under a policy containing such a clause would be liable to prosecution under section 35 (g). Where such exclusion applies only to liability in respect of persons against whose injury the Act does not require insurance, it is valid.

(a) *Hall v Brooklands Auto-Racing Club*, [1933] 1 K. B. 205, *per* SCRUTTON, L. J., at p. 213, cited *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A. C. 522, at pp. 533, 547, 564.

(b) See *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A. C. 522; *cf.* *Salmond on Torts*, 10th Edn., p. 9.

(c) *Auto*, p. 202.

(d) Since the vehicle would be one in which passengers are carried for hire or reward, or by reason, etc., of employment. And the owner might be liable (according to the terms of his contract) on the principle of *Monk v. Warbey*, [1935] 1 K. B. 75.

(e) [1924] A. C. 59.

(f) For the meaning of such words as "family," "household" and the like, see chapter VIII, *post*.

(g) *Cf. post*, p. 248.

3. Section 36 (4).

"Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

It should at the outset be observed that this subsection says insurers "shall be liable to indemnify," etc.: it does not say that the persons or classes of persons specified in the policy shall be deemed to be insured thereby (*h*). It has already been pointed out (*i*) that the presumption is very strong (*k*) that the legislature intended by this subsection to enable persons who are not parties to a motor insurance policy (*l*), and between whom and the insurers there is, therefore, no privity of contract, to have the right themselves to enforce the indemnity which the policy purports to grant them.

It was not until 1935, when the case of *Tattersall v. Drysdale* was decided, that it was seen whether this presumed intention was in fact effected by the wording of the section, so that persons specified in the policy possessed by virtue of the subsection a right to sue insurers direct under the policy.

The preamble to the Act showed that the intention of the Act was to make provision for the protection of third parties against risks arising out of the use of motor vehicles, *i.e.*, that every driver of a motor vehicle should be covered against such risks by a policy of insurance. There were, however, several provisions in this part of the Act which suggested that the intention thereof was to secure that every driver of a motor vehicle should be insured by a policy granted to and effected by him or his agent (*m*), save where he drives on another's behalf (*n*). The difficulties at Common Law were great, in that unless the subsection was held completely to abolish it, the defence that no party can sue on a contract to which he is not a party, and to which he gave no consideration, must succeed when the "authorised driver," *i.e.*, one driving with the consent or permission of the assured, and not as his agent, attempted to claim against insurers for an indemnity against a liability incurred by him from the use of the insured vehicle. In an earlier chapter (*o*) it was shown how various means might be employed in order to overcome this difficulty. It will be remembered that the sequence of legal decisions was as follows: in *Williams v. Baltic Insurance Association of London, Ltd.* (*p*), it was decided that in spite of the Life Assurance Act, 1774, which required privity of contract between parties benefiting under certain classes of insurance and the insurers, the authorised driver could obtain indemnity under the policy in an indirect way by receiving the policy monies from the assured as his trustee, and secondly that as the motor insurance policy insured a motor vehicle it was an insurance of goods and so was not affected by the Life Assurance Act, 1774.

(*h*) Nevertheless, in *Digby's Case*, [1943] A. C. 121; [1942] 2 All E. R. 319, it was held by the House of Lords that any person specified in the policy as being covered may become *pro hac vice* the insured when driving the insured vehicle.

(*i*) See *ante*, p. 161.

(*k*) See the judgments quoted below in this section of this chapter.

(*l*) As to who are parties see *ante*, chapter II, pp. 89 *et seq.*

(*m*) The provisions referred to are: (1) s. 40, which requires a driver to produce his certificate: (2) s. 36 (5) and the regulations made thereunder, which require special forms of certificate; (3) s. 38, which enables insurers to recover money applied to third parties, etc., in certain circumstances from the assured.

(*n*) And that other is insured against liabilities which he may incur through that driver's driving on the principle of vicarious liability.

(*o*) Chapter II, p. 96

(*p*) [1924] 2 K. B. 282.

After the Road Traffic Act of 1930 was passed, and section 36 (4) came into effect, *Freshwater's Case* (q) and *McCormick's Case* (r) threw doubt on the efficacy of section 36 (4) to give a right to authorised drivers to sue the insurers direct, in that *Williams v. Baltic Insurance Association of London, Ltd.*, only aimed at the mischief contained in the Life Assurance Act, 1774, and the new subsection only confirmed that that Act had no application to risks which the Road Traffic Act, 1930, required to be covered, whereas the difficulty at Common Law of the absence of privity of contract was not entirely resolved. In *Vandepille's Case* (s), which, being decided by the Privy Council, was not necessarily binding on the Courts in this country, the decision in *Williams v. Baltic Insurance Association of London, Ltd.*, that the assured could sue on behalf of the authorised driver as his trustee was expressly disapproved. It must be remembered that the point whether section 36 (4) gave a new right to authorised drivers came before the Courts very infrequently, although it had been a common practice of motor insurers to insert the extension clause covering "authorised drivers" for many years prior to 1930. As the insurers felt themselves in honour bound to give effect to the plain terms of their policies, those persons who drove insured cars with the *bona fide* permission of the owner found their liabilities to third parties invariably met, so that the position in law remained uncontested.

Finally, as stated previously, it fell to GODDARD, J., in *Tattersall v. Drysdale* (t), to decide the meaning and effect of subsection 36 (4). It is not proposed to restate here the terms of the judgment, which has been set out in full in an earlier chapter (u): the effect was that the subsection did in fact give a new right to sue insurers for indemnity under the policy to persons or classes of persons specified as being covered in the policy, and whether parties to the contract of insurance or not. After a somewhat chequered career, therefore, this subsection was held to have given legal effect to what had been common commercial policy for some years.

This right to obtain indemnity from insurers, thus provided for specified but unnamed persons, is subject to certain conditions. The person or persons or classes of persons, etc., which may be actually specified in the policy are usually

- (i) the named assured ;
- (ii) his chauffeur or some specified relative ;
- (iii) any person driving the insured vehicle with the assured's consent.

But the policy usually states (a) that the insurers will treat such other persons "as though they were the assured," and most policies require that such other drivers shall hold a proper licence to drive, or at least shall not be disqualified from holding one. Even where the assured permits a person to drive his car who does not come within the class of persons specified in the policy, any member of the public injured by the negligent driving of this excluded driver may have a right of action for breach of statutory duty imposed by section 35 (1) of the Road Traffic Act, 1930, against the owner of the car for causing or permitting the use of the motor vehicle whilst uninsured, and it has already been noted that insurers have agreed by the

(q) [1933] 1 K. B. 515.

(r) (1934) 49 Ll. L. R. 361.

(s) [1935] A. C. 70.

(t) [1935] 2 K. B. 174 ; in this case, too, the rights of the injured third party were secured, and the conflict arose between two insurers as to which was bound in law to indemnify the authorised driver.

(u) Chapter II, *ante*, p. 97.

(a) As to policies generally and the common form now in use see *post*, chapter VIII generally.

Domestic Agreement (b) to pay the unsatisfied damages and costs of such an action against the owner. The owner of the car may have to reimburse the insurers for such damages and costs. But where the driver of the car is specified in the policy as being of the class which the policy indemnifies, there are two points of importance to be borne in mind. First, he is usually required to observe the terms of the policy, in so far as they are applicable to him (c). In *Digby's Case* (c) it was settled that the effect of the clause extending cover to a permitted driver was to bring into existence a second contract of insurance between the insurer and this permitted driver, which was valid save for a breach of condition of the terms of the policy by that permitted driver. The substratum of this second contract is the original contract between the assured and the insurer, and this fresh promise of indemnity falls with the rest of the policy if the main contract between assured and insurer is brought to an end (d). If the owner of the insured vehicle has parted with his interest in the vehicle concerned, or if he never had an interest in it at all, there can be no policy to cover it, or, at least, he cannot be in a position to give permission to the driver to use it (e).

It is to be noticed that the terms "owner of the vehicle insured" and "the assured" have been used synonymously in the consideration of the position of the permitted drivers. It has been decided, though not perhaps finally (f), that no one but the owner may give the requisite permission to any other person to drive the insured car.

Lastly, against what kinds of liabilities does this right of indemnity, provided by section 36 (4) to all persons specified in the policy, extend? Is the right to sue for an indemnity only provided by section 36 (4) against Road Traffic Act liabilities (i.e., those required to be covered by section 36 (1) of the Act) or does it extend to all risks in fact covered by the policy in question? The point was decided by TUCKER, J., as he then was, in *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.* (g), in a judgment which was confirmed *in toto* by the Court of Appeal (h).

In that case the question was whether an insurance company was liable to indemnify a "permitted driver" under an extension clause against damages which that driver had been found liable to pay to a voluntary passenger in the insured car. The following is the relevant extract from the judgment of TUCKER, J.:

"The defendants point out that *Tattersall's Case* (i) was one where the indemnity sought was in respect of a liability required to be covered by the Road Traffic Act, 1930, section 36, whereas in the present case the liability of the assured was to a passenger in the car, which is not a liability required to be covered by section 36, and could have been made the subject of a policy which in no way conformed to the requirements of the Road Traffic Act. It was accordingly contended that the policy, although for some purposes a policy issued under section 36, was for the purposes of the present case to be regarded as a policy issued irrespective of that section, and, therefore, *Tattersall's Case* (i) does not apply. . . . It is to be observed that subsection 36 (4) is dealing with the liability of 'persons

(b) See Introduction and chapter VI, *post*.

(c) *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319.

(d) *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1938] 2 All E. R. 267.

(e) *Zurich General Accident Insurance Co. v. Buck* (1939), 64 Ll. L. R. 115; *Goodbarne v. Buck*, [1940] 1 K. B. 771; [1940] 1 All E. R. 613; *Guardian Assurance Co., Ltd. v. Sutherland*, [1939] 2 All E. R. 246.

(f) *Per* MACKINNON, L.J., in *Goodbarne v. Buck* (*supra*).

(g) [1944] 2 All E. R. 243, at p. 248.

(h) [1945] K. B. 250; [1945] 1 All E. R. 316.

(i) [1935] 2 K. B. 174.

“ ‘issuing a policy of insurance under this section’ and that the words ‘in respect of a liability required to be covered by a policy issued under this section’ are absent. Contrast with this the language of the Road Traffic Act, 1934, section 10, where such words do occur. The Zurich were ‘persons issuing a policy of insurance under section 36,’ . . . and Austin is one of the ‘persons or classes of persons specified in the policy’ in respect of a liability which the policy purported to cover in the case of those persons or classes of persons. In my view he comes within the express language of the subsection which is not confined to a liability required to be covered by section 36, and is accordingly, on the authority of *Tattersall’s Case*, entitled to sue the Zurich in his own name.”

4. Section 36 (3).

“ For the purposes of this Part of this Act, the expression ‘authorised insurer’ means an assurance company or an underwriter in whose case the requirements of the Assurance Companies Act, 1909 (9 Edw. 7, c. 49), as amended by this Act, with respect to deposits by assurance companies and deposits and guarantees by underwriters are complied with.”

This section has been repealed by the terms of the Assurance Companies Act, 1946 (*k*), and replaced by section 5 of that Act. The definition and position of an authorised insurer, as set out in this new legislation, is considered in Part IV of this chapter.

5. Section 36 (5).

“ A policy shall be of no effect for the purposes of this Part of this Act unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Part of this Act referred to as a ‘certificate of insurance’) in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances.”

“ *Prescribed.*”—This means prescribed by the Minister of Transport by order or regulation issued under the powers so to do given to him by section 41 of the Act. Section 41 is further considered in a subsequent section of this chapter. Only two points need be noted here.

(1) What may be prescribed by the Minister are the *particulars* to be put on the certificate, and not the conditions under which the policy may be issued. In accordance with this view the Minister has adopted the opinion that the words in subsection (1) (b) of section 36, “ arising out of the use of the vehicle on the road,” means the use allowed by the policy, and has prescribed on the form of insurance certificate that “ limitations of use ” [other than those hit by section 12 of the 1934 Act] (*l*) shall be stated, and on a certificate of security the conditions subject to which the security is issued.

(2) There is no need to put on the certificate any particulars other than such as may be prescribed.

The regulations relevant to this subsection which have so far been issued are reproduced below, not merely for the sake of convenience, but because they must be read with the provisions of the Act itself, bearing as they do the force thereof (*m*). The specimen certificates are, however, printed in an Appendix. It must always be remembered that these regulations may change (*n*).

(*k*) 39 Halsbury’s Statutes 38.

(*l*) S. R. & O. 1941, No. 926.

(*m*) Road Traffic Act, 1930, s. 111; s. 41.

(*n*) They may be altered, added to, or superseded at any time without notice or general publicity.

These regulations are contained in the Motor Vehicles (Third Parties Risks) Regulations 1941 (*nn*), and the following are the extracts therefrom relevant in this context :

- " Regulation 5.—**(1) A company shall issue to every holder of a security
 " or of a policy other than a covering note issued by the company :—
 " (a) in the case of a policy or security relating to a specified vehicle or
 " to specified vehicles a certificate of insurance in form A or a
 " certificate of security in form D set out in the Schedule to
 " these Regulations in respect of each such vehicle.
 " (b) in the case of a policy or security not relating to any specified
 " vehicle or vehicles such number of certificates in the form B
 " or D set out in the Schedule to these Regulations as may be
 " necessary to enable the requirements of subsection (1), Section 40
 " of the Act and of these Regulations as to the production of
 " evidence that a motor vehicle is not being driven in contra-
 " vention of Section 35 of the Act to be complied with :
 " " Provided that where a security is intended to cover the use
 " of more than 10 motor vehicles at one time the company by
 " whom it was issued may subject to the consent of the Minister
 " issue one certificate only and where such consent has been given
 " the holder of the security may issue duplicate copies of such
 " certificate duly authenticated by him up to such number and
 " subject to such conditions as the Minister may determine.
 " (2) Every policy in the form of a covering note (o) issued by a company
 " shall have printed thereon or on the back thereof a certificate of insurance
 " in the form C set out in the Schedule to these Regulations.

Subject to Regulation 7 (as to which see below) it would appear that under this regulation not more than one certificate need be issued in respect of any one vehicle where the policy relates to a specified vehicle or vehicles.

The provisions in regard to the issue of certificates in respect of securities should be particularly noted.

The provisions of these regulations should be carefully compared with the requirements of section 14 of the Road Traffic Act, 1934 (*p*).

- " Regulation 6.—**(1) Every certificate of insurance or certificate of
 " security shall be duly authenticated by or on behalf of the company by
 " whom it is issued.
 " (2) The certificate aforesaid shall be issued not later than four days
 " after the date on which the policy or security is issued or renewed."

"*Duly authenticated*" presumably means stamped with the company's seal, or signed by some person having proper authority in that respect on behalf of the insurers.

- " Regulation 7.** Where under the terms of a policy or security relating
 " to a specified motor vehicle the holder is entitled to drive any other
 " motor vehicle than that specified without contravention of Section 35
 " of the Act, the company by whom the policy or security was issued may
 " and shall on demand being made to them by the holder issue to him a
 " further certificate of insurance in form A or B set out in the Schedule to
 " these Regulations or a further certificate of security as the case may be."

(*nn*) S. R. & O. 1941, No. 926.

(o) The cover note must constitute an effective policy. Where a cover note is issued covering an assured conditionally (*cf.* if the premium is paid) and the condition is not met, there is no cover, and therefore no requirement for a certificate (*London and Scottish Assurance Corporation, Ltd. v. Ridd* (1939), 65 Ll. L. R. 46).

(*p*) *Post*, chapter V, pp. 334 *et seq.*

This shows that, under the ordinary form of private car policy now current, in which the insurers "undertake" also to indemnify the assured whilst personally driving a motor car (or motor cycle) not belonging to him and not hired to him under a hire purchase agreement, two certificates may be obtained. It should be noticed that the regulation prescribes forms A and B; but when reference is made to these forms it will be seen that both provide for the insertion thereon of the index mark and registration number of the vehicle insured. Either, therefore, this regulation means that the mark and number of the other vehicle is to be inserted, or that the certificate is to be precisely the same as that which the assured requires for driving his own car, viz. giving the mark and number of the assured's car. If the former is the true meaning, it suggests that the Act requires a separate certificate in each instance where a car is being driven which refers to the driving of *that* car by that person driving it at that time, and since the regulation provides for the issue of "a further" certificate it would seem that the assured can only drive one particular car which is not his own; if the latter is the real intention the regulation seems purposeless except as a facility for fraud by enabling two cars to be driven (under a policy which only covers one) at the same time without risk of detection.

Thus if A had a policy covering himself whilst driving the insured car or any other car, and also covering the driving of his car by some person with his consent, the regulation would enable A to drive another car at the same time as his car was being driven by some person with his consent. In such a case, it is submitted, the policy would not be in force (g), and A and the person driving his car would be in breach of section 35 (r). But even if both were involved in accidents at the same time, there would be no risk of detection under the operation of section 40 (a).

" Regulation 10.—(1) Every certificate issued in pursuance of Part II of the Act and of these Regulations shall be printed and completed in black on white paper or similar material.

" (2) No certificate so issued shall contain any advertising matter either on the face or on the back thereof :

" Provided that the name and address of a company by whom a certificate is issued or a reproduction of the seal of the company or any monogram or similar device of the company or the name and address of an insurance broker shall not be deemed to be advertising matter for the purposes of this Regulation if it is printed or stamped at the foot or on the back of such certificate.

" (3) A company by whom a certificate of insurance or a certificate of security is issued may insert on the face or on the back of the certificate a statement as to whether or not the policy or security to which it relates is effective while any motor vehicle in respect to which it is issued is being driven in Northern Ireland."

" Regulation 12.—(1) Every company by whom a policy or a security is issued shall keep a record of the following particulars relative thereto and of any certificates issued in connection therewith :

" (a) Full name and address of the person to whom the policy security or certificate is issued.

" (b) In the case of a policy relating to a specified motor vehicle or to specified motor vehicles the index mark and registration number of each such motor vehicle.

" (c) The date on which the policy or security comes into force and the date on which it expires.

(g) See this question discussed *post*, chapter VII, p. 538.

(r) See as to this, *ante*, pp. 177 *et seq.*

(a) As to s. 40 and for this and similar points, see *post*, pp. 249 *et seq.*

" (d) In the case of a policy the conditions subject to which the persons
" or classes of persons specified in the policy will be indemnified.

" (e) In the case of a security the conditions subject to which the under-
" taking given by the company under the security will be im-
" plemented; and every such record shall be preserved for one year
" from the date of the expiry of the policy."

" (2) Every local authority as defined in sub-section (6) of Section 35
" and Section 44 (b) of the Act shall keep a record of the motor vehicles owned
" by them in respect of which a policy or a security has not been obtained,
" and of any certificates issued by them under these regulations in respect
" of such motor vehicles, and of the withdrawal or destruction of any such
" certificates.

" (3) Any person who has deposited and keeps deposited with the
" Accountant-General of the Supreme Court the sum of fifteen thousand
" pounds in pursuance of sub-section (4) of Section 35 of the Act shall keep
" a record of the motor vehicles owned by him and of any certificates issued
" by him under these regulations in respect of such motor vehicles and of the
" withdrawal or destruction of any such certificates.

" (4) Any person, authority, or company by whom records of docu-
" ments are required to be kept by these Regulations shall, without charge,
" furnish to the Minister or to any chief officer of police on request any
" particulars thereof."

" **Regulation 13.** Where to the knowledge of a company a policy or
" security issued by them ceases to be effective without the consent of the
" person to whom it was issued otherwise than by effluxion of time or by
" reason of his death the company shall forthwith notify the Minister of
" the date on which the policy or security ceased to be effective (c).

" **Regulation 14.** Where with the consent of the person to whom it was
" issued a policy or security is transferred or suspended or ceases to be
" effective otherwise than by effluxion of time such person shall forthwith
" return any relative certificates to the company by whom they were issued
" and a new policy or security shall not be issued to that person, nor shall
" the said policy or security be transferred to any other person unless and
" until the certificates have been returned to the company or the company
" are satisfied that they have been lost or destroyed.

" **Regulation 15.** Where any company by whom a certificate of insurance
" or a certificate of security has been issued are satisfied that the certificate
" has become defaced or has been lost or destroyed they shall if requested
" so to do by the person to whom the certificate was issued, issue to him a
" fresh certificate."

Careful comparison must be made between the provisions of these regula-
tions and those of sections 10 and 14 of the Road Traffic Act, 1934 (d).

The effect in law of an insurance certificate, so far as it affects the position
or creates rights between the insurers and persons driving the insured car
with the assured's consent, was considered fully and the relevant decisions
quoted and referred to in an earlier chapter. That the words " containing
such particulars of any conditions subject to which the policy is issued "
have been held to show that section 36 (1) (b) does not require an unqualified
or unrestricted insurance has already been noted (e). Apart from the fore-
going, this subsection seems to speak for itself. The following points,

(b) Which relates to Scotland.

(c) But see chapter IX, *post*, as to effect of waiver by the insurers of their rights
to avoid or repudiate liability.

(d) *Post*, chapter V, pp. 278 *et seq.*, 334 *et seq.*

(e) *Ante*, pp. 192 *et seq.* See *Gray v. Blackmore*, [1934] 1 K. B. 95, and cf. *McCormick
v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361.

however, some of which become more material when considering the effect of section 10 of the Road Traffic Act, 1934 (*f*), must be carefully noted :

1. Although a policy in respect of which a certificate has not been delivered to the assured is ineffective for the purposes of this part of the Act of 1930, and consequently a person using a car on the road with an uncertificated policy would be in breach of section 35, such a policy is not thereby ineffective for any other purpose (*g*).

2. It follows that the rights of the assured under the policy against the insurers, and of third parties to whom such rights have been transferred under the Third Parties Act are not affected by the lack of an insurance certificate (*h*).

3. The subsection requires the issue of a certificate to the person by whom the policy is effected (*i*). Section 40 requires the driver of a vehicle in the circumstances therein specified to produce *his* certificate. That section defines the phrase "produce his certificate" as meaning "the relevant certificate," where a person is driving with the permission of the assured, he is given time by section 40 (*i*) to obtain the relevant certificate, which refers to and makes valid his driving, from the assured.

4. There is nothing in the subsection or in the regulations to suggest that not more than one certificate can be issued. It is apprehended that in cases where there is more than one person insured by a policy, a separate certificate can and perhaps should be issued to each of such persons. Moreover, it is noticeable that by Regulation 7 of Order 926 insurers *may* and shall on demand issue a duplicate certificate in cases where the assured is by his policy covered when driving cars other than his own. One of the apparent defects of this regulation has already been remarked upon (*j*). Another remarkable feature of this regulation is that it exists at all. Unless the Act requires it, there seems to be no reason why an assured should want a duplicate certificate when he drives another's vehicle, any more than he should want one in any other case. He might well, for example, want a duplicate certificate for use by him when he is driving another's car whilst at the same time some other person is driving his car with his permission. But the regulations make no provision for such a case, perhaps thereby recognising that it is at least questionable (*k*) whether in such circumstances the policy would be in force so as to cover the driving of two cars at once (*l*). But there are many other purposes for which a private owner might well need one or more duplicate certificates, but the regulations provide only for the case where this would be least useful.

5. The issue of certificates by Lloyd's brokers and by hirers of "self drive" cars is considered later (*m*).

(*f*) As to which see chapter V, *post*, pp. 279 *et seq.*

(*g*) Cf. remarks above as to whether a policy not complying with the Act is binding. Under the Motor Insurers' Bureau agreements, the third party's just claims in respect of "Road Traffic Act liability" will be met by the insurer concerned whether or no the policy covering the vehicle involved in the accident complies with the Act.

(*h*) Contrast the provisions of s. 10 of the Road Traffic Act, 1934, *post*, chapter V, whereunder a third party gets no rights unless and until a certificate has been delivered to the assured (*Wyatt v. Guildhall Insurance Co., Ltd.*, [1937] 1 K. B. 653; [1937] 1 All E. R. 792).

(*i*) Delivery must be made to the assured or his agent, and not to a person or a company (*cf.* a hire-purchase company) who holds the certificate as a matter of right, and not on the assured's behalf (*Starkey v. Hall* (1937), 58 Ll. L. R. 24).

(*j*) *Ante*, pp. 214-216.

(*k*) See this question discussed *post*, p. 538.

(*l*) Since by doing this with one certificate the assured would run the risk of detection under the operation of s. 40; as to which see *post*, pp. 249 *et seq.*

(*m*) *Post*, chapter VII, p. 476, and chapter IX p. 649.

6. Section 36 (6).

"In this Part of this Act the expression 'policy of insurance' includes a covering note."

A covering note, or, as it is more commonly called, a cover note, is a document issued by insurers before a policy has been granted to a person who has applied therefor and whilst the insurers are considering whether or not to accept such person's proposal. The effect in law of the issue of a cover note, and the rights and liabilities which are thereby created, will be considered in a later chapter (*n*). It suffices here to point out that a cover note of itself creates a contract whereof the validity and binding force are not affected by a subsequent refusal of the insurers to issue a policy. By Regulation 5 (2) of Order 926 (*o*), it is provided that every cover note shall incorporate an insurance certificate (*p*).

II.—CONDITIONS IN POLICIES AND SECURITIES

1. Section 38.

Certain conditions to policies or securities to be of no effect.

"Any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such claims as are mentioned in paragraph (b) of subsection (1) of section thirty-six.

"Provided that nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties."

This section has little effect in accidents occurring after July 1st, 1946, when the Domestic Agreement (*q*) came into force, whereby insurers will honour their policies in respect of third party claims against a Road Traffic Act liability irrespective of any breach of condition by the assured. The Domestic Agreement specifically reserves the insurer's right to recover such monies, paid to satisfy the judgment obtained by the third party, from the assured, as set out in the proviso to this section. In any case, since the passing of the Road Traffic Act, 1934, by section 10 of that Act, insurers were precluded from relying on conditions in the policy as affording a defence against third party claims, save those which had the effect of avoiding the policy *ab initio*. No cases of interest have therefore been decided on this section since 1934. Cases prior to that date on the interpretation of the section were fully discussed in the first edition (*r*).

The section was designed to prevent the rights which third parties might acquire under the Third Parties Act, 1930, being defeated by some breach of condition on the part of the assured committed after his liability to the third party had been incurred. Conditions were (and subject

(*n*) *Post*, chapter VII.

(*o*) The Motor Vehicles (Third Party Risks) Regulations, 1941.

(*p*) See *ante*, p. 214.

(*q*) See *post*, chapter VI.

(*r*) The cases were *Bright v. Ashfold*, [1932] 2 K. B. 153; *Jester-Barnes v. Licences and General Insurance Co., Ltd.* (1934), 49 Ll. L. R. 231; *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361; *Gray v. Blackmore*, [1934] 1 K. B. 95; *Revell v. London General Insurance Co.* (1934), 50 Ll. L. R. 114.

to the effect of this subsection still are) commonly placed in policies (s) whereby if, for example, the assured fails to report the accident out of which his liability to the third party arose (t), or makes an admission of such liability to such third party (u), or refuses to allow the insurers to have control of proceedings brought against him in respect thereof (v), or refuses to arbitrate a disputed claim (w), the insurers are not liable on the policy. Usually these conditions were (and are) made conditions precedent to the insurer's liability to make any payment on the policy.

These conditions are still valid *against the assured, or against anyone claiming indemnity under the policy* (x).

1. "*Liability.*"—This means liability of the insurers to the assured.

2. "*Some specified thing being done or omitted to be done.*"—Examples of this have already been given. The section only hits some act or omission *specified* in the policy. Suppose that the assured, having run down and injured a pedestrian, refuses to stop and render him assistance and the pedestrian as the result of lack of assistance dies of his injuries or is accidentally run over and killed by another car (y). Here the assured would commit a definite breach of duty which would, apart from the subsection, entitle the insurers to repudiate liability under the policy. As a rule such a duty would be a "condition in the policy" specifically expressed therein (z). But it would not, it is submitted, be a condition in the policy for the purposes of this subsection, if only implied, since although it might be argued that a policy contains not only such conditions as are expressed therein but also such as must necessarily be implied (a), there would be no *specified* thing which the assured had done or failed to do.

3. "*After the happening of the event giving rise to a claim under the policy or security.*"—This means after the happening of the event giving rise to the liability to a third party (b). As a rule, and under the usual form of motor policy now compulsory, the two events would be contemporaneous. Formerly there were cases in which this might not have been so (c).

4. "*Shall be of no effect.*"—This should be read as if followed by the words ("subject to proviso to this subsection"). The limited operation of this subsection must be stressed. It only invalidates conditions of the type described in so far as they apply to third party claims against which insurance is compulsory (d).

(s) As to such conditions now inserted in the common form of policy, see *post*, chapter VIII.

(t) See as to this, *post*, chapter VIII, p. 590 *et seq.* and cases there cited.

(u) *Tustin v. Arnold & Sons, British Dominions General Insurance Co., Ltd., Third Parties* (1915), 84 L. J. K. B. 2214.

(v) See *post*, chapter VIII and chapter X.

(w) As to this see further, *post*, chapter VIII, p. 611.

(x) *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243; affirmed, [1945] K. B. 250; [1945] 1 All E. R. 316.

(y) In this latter example, it is submitted that the assured might be liable for the death, the rule of remoteness not applying in these circumstances, as it would where, e.g. the injured third party was involved in another collision whilst being driven to hospital.

(z) *I.e.* the term requiring the assured to minimise the loss.

(a) As to implied terms in a contract of motor insurance, see *post*, chapter VIII.

(b) The liability to the third party is incurred at the moment at which the occurrence out of which it arises takes place. See *per* TOMLIN, J., in *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793; chapter III generally, *ante*.

(c) As where the policy provided that the insurers should only be liable on claims actually paid by or on judgment being obtained against the assured.

(d) *I.e.* those specified in subsection (1) (b) of section 36.

5. "In connection with such claims as are mentioned in paragraph (b) of subsection (1) of section 36."—The claims referred to are claims in respect of the liability of the assured for the death of or bodily injury to certain third parties.

6. "Requiring the person insured to repay to the insurer."—The "person insured" means the persons or classes of persons specified in the policy as being insured (e).

It is submitted that the insurers could in the circumstances contemplated by the proviso to section 38 obtain repayment from such persons other than the assured of money paid in discharge of third party liability incurred by them in an action for money paid to their use (f). Under the Domestic Agreement, the third party is required to assign any judgment obtained against the negligent motorist to the insurer concerned. This judgment can subsequently be executed against the motorist.

7. "And which have been applied to the satisfaction of the claims of third parties."—The latter part of this proviso is curiously worded. Its apparent effect, taken with the substantive part of the subsection, would seem to be that a provision in a policy entitling insurers to repayment of monies paid in respect of the third party indemnity, but not applied to the satisfaction of third party claims (as where, for example, the assured had insisted—as he can, at any rate under some policies, insist) (g) on the money being paid to him and had then failed to apply it in discharge of the third party's claim, would be void. It is curious, also, that many motor policies now commonly in use follow exactly these words and do not expressly give the insurers any right to claim repayment in circumstances where the monies, although paid, have not been applied to the satisfaction of the third party claim. However this may be, it is apprehended that the proviso merely states, what without it would have been doubtful, that nothing in the section shall invalidate a provision of the kind described in the proviso, and does not by necessary implication exclude a provision whereby insurers could recover monies paid to the assured but not applied by him as aforesaid (h). In this connection it is important to remind the reader of the divergence of judicial opinion as to the meaning and effect of the indemnity clause in a motor policy which has been previously referred to (i). Another curious result which the proviso might seem to produce is this: where a third party acquires rights under a policy by virtue of the Third Parties Act or by assignment he takes those rights subject to any defence available against the assured (j). Under a policy containing a clause such as that indicated by the proviso, the assured claiming the indemnity under the policies might be met with a set-off or counterclaim based on such a clause (k):

(e) See s. 36 (4), *supra*. *Tattersall v. Drysdale*, [1935] 2 K. B. 174; *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250; [1945] 1 All E. R. 316.

(f) See *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552; *Kemp v. Finden* (1844), 12 M. & W. 421; *Allen v. Wingrove* (1901), 17 T. L. R. 261; and see 7 Halsbury's Laws, 2nd Edn. 61 *et seq.*

(g) See *ante*, pp. 74-5, and the cases there cited, and *cf.* the remarks of GREER, L. J., in *Israelson v. Dawson*, [1933] 1 K. B. 301.

(h) "Many instances might be given where provisos could be found in legislation that are meaningless because they have been put in to allay fears when those fears were absolutely unfounded and when no proviso at all was necessary." *Per* Lord HERSCHELL, in *West Derby Union v. Metropolitan Life Assurance Society*, [1897] A. C. 647. See *Fryer v. Morland* (1876), 3 Ch. D. 675; and see *Mullins v. Surrey Treasurer* (1880), 5 Q. B. D. 170; *Duncan v. Dixon* (1890), 44 Ch. D. 211.

(i) *Ante*, pp. 74-5.

(j) See *ante*, pp. 131 *et seq.*

(k) Unless indeed the section does prevent recovery where the money has not been applied in satisfaction of the claims of third parties.

there is nothing in the subsection which says that such a defence cannot be raised against an injured third party claiming under the policy. Nevertheless it could not, it is submitted, defeat a third party's claim.

III—SECURITIES

1. Section 37 (1).

Requirements in respect of securities.

"In order to comply with the requirements of this Part of this Act a security must—

- "(a) be given either by an authorised insurer or by some body of persons
 - "which carries on in the United Kingdom the business of giving
 - "securities of a like kind and which has deposited and keeps
 - "deposited with the Accountant-General of the Supreme Court
 - "for and on behalf of the Supreme Court the sum of fifteen
 - "thousand pounds in respect of that business; and
- "(b) consist of an undertaking by the giver of the security to make good,
 - "subject to any conditions specified therein, and up to the
 - "amount, in the case of an undertaking relating to the use of
 - "public service vehicles, of not less than twenty-five thousand
 - "pounds, and, in any other case, of not less than five thousand
 - "pounds, any failure by the owner of the vehicle or such other
 - "persons or classes of persons as may be specified in the security
 - "duly to discharge any such liability as is required to be covered
 - "by a policy of insurance under the last preceding section which
 - "may be incurred by him or them."

1. "*An authorised insurer*" is defined, and the conditions such is required to satisfy are specified in section 5 of the Assurance Companies Act, 1946 (*l*). These are fully dealt with elsewhere (*m*). *It should particularly be noticed that since the Road Traffic Act, 1930, came into force, no persons or body of persons have given security in conformity with this section 37 (1) who are not also "authorised insurers."*

2. "*Some body of persons.*"—The Act gives no meaning to this vague phrase and it is difficult to find one. It apparently excludes individuals acting alone, and a single underwriter could not therefore issue a valid security under the Act. On the other hand, it is doubtful whether two or more underwriters joining for the purpose of underwriting a particular security would constitute a "body of persons." The phrase seems to connote something of a less ephemeral character, such as a partnership or company (*a*). Moreover, it should be noted that when several underwriters join in subscribing a policy of insurance each undertakes only a proportion of the total risk insured (*b*). If this practice were followed in regard to a security, it is doubtful whether, in view of the provisions of the second part of the subsection (*c*), the security would be sufficient (*d*). It is thought, therefore, that underwriters, whether singly or in groups, could not issue valid securities unless they were all authorised insurers (*e*), or unless the undertaking given by the security were joint so that each was liable for the full amount

(*l*) 39 Halsbury's Statutes 42.

(*m*) At pp. 227 *et seq.* *post*.

(*a*) Or perhaps an association of underwriters.

(*b*) See. as to the method of underwriting motor insurance risks, *post*, chapter VII, Tit. "Lloyd's."

(*c*) *I.s.* subsection (1) (*a*), which requires the undertaking to be given by the *body* and not split amongst the members thereof

(*d*) Unless each separate underwriter undertook the risk up to £5,000 or £25,000 as the case might be.

(*e*) As to what an underwriter must do to be an "authorised insurer," see *post*, pp. 227 *et seq.*

thereof (*f*). Moreover, the word "body" implies some degree of permanence, and it seems doubtful whether any group of persons joining together for the purpose of issuing a single security would satisfy the requirements of the subsection unless their association amounted to a partnership (*g*). On the other hand, it seems doubtful whether an incorporated company, which in law exists as a separate entity independently of its members, could be held to be a body of persons. That phrase is habitually used in various enactments throughout the statute law as including incorporated companies. Thus the Assurance Companies Act (*h*) in section 1 refers to "persons or bodies of persons, whether corporate or unincorporate"; the Income Tax Act of 1918 (*i*) defines "body of persons" as being, for the purposes of that Act, "any body politic, corporate or collegiate, and any company, fraternity, fellowship and society of persons, whether corporate or not corporate" (*j*). It is submitted that "body of persons" in the above section includes incorporated companies, unincorporated companies, friendly societies, trades unions, clubs *et hoc genus omne*. Indeed, it may have been expressly designed to refer to such nebulous entities as those last mentioned (*k*).

3. "*Which carries on in the United Kingdom the business.*"—The meaning of the phrase "carry on business" (and the application thereof to particular facts) has been the subject of innumerable decisions in the Courts in different branches of the law (*l*). It is submitted that the meaning most likely to be adopted here would be that which the phrase has been held to bear in the cases which decide whether a company is sufficiently resident in England to enable service of a writ against the company to be effected within the jurisdiction (*m*). It should be noted, however, that in these cases the area concerned is England and Wales (*n*), whilst the United Kingdom includes Scotland and Northern Ireland, which countries are beyond the jurisdiction of the English Courts.

4. "*. . . of giving securities of a like kind.*"—There does not seem to be any known business of giving securities of a like kind—or indeed any business of a like kind, with the possible exception of guarantee or fidelity insurance. Fidelity or guarantee insurance is usually carried on by insurance companies and consists in an undertaking given to one person (usually an employer), who pays a premium or gives consideration in some other form therefor to make good any loss caused to that person by the wrongful act or default of another person (usually an employee). This class of insurance, for reasons which will hereafter become plain, differs radically from the insurance required by the Act, and it is thought therefore that "securities of a like kind" must be taken to mean securities of such a kind, *i.e.* the securities required and prescribed by the section (*o*).

(*f*) It should be noticed that section 36 suggests no difficulties of this kind: under that section a policy satisfies its requirements—*viz.* "a policy which insures" although the underwriters subscribing thereto are liable only "each for their own part" and not jointly.

(*g*) See s. 1, Partnership Act, 1890; 12 Halsbury's Statutes 529.

(*h*) 1909 (2 Halsbury's Statutes 724).

(*i*) 9 Halsbury's Statutes 426.

(*j*) *Ibid.*, section 237.

(*k*) *Cf.* the provisions of s. 26, Road Traffic Act, 1934. Assurance Companies Act, 1946, Second Schedule.

(*l*) See the cases cited under this phrase in Stroud's Judicial Dictionary, 2nd Edn.

(*m*) *Cf. Dunlop Pneumatic Tyre Co. v. Act. für Motor und Motorfahrzeugbau vorm. Cudell & Co.*, [1902] 1 K. B. 342; *Saccharin Corporation, Ltd. v. Chemische Fabrik von Heyden Akt.*, [1911] 2 K. B. 516.

(*n*) And Berwick-on-Tweed.

(*o*) It should be noted that the section does not require that the body of persons shall have in the past carried on business of a like kind. On the other hand, it is difficult to see how, when issuing the first security under the Act, a body of persons could be said then to be "carrying on business" of such a kind.

5. "And which has deposited and keeps deposited, etc."—"And which" makes it doubly clear (since it would have been clear from the fact that a company cannot be authorised unless it has deposited £15,000) (*p*) that the paragraph should be read as if there were a comma after the word insurer, and that the whole of the paragraph thereafter refers to "body of persons." The rules relating to the manner of the deposit, and of its treatment thereafter, are governed by section 43 (*q*) and the regulations made under section 41, and are dealt with in their appropriate place hereafter (*r*).

2. Section 37 (1) (b).

"consist of an undertaking by the giver of the security to make good, subject to any conditions specified therein, and up to the amount, in the case of an undertaking relating to the use of public service vehicles, of not less than twenty-five thousand pounds, and, in any other case, of not less than five thousand pounds, any failure by the owner of the vehicle or such other persons or classes of persons as may be specified in the security duly to discharge any such liability as is required to be covered by a policy of insurance under the last preceding section which may be incurred by him or them."

This perhaps is the most remarkable part of the provisions in Part II of the Act.

1. "Consist of an undertaking."—The first question which leaps to the mind is, to whom is the undertaking to be given? The answer, plain enough on the meaning of the words taken by themselves, though not so plain when regard is paid to the objects (*s*) of sections 35 (*t*), 36 (*u*), 38 (*v*) and 43, is removed from all possible doubt by looking at the next subsection, and at the references to a security which appear in sections 35 (*w*), 38 (*x*) and 40 (*y*). It is that the undertaking is to be given to the person who may incur the liability referred to. It is difficult to see what good this can be to third parties, who might acquire rights under the Third Parties Act, unless it be held that the meaning of "contract of insurance" in that Act includes a security given under this Act (*z*).

2. "To make good . . . any failure by the owner of the vehicle, etc., duly to discharge. . . ."—It is hard to understand how A can "make good" to B a failure by B to discharge a duty to C. An undertaking to make good another's failure has hitherto taken the form of an undertaking given by A to B to make good to B a failure by C.

"Nobody doubts that the word 'fail' may have different meanings, having regard to the context in which that word is used" (*a*). When considered from the point of view of the third party to whom the liability is incurred "failure" would occur when B either—

- (a) Had no money wherewith to discharge such liability; or
- (b) Having sufficient money therefor, wilfully refused to do so.

But from the point of view of the person giving the security, which is the

(*p*) As to deposits by authorised insurers, see *post*, pp. 229 *et seq.*

(*q*) *Post*, p. 227.

(*r*) *Post*, p. 233.

(*s*) *I.e.* the objects to be deduced from the combined effect of their provisions—namely, that no person shall cause death or injuries by the use of a motor vehicle on the road unless some provision is made whereby a third party suffering damage thereby will be compensated from one source or another.

(*t*) *Ante*, pp. 163 *et seq.*

(*u*) *Ante*, pp. 189 *et seq.*

(*v*) *Ante*, pp. 219 *et seq.*

(*w*) *Ante*, p. 187.

(*x*) *Ante*, p. 219.

(*y*) *Post*, pp. 249 *et seq.*

(*z*) As to this and what is meant by a contract of insurance, see *ante*, p. 121. It is quite clear that this Act intends a security to be something of different character to a contract of insurance, see *post*, p. 233.

(*a*) *Per* BAKERS, L.J., in *R. v. Southwark Borough Council, Ex parte Southwark Borough Market Trustees* (1921), 90 L. J. K. B. 359, at p. 360.

relevant point of view, failure would only occur in the first of the above instances. It would seem, therefore, that the section requires a form of insurance against insolvency. And there seems to be nothing in this Act, giving as it does no direct rights to third parties, to necessitate any other interpretation of these words than that which, it is submitted, they naturally bear (b).

3. "*Subject to any conditions specified therein.*"—It will be remembered that there is no such express qualification as this in the requirements of subsection (1) (b) of section 36 relating to a policy of insurance (c). But it was decided that this qualification was implied in that subsection (d), and since section 38 expressly applies to securities there appears to be no material distinction in this respect between the terms required in a policy and those allowed in a security. But it does not by any means follow that the effect of this express qualification in regard to a security is the same as that implied in regard to a policy. The contrary is the case. The nature and effect of a security are, as has been pointed out, essentially different from those of a policy of insurance. A policy of insurance which purported to be conditional upon the assured's taking all reasonable steps to keep his finances in order would hardly be a policy of insurance against third party liability. But a security against insolvency resulting from accident might well contain such a condition (e). It should be noted that the certificate of security prescribed by the Minister of Transport (f) requires that some of the conditions subject to which the security is issued shall be stated thereon (g).

4. "*In the case of an undertaking relating to the use of public service vehicles.*"—The "undertaking" referred to is the undertaking in the security, and not the "undertaking" in the sense of "business," or commercial concern, which owns or runs the public service vehicles. "Public service vehicle" is defined by section 121 as being a

"motor vehicle used for carrying passengers for hire or reward (p) other than a vehicle which is a contract carriage within the meaning of this Act adapted to carry less than eight passengers or a tramcar (q) or a trolley vehicle" (h).

"Contract carriage" is defined by section 61 (1) (c) as a motor vehicle carrying passengers for hire or reward (i) under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum.

5. "*Not less than £25,000.*"—It is not clear whether the securer can limit his undertaking to a sum of this figure in the case of a single vehicle or in the case of any number of vehicles. It must be presumed that the latter is intended and provided by the subsection, since the singular "an undertaking" is used with the plural word vehicles, and there is no presumption that persons owning only one public service vehicle are not as numerous as those owning several, although in fact that may not be so (j). Whether the

(b) See title to Part II of the Act, and see *ante*, p. 161.

(c) See *ante*, pp. 193 *et seq.*

(d) *Gray v. Blackmore*, [1934] 1 K. B. 95; and see *ante*, pp. 194 *et seq.*

(e) Expressly if not by implication as a duty not to increase the risk. *Sed quaere*, as this may be a principle peculiar to insurance.

(f) See Form D, Third Party Risks Regulation, S. R. & O. 1941, No. 926.

(g) Cf. the Certificate of Insurance which is only required to state certain "Limitations of Use." Conditions hit by section 12 of the Act of 1934 must not be stated, but others must.

(h) As to when a vehicle is deemed to be used for hire or reward, see section 26 of the Road Traffic Act, 1934.

(i) As to tramcars and trolley vehicles, see *ante*, p. 187.

(j) On the other hand it must be admitted that the use of the singular "vehicle" later in the subsection makes this doubtful. It may be that in the case of public service vehicles any number can be covered by one security, but in other cases only one.

limit of £25,000 is allowed to be put upon (1) the total amount undertaken to be made good by the security during the time it is in force, (2) upon the total amount to be payable in respect of one accident, (3) upon the total amount payable in respect of one vehicle, or (4) upon the total amount payable in respect of any one liability (since more than one liability may arise from one accident) (*k*), is not clear. Having regard to the words of the paragraph taken as a whole, it is apprehended that the first is the meaning which it would be held to bear—namely, a limit of £25,000 in respect of the total amount payable under the security (*l*). This, however, must remain doubtful, and although the second is an unlikely construction, the last seems almost equally possible.

6. "Not less than £5,000."—The public service vehicle would generally be of the class against liability to passengers in which insurance is required by section 36 (*m*), whilst other vehicles would not generally be of that class (*n*). This it is presumed is why the limit is so much lower in the case of vehicles other than public service vehicles (as defined) (*o*). The same doubts and the same hesitant conclusion must be expressed in regard to what it is to which the limit applies as in the case of the limit in respect of public service vehicles (*p*).

7. "By the owner of the vehicle."—The contrast between this description of the person primarily required to be covered by the security and that in section 36 (1) (*b*) is noticeable.

8. "Or such other persons or classes of persons as may be specified in the security."—There is no difficulty here, as there is in the interpretation of the same words in section 36 (1) (*b*) as to what is meant. Clearly "persons or classes of persons specified" must mean "parties to the contract of security between whom and the giver thereof there is privity of contract and the passing of consideration." For only to such could an enforceable undertaking be given.

The special provisions as to certificates of security should be noticed (*q*).

3. Section 37 (2).

"A security shall be of no effect for the purposes of this Part of this Act unless and until there is issued by the person giving the security to the person to whom it is given a certificate (in this Part of this Act referred to as a 'certificate of security') in the prescribed form and containing such particulars of any conditions subject to which the security is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances."

The provisions of this subsection are almost identical with those of subsection (5) of section 36 (*r*) relating to the requirements in respect of certificates of insurance. The relevant regulations are contained in those which have been set out under subsection (5) of section 36 (*s*). The remarks appearing in the notes to that subsection can therefore be applied, *mutatis mutandis*, to this (*t*). The question as to what rights third parties can acquire against securers is discussed elsewhere (*u*).

(*k*) Cf. *South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402; *Allen v. London Guarantee and Accident Co., Ltd.* (1912), 28 T. L. R. 254.

(*l*) *I.e.* during its currency.

(*m*) As to this, see *ante*, pp. 202 *et seq.*

(*n*) *I.e.* not vehicles in which passengers are carried for hire or reward.

(*o*) See above.

(*p*) As to which see above. By s. 97 of the Road Traffic Act, 1930, operators of public service vehicles may not by contract limit their liability to passengers carried herein.

(*q*) See *ante*, p. 214.

(*r*) *Ante*, p. 214.

(*s*) See pp. 214, *et seq.*

(*t*) For these, see *ante*, pp. 216–18.

(*u*) *Ante*, chapter III, and *post*, chapter V.

PART 4.—THE LEGAL POSITION OF AUTHORISED INSURERS

1. Section 36 (1) (a) and Section 42.

Requirements in respect of policies

" (1) In order to comply with the requirements of this Part of this Act, a policy of insurance must be a policy which—

" (a) is issued by a person who is an authorised insurer within the meaning of this Part of this Act ;

" [" (3) For the purposes of this Part of this Act, the expression ' authorised insurer ' means an assurance company or an underwriter in whose case the requirements of the Assurance Companies Act, 1909, as amended by this Act, with respect to deposits by assurance companies and deposits and guarantees by underwriters are complied with "] (uu).

Section 42.

Amendment of Assurance Companies Act, 1909.

" (1) Section one of the Assurance Companies Act, 1909, shall have effect as if after paragraph (e) thereof there were added the following paragraph :—

" (f) motor vehicle insurance business, that is to say, the business of effecting contracts of insurance against loss of, or damage to or arising out of or in connection with the use of, motor vehicles, including third party risks."

" (2) Where an assurance company within the meaning of the Assurance Companies Act, 1909, carries on motor vehicle insurance business, that Act shall apply with respect to that business in the same way as it applies to accident insurance business subject to the following modifications :—

" (a) If the company does not also carry on assurance business of some other class, the reference in subsection (1) of section two of that Act to the sum of twenty thousand pounds shall be construed as a reference to the sum of fifteen thousand pounds ;

" (b) If the company also carries on assurance business of some other class, the reference in subsection (4) of the said section two to a sum of twenty thousand pounds shall, as respects the motor vehicle insurance business, be construed as a reference to a sum of fifteen thousand pounds, and, notwithstanding anything in the said Act relieving a company from making a deposit in respect of any class of insurance business where it has made a deposit in respect of any other class of assurance business, the total sum to be deposited under the said subsection (4) shall in no case be less than thirty-five thousand pounds ;

" (c) Sections five and six and paragraphs (a), (b) and (c) of section thirty-two of that Act shall not apply"] (uu).

2. The authorised insurer.—The financial requirements to be observed by any person or body of persons who desires to become an authorised insurer within the meaning of section 36, and thus become enabled to issue valid policies of insurance under the Road Traffic Act, 1930, have been completely altered by the provisions of the Assurance Companies Act, 1946 (v). To allow a full understanding of the present requirements, a recapitulation is necessary of the relevant terms of the Road Traffic Act, 1930, and of the Assurance Companies Act, 1909 (w), which set out the obligations of an authorised insurer in the years between 1930 and 1946. By section 36 (3) of the Road Traffic Act, 1930, an authorised insurer was defined as any assurance company or underwriter who had complied with the terms of

(uu) The subsections in brackets were repealed by the Assurance Companies Act, 1946 ; see *ibid.*, Schedule 4.

(v) 39 Halsbury's Statutes 37

(w) 2 Halsbury's Statutes 724.

section 1 of the Assurance Companies Act, 1909, as amended by section 42 (2) (a) (b) of the Road Traffic Act, 1930, with respect to deposits by assurance companies and deposits and guarantees by underwriters (x).

In order to determine who might be an authorised insurer it is forthwith necessary to refer, as section 36 (3) indicates, to the Assurance Companies Act, 1909, which hereafter in this section is referred to for convenience as the 1909 Act.

The 1909 Act did not apply to registered trade unions or friendly societies (y), which thus could not be authorised insurers under the Road Traffic Act, 1930. Further, companies which satisfied the Board of Trade that they carried on business solely or mainly for insurance against employers' liability or companies which carried on employers' liability business as incidental only to marine insurance business were also excepted from that Act's purview (z), and thus cannot be "authorised insurers" under section 36 of the 1930 Act. The 1909 Act also provides that it shall not apply to a member of Lloyd's or of any other association of underwriters approved by the Board of Trade, provided the requirements of the Eighth Schedule of that Act are complied with (a). But section 36 (3) of the Road Traffic Act expressly included such underwriters within the definition of "authorised insurers" (b).

Subject to the above qualifications the 1909 Act applied to all persons or bodies, whether corporate or unincorporate, whenever and wherever established, which carry on within the United Kingdom assurance business of all or any of the specified classes (c). The Act applied to all foreign companies (d) which are registered under the English Companies Act (e), or which carry on any of the specified classes of business within the United Kingdom (f). Such foreign companies, therefore, might be authorised insurers within the Road Traffic Act, 1930.

The classes of business originally specified in the 1909 Act were :

- (a) Life assurance business.
- (b) Fire insurance business.
- (c) Accident insurance business.
- (d) Employers' liability insurance business.
- (e) Bond investment business.

To these five classes the Road Traffic Act, 1930, has added a sixth, i.e. :

- (f) Motor vehicle insurance business, which is defined in that Act as :

"the business of effecting contracts of insurance against loss of or damage to or arising out of or in connection with the use of motor vehicles, including third party risks" (g).

It should be noted that the business comprised under this additional class of insurance is wider than the so-called compulsory insurance against death or bodily injury to third parties under Part II of the 1930 Act.

(x) Section 36 (3) of the Road Traffic Act, 1930, and s. 42 (2) (a), (b), have been repealed by the Assurance Companies Act, 1946, *vide infra*.

(y) Section 1. Although it seems that an unregistered trade union or friendly society could be an authorised insurer.

(z) Section 33 (1) (a) and (b).

(a) Section 28 (2) ; and Schedule VIII.

(b) *Ante*, p. 227.

(c) Section 1.

(d) *I.e.* companies incorporated outside the United Kingdom.

(e) Companies Act, 1948, and the enactments repealed thereby.

(f) Section 1. The test of the place of carrying on business is where its contracts of insurance are made. Such companies must comply with section 407 of the Companies Act, 1948, which provides for registration and delivery of documents to the Registrar.

(g) Road Traffic Act, 1930, s. 42 (1) (23 Halsbury's Statutes 641).

The conduct by an assurance company of each class of business specified and by an "authorised insurer" of the sixth class must in every case be subject to the provisions of the 1909 Act as amended.

3. Preliminary obligations in regard to deposits from 1930 to 1946.—The preliminary obligations of an "authorised insurer" related to the making of deposits with the Supreme Court. By the 1909 Act every assurance company to which that Act applied had to deposit and keep deposited the sum of £20,000 with the Paymaster-General in respect of each class of the first five specified classes of business carried on by it (*h*). The common characteristic of all such assurance companies is that they issue or undertake liability under policies insuring against the contingencies, events and losses specified in the various classes (*hh*). In the case of the sixth and additional class of insurance, *i.e.* motor vehicle insurance business, a different criterion is applicable. No "policy of insurance," at least as commonly understood, need be issued, nor any liability thereunder accepted. A motor vehicle insurance business was carried on, and the requirements of the 1909 Act had therefore to be observed, whenever a person or body of persons carried on the business of making *contracts of insurance* against the risks therein defined with other persons (*i*).

Section 42 (2) of the 1930 Act provided that any assurance company within the meaning of the 1909 Act which carried on motor vehicle insurance business should be governed as regards that class of business by those provisions of the 1909 Act which related to accident insurance business, subject to the modifications specified in that section. At the present juncture it is relevant to note that under the joint effect of the two enactments mentioned, where the assurance company carried on no other business of the specified classes, then the sum of £15,000 had to be deposited, and where the company carried on business of some other or others of the specified classes the additional sum of £15,000 had to be deposited in respect of the motor vehicle insurance business (*j*). But in such case the total sum deposited by the company had not to be less than £35,000, notwithstanding any provision in the 1909 Act to the contrary. This modified the provision of the 1909 Act requiring separate deposits of £20,000 to be made in respect of each class of business carried on by the assurance company.

No deposit could be accepted by the Paymaster-General except upon the warrant of the Board of Trade (*k*) with respect to the issue of which as well as to the payment of deposits, to the deposit of stocks or securities in lieu of money and to certain other matters the Board of Trade had power to make rules which were to be laid before Parliament and which have effect as if they were part of the Act (*l*).

The effect of the Board of Trade's Order of June 6, 1910 (*m*), which was amended in relation to motor vehicle insurance business by the Board's Order of October 8, 1930 (*n*), and December 22, 1930 (*o*), may be briefly summarised. The company or all or some of the subscribers to the company's Memorandum of Association on behalf of the company had to apply to the Board of Trade for the warrant upon the issue of which the company or such other persons were entitled to deposit the necessary sum

(*h*) Assurance Companies Act, 1909, s. 2 (2 Halsbury's Statutes 720).

(*hh*) *Ibid.*, s. 1, *passim*.

(*i*) Road Traffic Act, 1930 s. 42 (1) (23 Halsbury's Statutes 641).

(*j*) Road Traffic Act, 1930, s. 42 (2) (*a*) and (*b*) (23 Halsbury's Statutes 641, 642).

(*k*) For form of warrant see *Encyclopædia of Forms and Precedents*, 2nd Edn., vol. iv, p. 22, No. 8.

(*l*) Section 2 (5), (6).

(*n*) S. R. & O. 1930, No. 780.

(*m*) S. R. & O. 1910, No. 566.

(*o*) S. R. & O. 1930, No. 1101.

(of £15,000 in the case of motor vehicle insurance business) in Court. In lieu of money the equivalent of such sum must be deposited in authorised securities (*p*) and treated similarly to a cash deposit, the securities being valued at a figure near to but not exceeding the current market value. When the application for the Board of Trade's warrant was in respect of motor vehicle insurance business or in respect of a class of business for which a separate insurance fund is required to be kept (*q*), it had to state the class of business in respect of which the deposit was being made (*r*).

4. The position of members of Lloyd's.—In concluding the summary of the preliminary obligations of insurers before the Assurance Companies Act, 1909, it remains to deal with the position in that respect of underwriting members of Lloyd's carrying on business as authorised insurers under the Road Traffic Act, 1930 (*r*). Their position can best be explained by setting out the relevant provisions of the Assurance Companies Act, 1909 (*s*). These are as follows :

"Section 1.—This Act shall apply to all persons or bodies of persons, whether corporate or unincorporate, not being registered under the Acts relating to friendly societies or to trade unions (which persons and bodies of persons are hereinafter referred to as assurance companies), whether established within or without the United Kingdom, who carry on within the United Kingdom assurance business of the following class :

"The business of effecting contracts of insurance against loss or damage arising out of or in connection with the use of motor vehicles including third party risks" (*t*).

"Section 28 (2).—This Act shall not apply to a member of Lloyd's, or of any other association of underwriters approved by the Board of Trade, who carries on assurance business of any class, provided that he complies with the requirements set forth in the Eighth Schedule to this Act, and applicable to business of that class."

"Section 29.—The expression 'underwriter' includes any person named in a policy or other contract of insurance as liable to pay or contribute towards the payment of the sum secured by such policy or contract."

The Eighth Schedule provided requirements to be complied with by underwriters being members of Lloyd's or of any other association of underwriters approved by the Board of Trade.

Thus it will be seen that an underwriter, in order to be an authorised insurer within the meaning of the Road Traffic Act, had *either* to

- (1) deposit £15,000 as an assurance company, or
- (2) (a) be a member of Lloyd's or some other association of underwriters approved by the Board of Trade (*u*), and
- (b) comply with the requirements of the Eighth Schedule.

The requirements relating to the application and administration of underwriters' securities or deposits were contained in the regulations issued by the Board of Trade which have been mentioned.

(*p*) By the expression "authorised securities" was denoted such funds, stocks or securities in which cash under the control or subject to an order of the Court might from time to time be invested.

(*q*) *I.e.* not in respect of accident insurance business. See 1909 Act, s. 32 (1), and note that the provisions of the 1909 Act as regards accident insurance business were applied, *mutatis mutandis*, to motor vehicle insurance business by the 1930 Act, s. 42 (2).

(*r*) S. 35 (3) (23 Halsbury's Statutes 636).

(*s*) As amended by s. 42 of the Road Traffic Act, 1930.

(*t*) This apparently does not include the issue of a security under s. 37, since such need not be authorised insurers. See *ante*, p. 222. It seems clear, therefore, that a security does not come within the Third Parties Act, 1930.

(*u*) In fact Lloyd's are the only association so approved.

5. Deposits by securers or in lieu of insurance.—Deposits under section 35 (4) of the Road Traffic Act, 1930, by persons who do not wish to insure, and deposits by those who issue securities under section 37, and who are not authorised insurers (v), are not dealt with under the Assurance Companies Act, 1909. Provision in respect of them is however made by the Motor Vehicles (Third Party Risks) Regulations (w) which assimilates their treatment to that of deposits made by authorised insurers.

6. The rights of policy holders.—The Act of 1909 required assurance companies carrying on separate classes of assurance or other business to keep separate accounts and form separate funds for each such business. The separate funds which were established partly from the deposits required to be made by the Act, had to bear distinctive names and form the security of the policy-holders under each separate class, not being available to satisfy the liabilities of the company otherwise than in respect of such class (x). These provisions did not apply to any case in which accident insurance business is carried on (y). Likewise these provisions as to separate funds and accounts did not apply to motor vehicle insurance business, which is governed by the special provisions of the 1909 Act which apply to accident insurance business. The question therefore arose as to what, if any, rights holders of policies of motor vehicle insurance enjoyed against the deposit of £15,000 which must be made by an "authorised insurer" in respect of motor vehicle insurance business (z).

This point was decided in *Re South East Lancashire Insurance Co., Ltd.* (a), in which the Court of Appeal held that the deposit formed part of the assets of the company and was available for distribution amongst all its creditors without distinction between different classes of policy holders, or between policy holders and other creditors.

7. The Assurance Companies Act, 1946.—On February 6, 1936, a Departmental Committee on Compulsory Insurance was set up under the auspices of the Board of Trade to consider possible changes in existing law relating to the carrying on of the business of insurance in the light of statutory provisions relating to compulsory insurance against third party risks. The main cause of the setting up of this Committee was the failure of five companies transacting compulsory insurance business. The Committee made its report on July 19, 1937, which was printed as Cmd. 5528. The main recommendations relating to solvency of insurers were :

1. That no insurer should be permitted to undertake any branch of compulsory insurance unless licensed to do so by the Board of Trade. The licence should be for a period of one year at a time and should be renewable. That solvency should be the sole criterion for the granting of such a licence, and that the standards of solvency should be severe.

2. That there should be set up three Advisory Committees to advise the Board of Trade regarding the licensing of (a) Insurance Companies, (b) Lloyd's Underwriters and (c) Mutual Indemnity Associations respectively.

3. That assets which arise from life and other insurance contracts of a permanent character should be effectively segregated and earmarked,

(v) *I.e.* a body of persons which has deposited £15,000 (see *ante*, pp. 222 *et seq.*).

(w) S. R. & O. 1941, No. 926.

(x) Ss. 2 (4), 3 (2 Halsbury's Statutes 726, 727). *Re Hearts of Oak Assurance Co. Ltd.*, [1936] Ch. 558.

(y) *Ibid.*, s. 32 (d).

(z) S. 42 (2) (23 Halsbury's Statutes 641). See *ante*, p. 229.

(a) [1935] Ch. 225.

but that the assets arising from motor insurance should not be so segregated, in view of other recommended safeguards for injured third parties' claims.

4. That a Central Fund should be constituted by insurers transacting compulsory motor insurance business to be used as a second line of defence to meet the contingency of the insolvency of an insurer licensed to transact compulsory motor vehicle insurance.

5. That every new insurance company desiring to transact any class of insurance business coming within the provisions of the Assurance Companies Act, 1909, as amended, should make a deposit of £20,000 before being permitted to become an insurer.

6. That every company transacting compulsory motor vehicle insurance should render to the Board of Trade revenue accounts in an approved form.

7. That givers of securities should be placed in a position analogous to that of insurance companies in relation to the granting of a licence.

It was urged before this Committee that, as the statutory deposit of £15,000 constituted a poor safeguard to the insured even in cases where the deposit was earmarked for the satisfaction of creditors of the class of insurance business in question, since the annual premium income and the liabilities of the authorised insurer might greatly exceed the amount of the deposit, therefore the deposit for compulsory insurance should be substantially increased and be earmarked in the first instance for the satisfaction of third party claims. The Committee recommended, however, no departure from the view that these deposits should be regarded as primarily intended to discourage persons of no substance from embarking on insurance business, rather than for the satisfaction of claims.

In the Assurance Companies Act, 1946 (*b*), which embodied the recommendations of this Committee, however, a different view was taken. The system whereby insurers undertaking motor vehicle insurance business for the first time made a statutory deposit has been discontinued, but, instead, no insurance company is permitted to commence motor insurance business for the first time unless it has a paid-up share capital of not less than fifty thousand pounds (*c*). Any assurance company may be wound up if it is unable to pay its debts, and it is deemed to be unable to pay its debts if the value of its assets, two years after it starts business, does not exceed the amount of its liabilities by the amount of fifty thousand pounds or one-tenth of the general premium income of the company in its last preceding financial year, whichever sum is the greater (*d*). Existing companies may within two years withdraw any statutory deposit made under section 2 of the Assurance Companies Act, 1909, as amended by section 42 (2) of the Road Traffic Act, 1930, but must satisfy the Board of Trade that it has the necessary paid-up share capital of fifty thousand pounds before doing so; and after doing so, it is liable to be wound up if it is unable to pay its debts as described above (*e*).

Lloyd's underwriters, who, it will be remembered (*f*), had either to become an assurance company within the meaning of the 1909 Act, or else comply with the requirements of the Eighth Schedule to that Act, are excluded from the provisions of the Assurance Companies Act, 1946, relating to minimum paid-up share capital and the margin of solvency, but by Part II of Schedule II to the 1946 Act a new Eighth Schedule is substituted in the 1909 Act. By

(*b*) 39 Halsbury's Statutes 37.

(*d*) *Ibid.*, s. 3 (1). If it is unable to pay its debts, the Assurance Companies (Winding up) Acts, 1933 and 1935, apply. See p. 104, *ante*.

(*e*) *Ibid.*, Schedule II, Part I.

(*c*) *Ibid.*, ss. 2 (1), 4 (1).

(*f*) *Ante*, p. 230.

this new Eighth Schedule, all premiums received by an underwriter or an association of underwriters must be carried to a trust fund under a trust deed approved by the Board of Trade. The account of every underwriter must be audited annually by an accountant approved by the Committee of Lloyd's and the Board of Trade is to be informed by certificate from that auditor that the value of the underwriter's assets is sufficient to meet his liabilities on a basis approved by the Board of Trade (*ff*). In addition, the Board of Trade may make regulations providing for the way in which deposits made and premiums placed in this new trust fund are to be dealt with (*g*).

Mutual Associations, Friendly Societies, Trade Unions and assurance companies dealing with insurance business of a particular and limited class are also considered in the Second Schedule to the 1946 Act. Without exception, if any of them engage in motor vehicle insurance business, the requirements of the Act relating to share capital and margin of solvency must be complied with (*h*).

Lastly, where one assurance company is guaranteed by another company or underwriter, the requirements of the Act as to the margin of solvency need not be observed by the first company if the guarantor has observed those requirements, or is an underwriter, or is itself guaranteed under the same conditions (*i*).

The provisions of the Assurance Companies Act, 1946, and the rules made thereunder are printed in the Appendix. No further comment is required here, for the terms of the Act are self-explanatory. The rights of policy holders and third parties are safeguarded under the new Act, not by special provisions with regard to them in the event of insolvency of an authorised insurer, but by preventing as far as possible any company or underwriter from carrying on motor vehicle insurance business unless it or he is in a suitably strong financial position to do so. Applying the principle that prevention is better than cure, the formation of the Motor Insurers' Bureau effects a second line of defence against any possible default of insurers, for by the agreements entered into by the Motor Insurers' Bureau any failure of an individual insurer to satisfy the claims of injured third parties will be covered by the Motor Insurers' Bureau itself (*k*).

It should be noted here that while the authorised insurer under the new system set up by the Assurance Companies Act, 1946, is no longer required to make a deposit under the provisions of the now obsolete section 42 (2) of the Road Traffic Act, 1930, yet there are still two classes of persons who may avoid the stringent requirements of the Assurance Companies Act and either may act as "securers" under section 37 or may deposit a sum of £15,000 in respect of their own vehicles under section 35 (4), so that, strictly speaking, the system of deposits has not been wholly abolished. The position of these two bodies of persons is considered in the succeeding section.

PART 5.—DEPOSITS UNDER SECTIONS 35 AND 37

Section 43.

"(1) No part of any sum deposited by any person with the Accountant-General of the Supreme Court under section thirty-five or section thirty-seven of this Act shall, so long as any liabilities, being such liabilities as are required to be covered by a policy of insurance under

(*ff*) See Lloyd's and other Approved Associations (Auditor's Certificate) Regulations, S. I. 1948, No. 774.

(*g*) Schedule II, Part II, Assurance Companies Act, 1946. See Lloyd's and other Approved Associations (Forms of Annual Statements) Regulations, S. I. 1948, No. 773.

(*h*) *Ibid.*, Schedule II, Parts III, IV and V.

(*i*) Schedule II, Part V.

(*k*) See *post*, chapter VI.

" this Part of this Act, which have been incurred by him have not been
 " discharged or otherwise provided for, be applicable in discharge of any
 " other liabilities incurred by him.

" (2) Any rules made by the Board of Trade under section two of the
 " Assurance Companies Act, 1909, which apply to deposits made by insurers
 " carrying on motor vehicle insurance business shall, with such necessary
 " modifications and adaptations as the Minister, after consultation with the
 " Lord Chancellor, may prescribe, apply to deposits made with the said
 " Accountant-General under the sections aforesaid."

Whilst section 35 of the Road Traffic Act and the regulations made thereunder appear to contemplate that the taking out of a policy of insurance shall be the customary mode of provision against the specified liabilities to third parties, it must not be overlooked that two alternative methods are expressly provided for by that section; these are the taking out of security against such risks (*l*) and the making of a deposit of £15,000 by the owner of a vehicle (*m*). The latter alternative was dealt with in its appropriate place under section 35, whilst the former, the security, has been discussed at some length in an earlier part of this chapter (*n*).

The Cassel Committee in its report (*o*) took note of the fact that in 1937 only eight companies, including certain co-operative societies, the Gas Light and Coke Company and five railway companies, had availed themselves of the facility under section 35 (4) of the 1930 Act of exemption from insurance under Part II of the Road Traffic Act, 1930, by depositing £15,000 with the Accountant General of the Supreme Court, but considered that the sum of £15,000 might well in some cases prove insufficient where a number of persons were injured in the same accident. They recommended that this exemption be limited to corporate bodies of sufficient size and standing licensed by the Board of Trade under conditions to be laid down by that Department. With regard to givers of security under section 37 of the 1930 Act, they recommended that these persons should be governed by the same rules as to financial standing and margin of solvency as authorised insurers, if indeed they were not authorised insurers themselves.

By section 5 (3) of the Assurance Companies Act, 1946, the Minister of Transport has been given the power to make such rules with respect to the deposits made both under section 35 (4) and section 37 of the Road Traffic Act as the Board of Trade might have made under section 2 of the Assurance Companies Act, 1909 (*p*), with regard to deposits made under the 1909 Act. These rules which the Minister is thus enabled to make are wide in their scope, and after they have been laid before Parliament have effect as if they were part of the Act. In fact, no regulations under this section have yet been prescribed by the Minister of Transport, for the good and sufficient reason that no persons other than authorised insurers have given securities under section 37 of the Road Traffic Act, 1930, and the eight bodies referred to above who have so far availed themselves of the power given to owners of vehicles under section 35 (4) of the 1930 Act of making a deposit of £15,000 are of a financial standing that is more than sufficient for the purpose of meeting any liabilities incurred as a result of motor accidents. Until other persons who are not authorised insurers, and who are therefore not subject to the stringent requirements of the Assurance Companies Act, 1946, in regard to financial solvency, take advantage of these two sections 37 and 35 (4) of the Road Traffic Act, 1930, it is unlikely that any regulations under this section 43 will be made.

(*l*) S. 37 (23 Halsbury's Statutes 639).

(*m*) See *ante*, pp. 222 *et seq.*

(*p*) See note (*k*), p. 229, *ante*.

(*m*) *Ibid.*, s. 35 (4).

(*o*) Cmd. 5528.

PART 6.—REGULATIONS

I.—REGULATIONS UNDER SECTION 39

1. Section 39.

Production of certificate of insurance or certificate of security on application for motor vehicle licence.

"Provision may be made by regulations under section twelve of the Roads Act, 1920, for requiring a person applying for a licence in respect of a motor vehicle under section thirteen of the Finance Act, 1920, as amended by any subsequent enactment, to produce such evidence as may be prescribed that either—

"(a) on the date when the licence comes into operation there will be in force the necessary policy of insurance or the necessary security in relation to the user of the vehicle by the applicant or by other persons on his order or with his permission; or

"(b) the vehicle is a vehicle to which the first section contained in this Act does not apply at any time when it is being driven by the owner thereof, or by a servant of his in the course of his employment, or is otherwise subject to the control of the owner."

1. "Regulations under section 12 of the Roads Act, 1920" (q).—That section makes provision for the making of regulations (which shall have statutory force, and the breach whereof involves an offence for which the maximum fine is £20 (r) as in section III of the Road Traffic Act, 1930) (s) for the purpose of carrying that Act into effect.

Section 5, subsection (1) of the Roads Act, 1920 (t), provides as follows:

"Provision as to licences.—Every person applying for a licence under section thirteen of the Finance Act, 1920, as amended by this Act, or under section four of the Customs and Inland Revenue Act, 1888 (u), shall make such a declaration and furnish such particulars with respect to the vehicle or carriage for which the licence is to be taken out or otherwise as may be prescribed."

2. "Section 13 of the Finance Act, 1920 (v), as amended by any subsequent enactment."—Section 13 provides for the rates of duty payable for licences on mechanically propelled vehicles. The subsequent enactments referred to are *inter alia* the Roads Act, 1920 (w), the Finance Acts of 1922 (a), 1924 (b), 1926 (c), 1927 (d), 1930 (e), 1931 (f), 1932 (g), 1933 (h), the Road and Rail Traffic Act 1933, (i), and the Finance Acts of 1940 and 1941. The following Regulations also effect certain amendments: The Road Vehicles (Registration and Licensing) Regulations, 1941 (j). The actual rates of duty payable are laid down in the Second Schedule to the Finance Act of 1920 (v), which has been frequently amended by subsequent Finance Acts.

(q) 19 Halsbury's Statutes 85.

(r) By subsection 3, which imposes a penalty of £20 on any person who acts in contravention of such regulations.

(s) See *post*, p. 238.

(t) 16 Halsbury's Statutes 576.

(u) 16 Halsbury's Statutes 850. See also Road Vehicles Registration and Licensing Regulations, 1941, S. R. & O. No. 1149.

(v) *Supra*, note (q).

(w) 16 Halsbury's Statutes 917.

(a) 16 Halsbury's Statutes 977.

(b) 24 Halsbury's Statutes 383.

(c) 26 Halsbury's Statutes 660.

(d) S. R. & O. 1941, No. 1199.

(i) *Supra*, note (q).

(a) 16 Halsbury's Statutes 905

(c) 16 Halsbury's Statutes 960.

(e) 23 Halsbury's Statutes 506.

(g) 25 Halsbury's Statutes 578.

(i) 26 Halsbury's Statutes 870.

3. "To produce such evidence as may be prescribed."—The regulation now in force which prescribes this is Regulation 11 of the Motor Vehicles (Third Parties Risks) Regulations of 1941 (*k*), which is reproduced below :

" **Regulation 11.** Any person applying for a licence under Section 13 of the Finance Act, 1920, as amended by any subsequent enactment shall produce to the licensing authority any necessary certificate of insurance, certificate of security or duplicate copy of a certificate of security issued in accordance with Regulation 5 (1) (b) of these Regulations indicating that on the date when the licence comes into operation there will be in force a policy or a security in relation to the user of the motor vehicle by the applicant or by any other persons on his order or with his permission :
" Provided that there may be produced in lieu thereof—

- " (i) in the case of a motor vehicle of which the owner has for the time being deposited with the Accountant-General of the Supreme Court the sum of fifteen thousand pounds in accordance with the provisions of subsection (4) of Section 35 of the Act a certificate signed by the owner of the vehicle or by some person authorised by him in that behalf that such deposit has been made (*l*),
- " (ii) in the case where the motor vehicle is one of more than ten motor vehicles owned by the same person in respect of which a policy or policies of insurance have been obtained by him from the same authorised insurer a statement duly authenticated by the authorised insurer to the effect that on the date when the licence becomes operative an insurance policy which complies with Part II of the Act will be in force in relation to the motor vehicle,
- " (iii) in the case of motor vehicles owned by a local authority as defined in subsection (6) of Section 35 and Section 44 (*m*) of the Act, or by a police authority or by the receiver for the Metropolitan Police District a certificate signed by some person authorised in that behalf by such authority or receiver as the case may be, that the vehicles in respect of which the application for a licence is made are owned by the said authority or receiver :

" Provided further that a person engaged in the business of letting motor vehicles on hire shall not, when applying for a licence under Section 13 of the Finance Act, 1920, as amended by any subsequent enactment, be required to comply with the first paragraph of this Regulation if the motor vehicle in respect of which the licence is applied for is intended to be used *solely* for the purpose of being let on hire and driven by the person by whom the motor vehicle is hired or by persons under his control."

Particular note should be taken of the provisions relating to a hirer of motor vehicles. These seem to contemplate that such a person can validly insure under one policy against liabilities which may be incurred by future and hypothetical customers. This can be done by some special form of policy under which the hirer acts as the insurer's agent, and where each customer gives consideration (*n*). Otherwise it would, it is submitted, be an impossibility in law (*o*).

(*k*) S. R. & O. 1941, No. 926.

(*l*) By the Motor Vehicles (International Circulation) Regulations 1941, S. R. & O. No. 1219, Regulation 8, no permit for a foreign car shall be issued without the production of a certificate of insurance, certificate of security or certificate of foreign insurance for the period of the permit applied for.

(*m*) This s. 44 relates to Scotland.

(*n*) See chapter IX, *post*, p. 652.

(*o*) See *ante*, pp. 96 *et seq.*

4. "The necessary policy . . . or security in relation to the user of the vehicle by the applicant or by other persons on his order or with his permission."—This again raises the whole question whether persons who drive a vehicle on the order or with the consent of the owner thereof are insured under a policy or security issued to and effected by him and to which they are not parties. Such persons are insured within the requirements of section 36 (1) (b) by virtue of section 36 (4) (p).

5. "A vehicle to which the first section contained in this part of this Act does not apply."—The section referred to is presumably section 35, though why that could not have been specifically stated it is difficult to imagine. The vehicles to which that section does not apply are those specified in subsection (4) thereof—namely, those in respect of which the owner has deposited £15,000 with the Accountant-General (q), those owned by police or local authorities (r) or being used on police business (s).

II.—REGULATIONS UNDER SECTION 41

1. Section 41.

Regulations for purposes of Part II.

"The Minister may make regulations for prescribing anything which may be prescribed under this Part of this Act and generally for the purpose of carrying this Part of this Act into effect, and in particular, but without prejudice to the generality of the foregoing provisions, may make regulations—

"(a) as to the forms to be used for the purposes of this Part of this Act ;

"(b) as to applications for and the issue of certificates of insurance and certificates of security and any other documents which may be prescribed and as to the keeping of records of documents and the furnishing of particulars thereof or the giving of information with respect thereto to the Minister or a chief officer of police ;

"(c) as to the issue of copies of any such certificates or other documents which are lost or destroyed ;

"(d) as to the custody, production, cancellation and surrender of any such certificates or other documents ;

"(e) for providing that any provisions of this Part of this Act shall, in relation to vehicles brought into Great Britain by persons making only a temporary stay therein, have effect subject to such modifications and adaptations as may be prescribed."

1. "The Minister."—This, by virtue of section 121, means the Minister of Transport.

2. "Regulations."—Regulations made by the Minister have the force of law but are not to be regarded as the peers of the provisions of the statute itself (t). Under some Acts, in which it is expressly so provided, they are, and even take precedence of those provisions since they come into existence later, and must therefore be taken as representing the latest intention of the legislature (u), but, where conflict between their apparent meaning and the apparent

(p) See *ante*, pp. 189, 211.

(q) See *ante*, pp. 185-6.

(r) *Richards v. Att.-Gen. of Jamaica* (1848), 6 Moo. P. C. C. 381 ; *R. v. Walker* (1875), L. R. 10 Q. B. 355 ; *Dale's Case* (1881), 6 Q. B. D. 376 ; *National Telephone Co. v. Baker*, [1893] 2 Ch. 180 ; *Patent Agents Institute v. Lockwood*, [1894] A. C. 347 ; *Re Macartney, Brookhouse v. Barman* (1920), 30 T. L. R. 394 ; *R. v. Minister of Health, Ex parte Yaffe*, [1930] 2 K. B. 98 ; affirmed, [1931] A. C. 494. As to legislation by the executive, see generally *Porte's Administrative Law* ; *Robson's Justice and Administrative Laws* ; and *The New Despotism*, by Lord Hewart of Bury.

(u) See *Wood v. Riley* (1867), L. R. 3 C. P. 26 ; *R. v. Baines* (1840), 12 Ad. & El. 210 ; and see *Maxwell on Statutes*, 7th Edn., p. 137.

(q) See *ante*, p. 187.

(s) See *ante*, pp. 185-6.

meaning of provisions in the statute occurs, the former must in some cases be interpreted in the light of the latter (*v*), and in others *vice versa* (*w*).

This is not the place to discuss the question as to how far the power to make regulations given under this section can be exercised (*x*). But it may be said shortly that despite the wide extent of the authority given, and although regulations contained in Statutory Instruments have the force of law, there is still some limit to the power given to an executive officer—in this case the Minister of Transport—to make his word the law. In the first place, although the regulations become effective as soon as the Minister chooses, according to the provisions of section III of the Act, any regulations must be laid before Parliament "as soon as may be" after they are made; and that either House of Parliament has the right, provided it is exercised within 28 days after the regulation has been laid before it, to annul the regulation (*y*). But such annulment does not affect anything previously done under the regulation. Secondly, although the Minister seems to have a complete discretion, it is limited to making regulations for the purposes of the Act, and the Courts have the power to decide that any particular regulation is not one made "for the purpose of carrying this Part of this Act into effect," and is therefore void. Finally, the provisions of the Statutory Instruments Act, 1946 (*a*) must be complied with.

An interesting speculation (upon which it is not proposed to embark here) might be made as to how many of the provisions of the Road Traffic Act, 1934, the Minister might have enacted by Order.

2. Section 111.

Provisions as to regulations.

" 111.—(1) Any regulations made by the Minister under this Act shall " be laid before both Houses of Parliament as soon as may be after they are " made, and if an address is presented to His Majesty by either House of " Parliament within the next subsequent twenty-eight days on which that " House has sat after any such regulation is laid before it praying that the " regulation shall be annulled, it shall thenceforth be void, but without " prejudice to the validity of anything previously done thereunder or to " the making of a new regulation.

" (2) Before making regulations under this Act the Minister shall consult " with such representative organisations as he thinks fit.

" (3) If any person acts in contravention of, or fails to comply with, " any regulation made by the Minister under this Act, contravention of or " failure to comply with which is not made an offence under any other pro- " vision of this Act, he shall for each offence, be liable on summary convic- " tion to such maximum penalty not exceeding a fine of twenty pounds as " may be prescribed by the regulations.

" (4) The production of a copy of regulations under this Act purporting " to be printed by the Government printer shall be evidence that the " requirements of this Act as to the making of regulations and the laying of " regulations before Parliament have been complied with."

(b) Unless there is a strong presumption to the contrary. See *Danford v. McAnulty* (1883), 8 App. Cas. 456; *Re Davis, Ex parte Davis* (1872), 7 Ch. App. 526; *Schneider v. Ball* (1881), 8 Q. B. D. 701; *R. v. Minister of Health, Ex parte Yaffe*, [1930] 2 K. B. 98; affirmed, [1931] A. C. 494; *Hartmont v. Foster* (1881), 8 Q. B. D. 82.

(w) See *Re Shettle, Ex parte Godden* (1862), 1 De G. J. & Sm. 260; *Re Weir, Ex parte Weir* (1871), 6 Ch. App. 875; *Walkins v. Naval Colliery Co.* (1897), Ltd., [1911] 2 K. B. 162.

(x) See the cases and works cited in note (f), *supra*.

(y) By section 3 of the Statutory Instruments Act, 1946, this period is increased to forty days.

(a) 39 Halsbury's Statutes 783.

It must always be remembered that the regulations made by the Minister under this or the 1934 Act may at any time, and without general publicity, be altered, added to, or superseded by new regulations.

3. "*Anything which may be prescribed.*"—Something may and has been prescribed under section 36 (subsection (5)) (b), section 37 (subsection (2)) (c), section 39 (d), section 40 (subsection (4)) (e), and section 43 (subsection (2)) (f).

4. "*And in particular.*"—The Regulations now in force which affect Part II of the Act are those contained in the Motor Vehicles (Third Parties Risks) Regulations, 1941 (g), made by the Minister of Transport under this section, under section 111, and under section 12 of the Roads Act, 1920 (h).

The relevant parts of this Order are to be found in their appropriate places in the text of this chapter as shown below, viz. :

(a) "*As to forms . . .*"—This is contained in Regulations 5, 6 and 10 (i) of the Order mentioned (k).

(b) "*As to applications for . . .*"—This is Regulation 11 (l) of the Order.

(c) "*As to the issue of copies . . .*"—This seems to be Regulation 15 (m) of the Order.

(d) "*As to the custody . . .*"—This is dealt with in Regulations 13 (n) and 14 (n) of the Order.

(e) "*In relation to vehicles brought into Great Britain.*"—The regulations relating to the use by foreign visitors of cars in England and to the application thereto of this Part of the Act are contained in Part II of the Order mentioned (o), which is set forth and discussed in the next part of this chapter.

It should be observed that subsection (2) compels the Minister to consult with such organisations as he sees fit. Subsections (3) and (4) are considered later (q).

PART 7.—INSURANCE REQUIRED OF VISITORS BRINGING MOTOR VEHICLES INTO ENGLAND FOR A TEMPORARY STAY.

1. Regulations.

There is nothing in the Act which expressly excepts foreign cars brought into England from its provisions save paragraph (e) of section 41. The regulations referred to therein have been made by and are contained in Part II of the Motor Vehicles (Third Parties Risks) Regulations, 1941 (r), previously referred to (s). They are as follows :

PART II.

"17. In this Part of these Regulations unless the context otherwise requires the following expressions have the meanings hereby respectively assigned to them :—

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- (b) See *ante*, pp. 214 *et seq.* (c) See *ante*, pp. 226 *et seq.* (d) *Ante*, pp. 235 *et seq.*
 (e) *Post*, p. 257. (f) *Ante*, p. 234.
 (g) S. R. & O. 1941, No. 926. (h) See *ante*, p. 235.
 (i) S. R. & O. 1941, No. 926.
 (k) For these Regulations see *ante*, pp. 215 *et seq.*
 (l) For these Regulations see *ante*, p. 236.
 (m) For this Regulation see *ante*, p. 217, or it may be Regulation 8, *post*, p. 259.
 (n) For these Regulations see *ante*, p. 217.
 (o) I.e. S. R. & O. 1941, No. 926. (r) S. R. & O. 1941, No. 926.
 (q) *Post*, pp. 266 *et seq.*
 (s) See *ante*, pp. 215 *et seq.*, 235, and *post*, p. 259.

" 'issuing authority' means any one of the following, that is to say, the Royal Automobile Club, the Automobile Association, the Royal Scottish Automobile Club and the London County Council.

" 'visitor' means a person bringing a motor vehicle into Great Britain and making only a temporary stay (i) therein.

" 'motor vehicle' means a motor vehicle brought into Great Britain by a visitor.

" 18. A visitor who is a holder of a policy of insurance issued outside Great Britain in respect of third party risks arising out of the driving by him of a motor vehicle in Great Britain may make application to an issuing authority for a certificate (hereinafter called 'a certificate of foreign insurance') in the Form G set out in the Schedule to these Regulations.

" 19. An issuing authority may issue a certificate of foreign insurance to any visitor who makes application therefor in the manner prescribed by these Regulations.

" 20. Every such application as aforesaid shall be signed by the person by whom it is made and shall specify the number of the policy in respect of third party risks held by him, the name and address of the company by whom it was issued, the date on which the policy commences and the date on which it expires, and shall also contain a declaration (a) by the applicant that the provisions of the policy with respect to third party risks are effective in relation to the driving of the motor vehicle in Great Britain by him or by some other person or persons or classes of persons specified in the declaration.

" 21. Every certificate of foreign insurance shall be signed by some person duly authorised in that behalf by the issuing authority by whom it is issued.

" 22. The period of validity of a certificate of foreign insurance shall not exceed the unexpired period covered by the policy to which it relates.

" 23. For the purposes of Part II of the Act and of Regulations 8 (b) and 11 (c) of Part I of these Regulations, a certificate of foreign insurance shall have effect as if it were a certificate of insurance issued by an authorised insurer and the policy of insurance to which it relates shall be deemed to comply with the requirements of Part II of the Act.

" 24. The provisions of Section 38 of the Act shall not apply in relation to any policy of insurance in respect of which a certificate of foreign insurance has been issued.

" 25. A certificate of foreign insurance shall be forthwith returned by the visitor to the issuing authority by whom it was issued if the motor vehicle to which it relates is sold or otherwise disposed of or if by reason of his obtaining a new policy or otherwise a new certificate of foreign insurance is issued to him during his stay in Great Britain, and if the certificate is not so returned it shall be surrendered to the issuing authority by whom it was issued by or on behalf of the visitor when the motor vehicle is taken out of Great Britain.

" 26. Every issuing authority shall keep a record of the following particulars relative to any certificates of foreign insurance issued by them :—

- " (1) The full name and address of the person to whom the certificate is issued and particulars of the persons or classes of persons authorised to drive the motor vehicle ;
- " (2) the date on which the policy of insurance to which the certificate relates commences and the date on which it expires ;
- " (3) the date of return of the certificate to the issuing authority ;

(i) The temporary stay must not exceed 90 days (Motor Vehicles International Circulation Regulations, 1941, S. R. & O. No. 1219).

(a) For penalty for knowingly making any false statement or withholding material information, see Road Traffic Act, 1930, s. 112 (2), *post*, p. 261.

(b) For Regulation 8, see *post*, p. 239.

(c) For Regulation 11, see *ante*, p. 235.

"and the issuing authority shall without charge furnish to the Minister or to any chief officer of police on request any particulars thereof.

"27. An issuing authority other than the London County Council shall notify that Council in such form and within such time as they may require of the issue by the authority and of the return or surrender to the authority of any certificate of foreign insurance.

"28. In the case of motor vehicles brought into Great Britain by visitors from Northern Ireland the provisions of Regulations 17 to 26 of these Regulations shall not apply, but a policy of insurance or a security which complies with the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930 (d), and which covers the driving of the motor vehicle in Great Britain and any certificate of insurance or certificate of security issued in pursuance of that Act and the regulations made thereunder in respect of such policy or security shall have effect as a policy of insurance or a security or a certificate of insurance or certificate of security respectively for the purposes of Part II of the Act, and of these Regulations."

2. Comments.

The effect of the above regulations is obscure. Whilst Regulation 24 makes it clear that section 38 of the Act (e) does not apply, no regulation expressly states whether all or which of the other sections thereof do so. Regulation 22 strongly suggests that they do not (f). But apparently section 12 of the 1934 Act applies, although the Minister has left the old form of certificate unaltered (g). On the other hand, Regulation 17, where some reference to section 36 (h) would be expected, refers to "a policy of insurance issued outside Great Britain in respect of third party risks." It is difficult to see how such a policy could be issued by an authorised insurer within the meaning of section 36, subsection (3). *Per contra*, "third party risks" is not qualified or explained in any way, and it must be assumed that the definition thereof in subsection (1) (b) of section 36 applies (i).

Again, Regulation 19 requires a declaration that "*the provisions of the policy with respect to third party risks are effective in relation to the driving of the motor vehicle in Great Britain*" by him or by some other person or persons or classes of persons specified in the declaration. Whatever may be the effect of subsection (4) of section 36 upon English contracts of insurance (k), this subsection could have no application to policies issued by foreign insurers abroad which would be governed by the law of the country in which they were issued (l). Moreover, it is remarkable that the declaration is required to refer to persons, etc., specified *in the declaration* and not, therefore, necessarily specified in the policy.

In the result it would seem, therefore, that the legality of a foreign insurance used by a temporary visitor would depend in each case upon the particular terms and conditions of his policy, upon the relation thereto of a person who at any given time was driving the vehicle, and upon the law of the country in which the policy was issued or, more accurately, the law of the country which governed the contract therein contained, which would usually but not necessarily be the same thing (m).

(d) The provisions of this Act are identical with those of Part II of the English Road Traffic Act, 1930, reviewed in this chapter.

(e) See *ante*, pp. 219 *et seq.*

(f) No provision has been made by fresh regulation in regard to s. 12 of the Act of 1934.

(g) Whilst altering the forms applicable to residents. S. R. & O. 1934, No. 1399.

(h) As to section 36 generally, see *ante*, pp. 188 *et seq.*

(i) I.e. that "third party" does not include voluntary passengers, etc. For this, see *ante*, pp. 202 *et seq.*

(k) As to this, see *ante*, pp. 211 *et seq.*

(l) See 6 Halsbury's Laws, 2nd Edn. 191 *et seq.*

(m) *Ibid.*

A temporary foreign visitor would not as a rule be subject to the Bankruptcy Laws, and therefore any question of the application of the Third Parties Act would not often arise. But if it did, immense difficulties would be involved as to whether any rights against the foreign insurers could be acquired under that Act, and if so, how, if at all, they could be enforced. On the other hand it is not clear that the provisions of section 10 (n) of the Road Traffic Act, 1934, do not apply to foreign policies (o). The Cassel Committee (p) found the problem presented by motor vehicles brought into this country by foreign visitors one of considerable difficulty. Their recommendations and the resulting paragraphs in the Motor Insurers' Bureau agreements are discussed in chapter VI (q).

PART 8.—CRIMINAL OFFENCES

Criminal offences may arise at common law in regard to motor insurance (r).

The Road Traffic Act (s) and the regulations made by the Minister of Transport under its various sections (t) make provision for the punishment of offences against the Act and regulations made thereunder. Many of these provisions supersede corresponding rules made under the Locomotives on Highways Act (u) and the Motor Car Act (v), and do not change the law. Others, however, constitute new offences (such, for example, as pillion riding contrary to section 16 of the Act). The present part of this chapter is concerned, however, not with all offences under the Act, but only with offences arising under the provisions of Part II and such other offences as relate to the matters dealt with in that Part of the Act.

1. Section 35 (1).—This section has been fully discussed above (w), thus it is unnecessary to deal with it in detail here, although the results of the earlier discussions may be usefully indicated. The position when the accused is charged with driving under a repudiated policy is treated later (x).

"Use."—It should be noted that this expression includes driving (xx), as well as any other use to which the motor vehicle may be put upon a road whilst it is in motion or stationary. It is further suggested that the word implies active use such as is made of the vehicle by the person controlling or having the right to control it, and that the expression does not extend to cover the mere passive use which a passenger without right or fact of control makes of a vehicle. The owner of a car uses it when his servant drives it for him, the owner's, purposes (y).

"Cause or permit to be used."—The meaning of these two words "cause" and "permit" has been fully discussed (z). It remains only to consider the evidence that may be produced in a prosecution for these offences.

(n) 27 Halsbury's Statutes 534, *post*, pp. 278 *et seq*.

(o) See *post*, p. 276, and see Regulation 22, p. 240, *ante*.

(p) Cmd. 5528, para. 180.

(q) *Post*, p. 357.

(r) These are not dealt with in this Part, which is confined to offences under the Road Traffic Act, 1930.

(s) 23 Halsbury's Statutes 607.

(t) *I.e.*, ss. 3, 9, 19, 30, 41, 59, 111, etc.

(u) 1896 (19 Halsbury's Statutes 64).

(v) 1903 (19 Halsbury's Statutes 76).

(w) See *ante*, pp. 163 *et seq*.

(x) *Post*, chapter IX.

(xx) Where a man guided or steered a vehicle, with engine stopped and empty petrol tank, downhill for 200 yards, he was held to be "driving a motor vehicle." *Saycell v. Bool*, [1948] 2 All E. R. 83. On the other hand, the steersman of a towed vehicle was held not to be a "driver" within section 11 of the Road Traffic Act, 1930; *Wallace v. Mayor* [1946] K. B. 473; [1946] 2 All E. R. 87.

(y) *Ellis (John T.), Ltd. v. Hinds*, [1947] K. B. 475; [1947] 1 All E. R. 337. See *ante*, p. 175.

(z) *Ante*, pp. 172 *et seq*.

The terms of any certificate of insurance or security produced to a police constable by the user of the vehicle will be taken as indicative of the limitations of the cover provided by the policy (a). In *Egan v. Bower* (b) the defendant was charged under section 35 (1) for using a motor van on the road uninsured, when it contained his wife and child. The certificate of insurance issued in the form prescribed by the Motor Vehicles (Third Party Risks) Regulations, 1933 (c), contained the following paragraph: "Limitation as to use: Use in connection with the policy holder's business under 'C' licence. Policy does not cover carrying of passengers for hire or reward." A letter was produced before the magistrates signed by the insurers which stated that in the event of an accident occurring while the vehicle was being used for private pleasure purposes, any claim normally covered by the policy would not be repudiated. This letter was, of course, not evidence in the case, and the Divisional Court on an appeal from an acquittal upheld the appellant Chief Constable's contention that, in the absence of other evidence, use for pleasure purposes was not a matter normally covered by the policy, and that it was impossible to extract from the words of the certificate the affirmative proposition that voluntary passengers could lawfully be carried. As the limitations with regard to the vehicle already precluded the user for passengers at all, the words relating to carriage of passengers for hire or reward seemed superfluous. The offence was therefore proved.

The whole purpose of the certificate of insurance is to show in summary form on its face the limitations to which the policy is subject. As has been pointed out earlier (d), it is not necessary for the certificate to show all the limiting conditions to which the policy is subject, nor is there any authority for claiming that the terms of the certificate in any way detract from the limitations imposed by the policy. On the other hand, it is submitted that in prosecutions under the section the certificate will be held to be conclusive evidence of the user permitted by the policy unless the policy is produced to the Court. If it is so produced, the terms of the policy will be accepted in evidence to explain any definition of the permitted user as to which the certificate is silent or as to which the terms of the certificate are ambiguous. Where the terms of the policy conflict, in favour of the driver or user of the vehicle, with the terms of the certificate, it is thought that the policy must be accepted and the certificate rejected. Nevertheless, it might be said that where the terms of the certificate do not truly set out the limitations as to user contained in the policy it is not a proper certificate issued under Part II of the Act, and the driver of the vehicle is therefore driving uninsured for the purposes of the Act, although between him and his insurer there is a valid policy (e). The defendant might object that the mischief at which the section is aimed is now removed by the effect of the Domestic Agreement (f) in that although the certificate does not comply with the regulations, its deficiency does not prevent an injured third party from obtaining satisfaction of his just claims under the terms of that agreement. This argument might go to mitigation of penalty, but in all such prosecutions the one and only

(a) Third Party Regulations, 1941, S. R. & O. No. 926, Regulation 8.

(b) (1939), 63 Ll. L. R. 266.

(c) Which were for practical purposes identical with those at present in force.

(d) Chapter II, p. 110.

(e) If the certificate has been deliberately altered, so as to deceive, an offence is committed under s. 112 (1), *post*, and where a false statement has been made in order to obtain the issue of a certificate, an offence is committed under s. 112 (2), *post*. And a person knowingly issuing a certificate which is false in any material particular is guilty of an offence under s. 112 (3).

(f) *Post*, chapter VI, p. 357.

question is whether the defendant is in fact insured as required by Part II of the 1930 Act, and the fact that insurers have voluntarily undertaken to satisfy judgments obtained by third parties against their assured, even though in the circumstances there is no legal liability resting on the insurers, should not be called to aid a defendant who has by his behaviour caused this burden to be placed on his insurer. Indeed, the Cassel Committee was at pains to point out that severe penalties should be inflicted on drivers who used motor vehicles whilst themselves uninsured, and it will be seen that the heavy penalties imposed by section 35 (2) have been regularly enforced.

"*Unless there is in force, etc.*"—As has been submitted, this means that every particular user at every particular moment, for any particular purpose, by any particular person must be covered by the necessary insurance against third party risks in such a way that the person upon whom the liability in respect of such risks is incumbent is entitled to enforce the benefits of a valid and subsisting contract of insurance respecting them (g). Note also:—

(i) that knowledge or guilty intention is not a necessary element in the offence, but, on the contrary, that any infringement, however technical or innocent, of the substantive part of the subsection is an offence (h),

(ii) that the offence exists quite independently of any accident, or injury or damage to third parties arising out of the presence of the vehicle on the road,

(iii) that the onus of proving that the offence has not been committed is upon the defence (i) to a certain extent. This question is fully discussed later (ii).

2. Section 35 (2).

"If a person acts in contravention of this section, he shall be liable to "a fine not exceeding fifty pounds or to imprisonment for a term not "exceeding three months, or to both such fine and imprisonment, and a "person convicted of an offence under this section shall (unless the court "for special reasons thinks fit to order otherwise and without prejudice "to the power of the court to order a longer period of disqualification) be "disqualified for holding or obtaining a licence under Part I of this Act for "a period of twelve months from the date of the conviction.

"A person disqualified by virtue of a conviction under this section or "of an order made thereunder for holding or obtaining a licence shall, for "the purposes of Part I of this Act, be deemed to be disqualified by virtue "of a conviction under the provisions of that Part."

This is provided to secure that the duty constituted by the preceding subsection should be observed and made effective. The offence created is not indictable and the offender has no right of trial by jury (j). Offences under the subsection can only be prosecuted before a Court of Summary Jurisdiction and the maximum penalties which may be imposed upon the guilty are as specified in section 113 (k).

"*A person.*"—These words, by virtue of the Interpretation Act, 1889 (l), include a body corporate, such as a company. A body corporate is, however, incapable of suffering imprisonment, but with this necessary qualification is exposed to the same processes and penalties as ordinary

(g) See *ante*, pp. 177 *et seq.*; *Bright v. Ashfold*, [1932] 2 K. B. 153.

(h) *Ante*, pp. 174 *et seq.*; *Williams v. Russell* (1933), 149 L. T. 190.

(i) *Williams v. Russell*, *supra*; *Martin v. White*, [1910] 1 K. B. 665.

(ii) *Post*, chapter IX.

(j) Summary Jurisdiction Act, 1879 (11 Halsbury's Statutes 329).

(k) Road Traffic Act, 1930, s. 113 (1), (2).

(l) Ss. 2, 19 (18 Halsbury's Statutes 992, 1001).

individuals. The effect of section 35 (4) which takes certain persons out of the operation of this subsection, is dealt with elsewhere (m).

"*Acts in contravention of this section.*"—This refers back to subsection (1) and in effect means using, or causing or permitting to be used, a motor vehicle in such circumstances as to be uncovered by a subsisting and valid policy of insurance or security against third party risks of the specified classes.

"*He shall be liable to a fine not exceeding £50 or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.*"—Within these limits the imposition of penalties is left to the discretion of the Court of Summary Jurisdiction before whom the offender is convicted. The imprisonment may be with or without hard labour, unless such imprisonment is in default of paying a fine (n). The Court may dismiss the charge under the Probation of Offenders Act, 1907 (o), upon the grounds of triviality, extenuating circumstances or on account of the personal character or condition of the offender (oo).

"*And a person convicted of an offence under this section SHALL . . . BE DISQUALIFIED from holding or obtaining a licence under Part I of this Act for a period of 12 months from the date of conviction.*"—This disqualification, be it noted, follows automatically (p) upon a conviction for the offence, whatever the punishment, unless the Court for special reasons thinks fit that no such period of disqualification should ensue. The Court further has power to impose a more lengthy period of disqualification than that laid down in the subsection. It is submitted that "special reasons" must be implied as a condition upon which the Court is entitled to impose a longer period of disqualification than twelve months.

"*Unless the Court for special reasons thinks fit to order otherwise.*"—"Special reasons" are nowhere defined in the Act and until recently have not received judicial consideration (q). The penalty of disqualification from holding a licence works great hardship on some offenders who make their living by driving on the road, and in the years between 1930 and 1946 it was a common practice of benches of magistrates to take into account as a special reason the fact that the offender would be deprived of his livelihood for twelve months.

In *Whitall v. Kirby* (r), where the offence had been committed under section 15 of the Road Traffic Act, 1930, of being "drunk in charge" of a motor car, this offence also leading to automatic disqualification in the absence of special reasons, it was held by the Divisional Court that the circumstances

(m) *Ante*, pp. 185 *et seq*.

(n) Criminal Justice Administration Act, 1914, s. 16 (11 Halsbury's Statutes 378).

(o) S. 1 (11 Halsbury's Statutes 365).

(oo) See *Quelch v. Collett*, [1948] K. B. 478, [1948] 1 All E. R. 252; *Blows v. Chapman*, [1947] 2 All E. R. 576. A typical case for dismissing the charge under the Act occurred in *Southgate v. Bunce* (unreported) before the Hampshire Quarter Sessions Appeals Committee, May 25, 1948. The assured had laid up the car referred to in the policy and used another, already owned by him, for hire-driving under the terms of the policy. Although he failed to inform his insurers of the change, evidence was given by them that they would have considered themselves in the circumstances bound to pay any claim arising out of the use of this second car.

(p) This follows from the words "shall be disqualified" and the wording of the proviso to which their operation may in certain cases be expressly made subject.

(q) Though see *R. v. Crossan* (1939), N. 1. 106; *Adair v. Brash*, [1940] Sc. (J.) 69; *Fairlie v. Hill*, [1944] Sc. L. T. 224; *Muir v. Sutherland*, [1940] Sc. L. T. 403; *Murray v. Macmillan*, [1942] S. C. (J.) 10, for Irish and Scottish decisions. Appeals have been made to the Divisional Court recently owing to the requirement in *R. v. Leicester Recorder, Ex parte Gabbitts*, [1946] 1 All E. R. 615, that the facts constituting a special reason must be stated by the court which relieves the defendant from disqualification.

(r) [1947] K. B. 194; [1946] 2 All E. R. 552.

constituting a special reason must be special to the offence and not to the offender and that financial hardship could not be taken into account. The following words are extracted from the judgment of Lord GODDARD, C.J. :

" It is to be observed that the sections (s) are mandatory, and Parliament has provided that a period of disqualification shall be imposed, but they have given a discretion to the Court which obviously is a limited discretion, to be exercised only for special reasons. The limited discretion must be exercised judicially. The reasons inducing the Court to exercise it must be special, and special is the antithesis of general. The fact that a man is a first offender or that he has committed no motoring offence for many years are reasons of the most general character that can well be imagined. . . . That a man is a professional driver cannot, as it seems to me, by any possibility be called a special reason. . . . A 'special reason' within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. . . . A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' within the exception. . . . One may give as an illustration (of a special reason) a driver exceeding the speed limit because he has suddenly been called to attend a dying relative, or a doctor going to an urgent call. It is difficult to visualise any special reason in the case of dangerous driving except the one mentioned in the section itself, namely the lapse of time from the date of a previous conviction. So, too, it is certainly difficult to visualise what could amount to a special reason in the case of driving under the influence of drink or drugs, though perhaps one might be found if the Court was satisfied that a drug had been administered to a driver without his knowledge, as for instance where a driver had taken a dose of medicine which he believed to be an ordinary tonic, but which in fact contained a powerful drug. . . . Magistrates both in petty and quarter sessions must take it to be the law that no considerations of financial hardship or of the offender being before the Court for the first time . . . can be regarded as a special reason within these sections. For myself, I find it very difficult to apply any different test for construing the words 'special reasons' in section 35 from that which applies to sections 11 and 15. . . . I strongly incline to the opinion that a person who drives or causes or permits a vehicle to be driven when there is no policy in force must be disqualified unless the Court can find in relation to the particular offence some mitigating circumstance, and that mere forgetfulness or carelessness in not taking out a policy could not amount to a special reason."

In *Knowler v. Rennison* (1) the meaning of the words "special reasons" under this section 35 (2) was reviewed, and it was held that many, if not all, of the considerations which should influence the Court in deciding on the extent of relief granted by these words apply equally to both the sections 15 and 35 (2). In this case the defendant, a motor cyclist, had been riding as a pillion passenger on his own cycle, while a friend had been driving it, in contravention of the terms of the defendant's policy of insurance. The defendant had an unfounded belief that he himself was covered by his policy, and that his friend also had a subsisting policy covering his own driving.

Lord GODDARD, C.J., said that it would be most dangerous to hold that the fact that a man misapprehended the legal effect of his policy was a special reason. He had a duty to see that he was insured. If he neither informed himself of the provisions of his policy, nor obtained advice as to what it covered, he had no reasonable grounds for believing that the policy covered something which it did not. Belief, however honest, could not be regarded as a special reason unless based on reasonable grounds. If the belief was

(1) *Ss. 11, 15 and 35 of the 1930 Act.*

(2) [1947] K. B. 488 ; [1947] 1 All E. R. 302.

founded on a wrong opinion from, say, an insurance agent, or if the matter turned on some obscure phrase, those might be considered special reasons. Disqualification was part of the punishment which Parliament had prescribed for certain motoring offences. There is no provision in the Road Traffic Acts in terms permitting the Court to refrain from disqualifying on the ground of exceptional hardship. Disqualification might work hardly on one person and not so hardly on another, but Parliament had not seen fit to draw a distinction between different offenders.

The meaning of these words "Belief, however honest, could not be regarded as a special reason unless based on reasonable grounds" is illustrated by the case of *Labrum v. Wilkinson* (u). A garage proprietor made a proposal for general cover for all his trade vehicles, and a temporary cover risk was issued to him covering "third party risks for any vehicle used in connection with the motor trade." The cover of the policy which was subsequently sent to him, and which he did not read, was limited to a named driver. It was held that the assured had been misled by the insurance company, and that it was reasonable for him to believe in the circumstances that his proposal for general cover had been accepted. Lord GODDARD, C.J., said:

"It is perfectly true that in *Rennison v. Knowler* (uu) I said that it was the "obvious duty of people to make themselves acquainted with their policies "and if they do not understand them it is their duty to take advice. . . . But "if an ignorant man who has a motor bicycle gets a policy and is puzzled "by its terms and he goes to some person who it would be reasonable to "suppose would be able to give him proper information about the effect of "the policy and that person gives him advice which turns out to be wrong, "nothing I have said in *Rennison v. Knowler* was intended to cover that "case."

These further points should be noticed. A right of appeal is granted by section 6 (2) (v) to the same Court which imposed disqualification to apply after six months for removal of the remainder of the twelve months' disqualification. On such an appeal, all grounds, including those of financial hardship, may, it is submitted, be urged in support. Secondly, it is open to the court of summary jurisdiction, where the facts show that an offence has been committed, not to proceed to conviction by virtue of the Probation of Offenders Act (vv).

It may be said that the discretion to dismiss the summons under this Act could be but rarely exercised, owing to the serious nature of the offence as evidenced by its prescribed punishment (w). In so far as the rights of injured third parties are now safeguarded by the setting up of the central

(u) [1947] K. B. 816; [1947] 1 All E. R. 824. In *Russman v. Barnett*, unreported, a case decided at Hampshire Quarter Sessions on 3rd July, 1947, the appellant had bought a car from an owner who had stated at the time that the property passed "I will see that my insurance policy is transferred to you, and in the meantime you may drive with my permission." A little later the appellant received a letter from the insurance company stating that the policy had been transferred to him. He at once drove the car, but later found that the policy had not in fact been transferred to him. As the late owner had divested himself of his interest in the car, he could not give permission to the appellant to drive, so that an offence was committed. But the Chairman held that the letter of the insurance company could be held to have given the appellant reasonable grounds for belief that he was covered, and a "special reason" existed.

(uu) See note (t), p. 246, *ante*.

(v) Cf. the 1930 Act, *vide infra*.

(vv) See note (oo), p. 245, *ante*.

(w) It is not for a bench of magistrates to consider that disqualification is too severe a penalty. Unless there is a special reason, disqualification automatically follows a conviction (*Williamson v. Wilson*, [1947] 1 All E. R. 306). By the proviso to section 6 (1) of the 1930 Act, the disqualification may be limited to the driving of a motor vehicle of the same class or description as the vehicle in relation to which the offence was committed.

fund controlled by the Motor Insurers' Bureau, it might be urged that the mischief against which the section 35 (2) operates is now removed, so that the Court is required only to consider the presence and extent of guilty intention in the offender when deciding whether or no to proceed to conviction. But the Cassel Committee's report (x) took the opposite view, that failure to insure should be treated as an offence of a very grave character. In 1936 there were 13,410 prosecutions for failure to insure. Charges were withdrawn or dismissed in 958 cases, and licences were suspended in only 4,571 cases, the average fine being 30s. In view of the decisions in the two cases quoted above, disqualification must ensue in the future in the great majority of cases.

The disqualification attendant upon conviction extends to prohibit the guilty person from either holding, *i.e.* continuing to hold, or from obtaining a driving licence under section 4 of Part I of the Act. The disqualification is made effective by the provisions of sections 6 and 8 of Part I, under which the Court must couple the disqualification with an order that the conviction be endorsed upon the offender's licence (a), and which provide that the Court must retain a licence when it is handed in for endorsement and forward it to the licensing authority concerned as well as notifying that authority, and the authority for the area in which the offender resides, of the conviction (b).

"A person disqualified by virtue of a conviction under this section or of an order made thereunder for holding or obtaining a licence shall for the purposes of Part I of this Act be deemed to be disqualified by virtue of a conviction under that Part of the Act."—The consequences of conviction for offences under Part II of the Act have been briefly described above. Certain results are expressly made operative upon convictions under Part I which, apart from the provision now under consideration, would not follow from a conviction of an offence under Part II alone. These consequences are provided in section 7 under which the licences of disqualified holders are suspended and made of no effect (c), and by which it becomes an offence punishable with fine and or imprisonment for a disqualified person to apply for or obtain a licence to drive or to drive a motor vehicle during his period of disqualification (d). These provisions apply to disqualification upon a conviction under section 35. A further consequence of convictions under Part I, made applicable to the offences under discussion, is the right of appeal against an order of disqualification which is expressly conferred and the power given to the Court in such case, if thought fit, to suspend the operation of the order pending the appeal (e).

The express provision of a right of appeal against the order of disqualification prevents any doubt from arising as to the rights of a convicted man to appeal against such an order either when he has pleaded guilty (f) or when he does not desire to appeal against such other punishment as has been inflicted upon him (g).

3. Section 35 (3).

"Notwithstanding any enactment prescribing a time within which proceedings may be brought before a court of summary jurisdiction, proceedings for an offence under this section may be brought—"

(x) Cmd. 5528, paras. 158 *et seq.*, dated 19th July, 1937.

(a) S. 6 (1) (b).

(b) S. 8 (6).

(c) S. 7 (1) and (2).

(d) S. 7 (4).

(e) S. 6 (2).

(f) Criminal Justice Act, 1925, s. 25 (1) Halsbury's Statutes 412).

(g) Criminal Justice Administration Act, 1914, s. 37 (1) Halsbury's Statutes 386).

- " (a) within a period of six months from the date of the commission of
 " the alleged offence ; or
 " (b) within a period which exceeds neither three months from the date
 " on which it came to the knowledge of the prosecutor that the
 " offence had been committed nor one year from the date of the
 " commission of the offence,
 " whichever period is the longer."

The time within which proceedings for summary offences may be brought is prescribed by the Summary Jurisdiction Act, 1848 (*h*), which has general application to such cases. By this Act, unless the particular statute upon which a prosecution is based provides another period of time, proceedings must be commenced within six months of the time when the offence was committed or the subject-matter of the complaint arose. Proceedings are commenced by the laying of an information or the making of a complaint, and it is that point of time which is considered as the "bringing of proceedings," as far as the application of the time limit is concerned (*i*). The general period of six months above referred to has to be qualified in relation to numerous particular offences by statutory provisions, and in this respect the subsection under consideration makes no departure from the general tendency.

The contents of the subsection as far as they specify a period of limitation are couched in unusual terms to provide an alternative to the prosecution, which has the option of prosecuting either within six months from the date of the alleged offence or within a time, not exceeding one year from the date of the offence, which does not exceed more than three months from the date when the prosecutor first knew of the offence. The effect of these alternative periods may be conveniently summarised :

- (i) Where the prosecutor knew of the offence when it was committed, or learned of it within three months of commission, the proceedings must be commenced within six months from the date of the offence.
- (ii) Where the prosecutor did not know of the offence until after it was three months old, proceedings must be commenced within a year from the date of the offence.
- (iii) If no proceedings are commenced within one year from the date of the offence then no proceedings can thereafter be instituted.

By the Road Traffic Act, 1934 (*k*), a similar provision is made applicable to offences under section 112 of the Act now under discussion.

4. Section 40 (1).

Requirements as to production of certificate of insurance or of security.

" Any person driving a motor vehicle on a road shall, on being so
 " required by a police constable, give his name and address and the name
 " and address of the owner of the vehicle and produce his certificate, and
 " if he fails so to do he shall be guilty of an offence : "

" Any person."—Person in this context must mean a physical person, and does not include a body corporate. Such a person may be either licensed to drive a motor vehicle, or a particular class of motor vehicles ; he may be a person qualified or unqualified to apply for or obtain a licence.

" *Driving a motor vehicle on a road.*"—This involves the difficult question of construing the meaning of the expression "driving." The contrast

(*h*) S. 11 (11 Halsbury's Statutes 278).

(*k*) S. 33 (27 Halsbury's Statutes 559).

(*i*) Stone's Justices' Manual, 1948.

between the various terms used in the Act has been indicated elsewhere. It is submitted, with some hesitation, having regard to the wording of the following subsection, that in section 40 (1) "driving" must receive its ordinary literal meaning since there is nothing to qualify or displace it. Thus the duty imposed by the subsection is limited to cases where a motor vehicle is being driven on a road. It does not apply when, a vehicle is not being driven, *i.e.* when it is stationary and driverless, or when, although in motion, it is not being driven on a road (*l*).

"*Shall, on being so required by a police constable.*"—The Act nowhere defines "police constable." An interesting, if unmeritorious, argument might be raised as to whether the expression includes police officers higher in rank than mere constables. Elsewhere, as will be later indicated, the Act refers to the Police Pensions Act, 1921 (*m*), which, albeit somewhat inconsistently, separates members of the police force for the purposes of that Act into different classes—"constables, sergeants, inspectors, superintendents, etc." The Police Act of 1919 (*n*) makes a similar classification. Other Acts, such as the Army Acts, 1879 (*o*) and 1881 (*p*), expressly define "constable" to include any police officer. It is submitted that the clue, although a somewhat obscure one, to the meaning of "police constable" in the present Act must be found by reference to the Statutes from which the police derive their existence and the bulk of their present-day powers—namely, the Metropolitan Police Act, 1829 (*q*), the County Police Acts, 1839 and 1840 (*r*), the Parish Constables Acts, 1842 and 1872 (*s*), and the Town Police Clauses Act, 1847 (*t*). Under these Acts all the members of police forces are treated as "constables" whatever their rank within the force, and it is to this terminology that reference should be made when an Act using the expression "police constable" fails to define it.

While there is nothing in the subsection or the Act necessitating that the police constable should be in uniform (*a*), it is submitted that the wording is sufficient to show that the driver of the motor vehicle must be made aware that he is being required to furnish the necessary particulars and produce his certificate to an authorised person. If the person driving were not made aware that the requisition made was a proper one within the subsection, then he could not be convicted of the statutory offence of failing to produce his certificate, etc., when so required by a police constable. The latter phrase is of the essence of the offence, and the onus of proving that the driver failed to comply when "so required by a police constable" would not be satisfied until it was proved that he knew that such requirement, *i.e.* one by a police constable, was being made of him (*b*).

"*Give his name and address and the name and address of the owner of the vehicle.*"—This means correct names and addresses. This comment would hardly be necessary were it not for the fact that another section of the

(*l*) In this connection it should be noted that section 14 of the Act makes it a criminal offence in certain circumstances and subject to certain conditions to drive a motor vehicle off the road.

(*m*) 11 & 12 Geo. 5, c. 31, referred to in s. 12 (1) (23 Halsbury's Statutes 621), *post*, p. 256.

(*n*) 12 Halsbury's Statutes 867.

(*o*) 42 & 43 Vict. c. 33, s. 181.

(*p*) S. 190 (17 Halsbury's Statutes 241).

(*q*) 12 Halsbury's Statutes 743.

(*r*) 12 Halsbury's Statutes 775, 787.

(*s*) 12 Halsbury's Statutes 797, 831.

(*t*) 12 Halsbury's Statutes 804.

(*a*) But see s. 20 (3), and remarks as to reading that provision with the present subsection at p. 252, *post*.

(*b*) But *cf.* on a charge of assault, etc., on a police constable the knowledge of the offender of the status of his victim is not material. The reason being that an assault is, *per se*, illegal. On the reasoning contained in *Harding v. Price*, [1948] 1 All E. R. 283, it is submitted that such knowledge is essential to the commission of the offence.

Act (c) specifically makes the giving of a false name and address a separate offence, apart from refusing to give a name and address. It seems obvious that a driver does not comply with the requirement of the subsection now under consideration unless he gives his and the owner's correct names and addresses. It is submitted that it is not essential for the driver to furnish the address of his or the owner's residence, it is sufficient if he gives the address at which he or the owner may as a rule be found (d).

The owner of the vehicle is expressly defined in the Act so as to include in the case of a vehicle the subject matter of a hire-purchase or hiring agreement, a person in possession of the vehicle under such agreement (e). Apart from this exceptional case the word owner possesses its ordinary significance and means the person entitled to the property in the vehicle in question.

"*And produce his certificate,*" i.e. the driver's certificate of insurance or security under the provisions of Part II of the Act, or other evidence that the vehicle is not or was not being driven in contravention of section 35. The expression "produce his certificate" is given a special statutory significance, the essence of which is summarised below (f).

"*And if he fails so to do he shall be guilty of an offence.*"—The words "fails to do so" must be taken to apply distributively to each of the requirements in the subsection with which the driver is bound to comply. If he fails, therefore, to give his name or his address, or the owner's name or address or, subject to the proviso next considered, to produce his certificate, he will be guilty of an offence even though he complies fully with all of the other requirements (f).

The offence created by this subsection can only be the subject of summary proceedings, not of indictment (g), and the penalties are a maximum fine of £20 in the case of a first offence, and in the case of a second or subsequent conviction, a maximum fine of £50 or three months' imprisonment (h).

"*Proviso.*—Provided that, if the driver of a motor vehicle within five days after the date on which the production of his certificate was so required produces the certificate in person at such police station as may have been specified by him at the time its production was required, he shall not be convicted of an offence under this subsection by reason only of failure to produce his certificate to the constable."

The effect of this proviso, which bears some resemblance to the proviso to the subsection next considered, is to give the driver of a motor vehicle an alternative as far as production of his certificate upon proper request is concerned. This alternative does not extend to the other requirements of the subsection, and in order to take advantage of it the driver must indicate at the time of the request that he cannot or will not produce his certificate there and then, but will do so at a specified police station within five days. In order to get the benefit of the proviso the driver must go in person to the police station specified by him at the time when he was requested to produce his certificate and failed or declined to do so. When the proviso is satisfied the driver is saved from possible prosecution for failure to produce his certificate when required to do so, but not from prosecution for any other failure to comply with this subsection (i).

(c) S. 20 (1).

(e) S. 121.

(g) S. 113 (1), *post*, p. 264.

(i) A similar-saving proviso may be found in s. 4 (5) of the Act, dealing with failure to produce a driving licence on similar request and the avoidance of prosecution by production at a specified police station by the licensee within 5 days. It is submitted that a driver who fails to give his name or address or to produce his certificate under

(d) *Simmons v. Woodward*, [1892] A. C. 100.

(f) See s. 40 (4), *post*, p. 257.

(h) S. 113 (2), *post*, p. 264.

To conclude the discussion upon this subsection it remains only to indicate a defect in the subsection which, if pursued to its logical conclusion, would frustrate its entire purpose. This lies in the wording of the subsection which obliges a person "driving a motor vehicle" to give certain information and produce documents in circumstances such that he cannot possibly comply with this duty unless he stops. Once he stops he is no longer "driving" the motor vehicle. Upon a strict construction of the subsection a person who is not "driving" a vehicle cannot be called upon to comply with its provisions; by stopping, therefore, a driver would be able to evade his obligations under the subsection. In order to avoid this extraordinary position, therefore, it is necessary to construe the subsection alongside section 20 (3) of the Act: "any person driving a motor vehicle on a road shall stop the vehicle on being so required by a police constable in uniform, and if he fails so to do shall be liable to a fine not exceeding £5."

Before the requirements of the present subsection would come into operation it would, as a rule, be necessary for the driver to be called upon to stop, and for this very purpose the Act provides a penalty to make the duty to stop when called upon effective (j). It must therefore be implied in section 40 (1) that when the person driving stops, he does not thereby evade the obligations which that subsection imposes upon him (jj).

5. Section 40 (2).

"If in any case where, owing to the presence of a motor vehicle on a road, an accident occurs involving personal injury to another person, the driver of the vehicle does not at the time produce his certificate to a police constable or to some person who, having reasonable grounds for so doing, has required its production, the driver shall as soon as possible, and in any case within twenty-four hours of the occurrence of the accident, report the accident at a police station or to a police constable and thereupon produce his certificate, and if he fails so to do, he shall be guilty of an offence:"

This subsection calls for careful contrast and comparison with section 22 of the Act which imposes upon drivers a duty to stop and furnish certain particulars in case of accidents. The points of contrast will be referred to as they arise in the consideration of the present subsection, but the two provisions should be textually compared in their entirety.

"If in any case owing to the presence of a motor vehicle on a road."—These words appear also in section 22 (1). The subsection appears at first sight to comprise all cases where a motor vehicle is present on a road whether it is being used or driven or not (k). There is, however, considerable doubt as to whether this interpretation is the correct one. Elsewhere the subsection appears clearly to contemplate that no obligation shall arise unless the motor vehicle is being "driven" when the accident occurs. For

s. 40 (1) and also fails to specify a police station where he will produce it, at the time of being called in for production cannot purge his guilt by producing his certificate later. *Cp. Dawson v. Winter* (1932), 149 L. T. 18. A Scotch case under s. 22 should also be noted. If a driver does not give his name and address at the time of an accident, and does not report to the police within 24 hours, it does not lie on the prosecution to prove that the driver has not, within 24 hours, given his name and address to some person interested in the case (*Wood v. Maclean*, [1947] S. L. T. 22).

(j) It should be noted that the automatic duty to stop under s. 22 (1) does not arise in cases under s. 40 (1), although it would arise in cases under s. 40 (2); see *post*, pp. 254 *et seq.*

(jj) As to what amounts to "driving," see *Saycell v. Boal*, [1948] 2 All E. R. 83, and *Wallace v. Major*, [1946] K. B. 473; [1946] 2 All E. R. 87, *ante*, p. 242.

(k) See *ante*, p. 171.

instance, the obligations under the subsection are imposed upon the "driver," not, be it noted, upon the owner, the person in charge of, or the person using the vehicle. That the latter interpretation is accurate is borne out by the provisions of section 40 (3) (l) which require the owner to furnish certain information when a "driver" has failed to produce his certificate under this section (m) for the purpose of determining whether or not the vehicle was then "being driven" in contravention of section 35 of the Act. Section 40 (3) thus, supplementing subsections (1) and (2), clearly contemplates only occasions when the motor vehicle was "being driven" as involving obligations under the two preceding subsections. Further light is thrown upon this point by the consideration of the similar terms of section 22 which impose the duty "to stop" upon the driver and thus appears to exclude cases in which the motor vehicle is stationary when an accident occurs. It is appreciated that the subsection under discussion is of importance, and that the interpretation of the expression under consideration is by no means an easy matter. It is, however, submitted that the obligations thereunder arising must be limited to cases in which the motor vehicle is being driven when the accident occurs (n).

"An accident occurs involving personal injury to another person."—Whereas the duty to stop and to furnish certain information is imposed by section 22 in cases when "damage or injury is caused to any person, vehicle or animal" (o), the duty arising under the present subsection is limited to accidents involving personal injury to another person. Thus where the "duty to stop" becomes effective where the driver himself, or his or any other person's vehicle or animal sustains injury or damage, no duty under section 40 (2) arises in any such case.

The difference between "causing damage or injury" (p) and "involving personal injury," apart from that necessitated by their different context, is probably merely one of words. For the purpose of the present duty the question of negligence or other wrongful act is immaterial (q). The "personal injury" is defined in relation to "an accident" from which it results, and not in relation to any person's breach of duty or wrongful act whereby the accident was caused. The driver, however innocent, however careful, must stop where an accident occurring through the presence (r) of his vehicle on the road has involved personal injury to any other person, whether a passenger in his vehicle or a stranger. The word "accident" must receive a broad interpretation. It cannot be confined to circumstances from which any question of guilty intention or negligence is absent (s). It cannot be confined to an "unlooked for mishap or an untoward event which is not expected or designed" (t). It is submitted that "accident"

(l) See *post*, pp. 258 *et seq.*

(m) S. 40 (1) and (2).

(n) In *Dawson v. Winter* (1932), 149 L. T. 18, it was decided that the initial duty of the driver of a vehicle involved in an accident under s. 22, to supply his name and address on request, must be complied with independently of reporting the same accident to the police; and that a subsequent report to the police within the proper time did not excuse the omission to supply the name and address under s. 22 (1). The Scots Court has held that if he has supplied his name and address on request by the other driver, he need not report to the police under s. 22 (2) (*Adair v. Fleming*, [1932] S. C. (J.) 51).

(o) "Animal" means horse, cattle, ass, mule, sheep, pig, goat, dog: s. 22 (3).

(p) Paraphrasing s. 22 (1). See also *Dawson v. Winter* (1932), 149 L. T. 18.

(q) "Causing" might be said to involve questions of fault, or legal liability, otherwise.

(r) See p. 252, *ante*, as to the meaning of this expression.

(s) As in the common parlance, or in the phrase "accidental death."

(t) See *per* Lord MACNAGHTEN in *Fenson v. Thorley & Co., Ltd.*, [1903] A. C. 443, at p. 448. It is in this sense that "by accident" in the Workmen's Compensation Act, 1925 (11 Halsbury's Statutes 513), is always interpreted.

within the present subsection must mean any occurrence arising out of the presence of a motor vehicle on a road in which a person other than the driver sustains injury (ii).

"The driver of the vehicle does not at the time produce his certificate to a police constable."—The implication of the use of the term "driver" at this point has already been discussed. A similar difficulty such as was discussed in concluding the commentary upon section 40 (i) arises here. The "driver" cannot comply in practice with his obligations under this subsection unless he stops driving and ceases, thus, to be a driver. The difficulty under this subsection is more easily surmounted than that under subsection (i) (u), inasmuch as in every case where the conditions of the present subsection arise the driver will already be under a duty to stop, by the operation of section 22 (v). To stop is therefore a duty inherent in all cases under section 40 (2), and one which must be complied with before the obligations under the latter subsection become effective.

The words "at the time" must also be widely interpreted. They cannot mean at the time when an accident occurs, nor at the time when the motor vehicle concerned is present or being driven upon a road; they must necessarily refer to that point of time at which the driver, in pursuance of his initial duty under section 22, has stopped his vehicle.

The expression "produce his certificate" has the same meaning as in section 40 (4), which is examined more fully below (w). The meaning of "police constable" has been already discussed in relation to the preceding subsection.

"Or to some person, who, having reasonable grounds for so doing, has required its production."—Whereas the duty to produce the certificate to a police constable is automatic and arises where the conditions of this subsection apply without any prior request on the part of such police constable, where that duty is not or cannot be complied with, the driver may produce it to some other person who requires its production. While nothing in the provision requires it, in practice the driver is invariably requested by a police officer, where one is present, to produce his certificate, and he does so without, as he might upon the construction of the subsection be entitled to do, producing it to some other person instead (i).

It is almost impossible to indicate what may be the "reasonable grounds" which entitle some person, not a police constable, to request production of a certificate. No *private* person has any legal right in such circumstances, apart from this subsection, to call upon another to disclose or produce his property or documents for inspection or perusal (a). "Reasonable grounds" cannot therefore be based upon any legal right, and must perforce be grounded on the facts of every particular case. It is submitted that a

(ii) In *Harding v. Price*, [1948] 1 All E. R. 283, a prosecution under s. 22, it was held that as that section required a driver positively to perform a duty, rather than in terms imposing an absolute prohibition on doing a particular unlawful act, therefore the defendant could avoid conviction where he showed that he had, and could have had, no knowledge of the occurrence of the accident. The same reasoning can be applied to this section 40 (2).

(i) See *ante*, pp. 249 *et seq.*
(v) See *ante*, p. 252. But the contrary does not hold true as the duty under s. 22 is much wider than that under s. 40 (2).

(w) *Post*, pp. 257-8.
(z) See *quære*: the phrase "who . . . has required its production" may be held to qualify both "police constable" and "some other person." The appearance of the comma before "who" tends to support, but the presence of the parenthesis "having reasonable . . . doing" to rebut, such construction.

(a) But see rights to "discovery" given in the Third Parties Act, 1930, etc., *ante*, pp. 145 *et seq.*

private person has "reasonable grounds" for calling upon a driver to produce his certificate in the following circumstances, *inter alia* :

- (i) where such person intends to make a claim upon the driver in respect of injuries sustained by himself ;
- (ii) where such person intends to report the driver to the police with a view to a prosecution based upon the circumstances in which the accident occurred (b) ;
- (iii) where such person is a witness of an accident involving personal injury to another sufficient to render that other person unable to make the request himself.

"The driver shall as soon as possible and in any case within twenty-four hours of the occurrence of the accident."—These words may be compared with their equivalent in section 22 (2), "as soon as is reasonably practicable and in any case within twenty-four hours." If there is any difference in practice between "reasonably practicable" and "possible," it must be negligible in view of the absolute limitation of twenty-four hours for the necessary report in both cases.

"Report the accident at a police station or to a police constable and thereupon produce his certificate."—Report must, it is submitted, mean to report orally and in person, inasmuch as the driver's report must be accompanied (subject to the proviso) by production of his certificate by him in person either at the time of the accident or subsequently, under the proviso. The driver may choose whether he reports the accident to a police constable or at a police station, and to which constable or station and in which locality.

The obligation to report and produce his certificate (c) only affects the driver when he has not, at the time of the accident involving personal injury, produced his certificate either to a police constable or to a person requiring its production upon "reasonable grounds." Should the driver at the time of the accident produce his certificate to either of such persons, then he is not subject to the obligation to report the accident and produce his certificate within twenty-four hours to a police constable or at a police station.

"And if he fails so to do."—Failure to do so is not, under this subsection, to be construed distributively, as was the case under section 40 (1) (d). It applies only to failure by the driver to report the accident and produce his certificate to a police constable or at a police station within twenty-four hours, where the driver is obliged to do so by reason of his failure to produce his certificate at the time of the accident.

"He shall be guilty of an offence."—Failure by the driver to report the accident and produce his certificate, where necessary, as last defined, is a summary offence punishable by a fine of £20 for the first offence and by a fine of £50 or three months' imprisonment for second and subsequent offences (e).

- "Proviso.—Provided that a person shall not be convicted of an offence under this subsection by reason only of failure to produce his certificate.
- "if, within five days after the occurrence of the accident, he produces the certificate in person at such police station as may be specified by him at the time the accident was reported."

This proviso only comes into operation in certain defined circumstances. In the first place, it can never take effect where the driver has produced his certificate at the time of the accident, for there the driver has done all that

(b) It is submitted that the public interest would justify such a ground.

(c) See s. 40 (4), *post*, as to meaning of this.

(d) See *ante*, p. 249.

(e) See s. 113 (1) and (2).

can be required of him. In the second place, a driver who has failed to report the accident within twenty-four hours cannot take advantage of the proviso. In the third place, the proviso only covers the driver's failure to produce his certificate at the time when he reported the accident to a police constable or at a police station, an obligation which does not arise where he has produced his certificate in accordance with the subsection at the time of the accident. Subject to these limitations, the effect and meaning of the proviso are similar, *mutatis mutandis*, to those of the proviso to section 40 (1) which have already been examined.

6. Section 40 (3).

"It shall be the duty of the owner of a motor vehicle to give such information as he may be required by or on behalf of a chief officer of police to give for the purpose of determining whether the vehicle was or was not being driven in contravention of section thirty-five of this Act on any occasion when the driver was required under this section to produce his certificate, and if the owner fails to do so he shall be guilty of an offence."

"*It shall be the duty of the owner of a motor vehicle.*"—The meaning of the words "owner of a motor vehicle" has already been noted, as has the effect of the use in this context of the term "driver" upon the meaning of the two preceding subsections (f). The provision now under consideration is inserted in order to make section 35 (g) effective where the driver who has been required to produce his certificate in the events specified in the two preceding subsections has failed to do so.

"*To give such information as he may be required . . . to give.*"—This phrase must be interpreted in conjunction with the words which next follow, which indicate the limits to the information which an owner can be called upon to give.

"*By or on behalf of a chief officer of police.*"—"Chief officer of police" is defined in relation to the Police Pensions Act, 1921 (h). The relevant part of that Act (i) indicates that chief officers of police are the City or Metropolitan Commissioners of Police in London and elsewhere the Chief Constable of a County or Borough Police Force (ii). It is submitted that it must be made known to the owner in every case that information is being required of him by or on behalf of a chief officer of police, before he is obliged to furnish the information necessary.

"*For the purpose of determining whether the vehicle was . . . being driven in contravention of section 35 of this Act on any occasion when the driver was required . . . to produce his certificate.*"—The circumstances in which a driver can be required to produce his certificate have been dealt with fully in the notes upon the two preceding subsections. The duty of the owner under the present provision does not arise unless the request to him for information has been preceded by the events specified in section 40 (1) or (2), unless, that is, an occasion has arisen when the driver was required to produce his certificate. The existence of such an occasion provides the initial condition for the operation of the duty under this subsection, which is further qualified by the phrase "for the purpose of determining, etc." It is the duty of the owner to furnish, upon proper request, information which he is required to give for determining whether his motor vehicle was

(f) *Ante*, pp. 249-256.

(g) See pp. 163 *et seq.*, *ante*.

(h) S. 121 (1), as amended by Schedule III of the Road Traffic Act, 1934.

(i) S. 30, Schedule III (12 Halsbury's Statutes 888, 894).

(ii) A chief officer of police, other than in London, may delegate his functions to any police officer not below the rank of inspector (s. 7, Police Pensions Act, 1921). The Commissioners of Police in London cannot delegate their functions (*ibid.*, s. 9).

being driven (*h*) contrary to section 35 at the particular time when the driver was called upon to comply with section 40, but not for any other purpose. The request of the police for information must be limited to the specific purpose indicated and the owner is not under any obligation to furnish information which bears upon the "driving" of his car upon some other occasion, not within section 40. The subsection does not oblige the owner to give information directed to any other purpose or to any other occasion or offence. Its scope is limited to what is expressly provided.

"*And if the owner fails to do so he shall be guilty of an offence.*"—The offence is one which can only be made the subject of summary proceedings, and the penalties therefor are as defined in section 113 (2) (*l*) of the Act. It is submitted that the subsection as far as it may have penal consequences must be strictly interpreted and that, unless it is proved by the prosecution that an occasion for the operation of section 40 (1) and (2) has arisen, that the owner was properly requested to furnish information, that such request was confined to the driving of the car upon the occasion under section 40 concerned, that such request was made solely to determine whether or not on that occasion the driver (*m*) was covered by the requisite insurance against third party risks, and that the owner in all these conditions failed to perform the duty laid upon him, the prosecution cannot succeed.

7. Section 40 (4).

"In this section the expression 'produce his certificate' means produce
"for examination the relevant certificate of insurance or certificate
"of security or such other evidence that the vehicle is not or was not
"being driven in contravention of section thirty-five of this Act as may be
"prescribed."

The expression "produce his certificate" occurs throughout section 40, as has been indicated, and this subsection is designed to give definition to the comprehensive ambiguity of the phrase where it is used.

"*Produce for examination.*"—This phrase is governed by subsections (1) and (2) of section 40, and requires the driver upon the events therein specified to produce his certificate for perusal and examination:

- (i) by a police constable either when called upon to do so or when an accident involving personal injury to another has occurred; or
- (ii) alternatively, under the respective provisos, by a police constable at a police station; or
- (iii) under subsection (2) by some other person to whom he has produced it in response to a request upon "reasonable grounds" to do so.

The scope of the examination to which the certificate, etc., may be subjected is limited only by the terms and contents of the certificate itself (*n*).

"*The relevant certificate of insurance or certificate of security.*"—As has been stated every person who uses a motor vehicle on a road must be covered, save in certain exceptional cases, by insurance or security against risks of injury to third parties arising out of such use (*o*). Such a person is not sufficiently covered unless a certificate of insurance or of security has been delivered to him before he uses or permits the use of a motor vehicle (*p*). In order to comply with the requirements of section 40 the driver must

(*h*) Cf. the expression "use" in s. 35 (1).

(*l*) See *post*, p. 264.

(*m*) Cf. s. 35 (1), "the user."

(*n*) The Minister of Transport has made Regulations governing the contents, terms and appearance of certificates. See S. R. & O. 1941, No. 926.

(*o*) See *ante*, pp. 163 *et seq.*, s. 35 (1).

(*p*) See *ante*, pp. 214, 226, ss. 36 (5), 37 (2).

produce for examination, unless he falls into one of the excepted categories, a certificate of insurance or security, in the prescribed form (g) which relates to his particular use of the car at the particular time when his obligations under section 40 arise. Unless such a certificate does relate to such user by the driver at such time, so as to cover him in respect of the specified third party risks arising therefrom, it cannot be said to be "relevant." To determine the question of whether a certificate is or is not relevant, according to the test which is here suggested, the previous comments upon the meaning of section 35 (1) (r) should be borne in mind.

The use of the possessive pronoun in the phrase "produce his certificate" is misleading inasmuch as it is the *relevant* certificate which must be produced. In practice many cases arise in which the certificate considered as being "relevant" is one which does not cover the driver producing it in name, e.g. in the case of a hired car, or when the owner's servant is driving otherwise than under a "named driver" policy. Further difficulty arises in cases where the owner or other assured obtains, as he is entitled to do, a duplicate certificate from his insurers (s). As has been indicated such duplicates could be used in evasion of the requirements of section 35, where by means of their use two cars are being driven by two separate persons at the same time under duplicate certificates issued in respect of the same policy of insurance. While in such case the policy would not be effective, as a rule, to cover the risks arising to either or both drivers, nevertheless each driver being armed with a formal and relevant certificate, superficially, at least, in order, would be able apparently to comply with the letter of section 40, despite his driving in contravention of section 35. He would, of course, be liable to prosecution, but the risk of this would be small, for in practice it would be almost impossible to determine whether the "duplicate" was being properly used and within the terms of the policy or not. Further, the Act provides no obligation upon drivers to carry certificates about with them (t), and imposes no duty upon a person producing a certificate to prove that such certificate is effective or that the policy under which it was issued covered his user of the particular motor vehicle on the particular occasion concerned (u).

"Or such other evidence that the vehicle is not or was not being driven in contravention of section 35 as may be prescribed."—The exceptions from the requirement of section 35 (1) in respect to certificates of insurance or security have been earlier discussed (v). The phrase now under consideration is, it is submitted, introduced to deal with the cases of persons excepted from the obligation to be covered by insurance or security under Part II of the Act. These persons are specified in section 35 (4) (w), and in section 121 (2) (x). They are, briefly put, the Crown and its servants, local and police authorities, and persons who have deposited £15,000 in the Supreme Court.

As the person using a motor vehicle in cases covered by these exceptions will be protected by neither a certificate of insurance nor a certificate of security, possession of which is essential under the Act, he must produce "other evidence" showing that he is not using the car in contravention of section 35. This other evidence varies according to the exceptional class

(g) S. R. & O. 1941, No. 926.

(r) *Ante*, pp. 170 *et seq.*, *post*, p. 292.

(s) See *ante*, p. 215, S. R. & O. 1941, No. 926, Rule 7.

(t) Subject to the qualified obligation arising under s. 40 (1) and (2)—limited by the provisos.

(u) But when a prosecution under s. 35 has been initiated, *semble*, the onus of proving "effective cover" is upon the defence. See *Williams v. Russell* (1933), 149 L. T. 190. And see further, chapter IX, *post*.

(v) *Ante*, pp. 185 *et seq.*

(w) *Ante*, p. 185.

(x) *Ante*, p. 170.

within which the person using the vehicle falls. It is submitted that "other evidence" does not and cannot imply that a person covered by certificate of insurance or security is entitled to produce other evidence that he is complying with section 35 than such certificate (a). The driver may only produce "other evidence" when he is excepted from the obligation of having a certificate of insurance or security. This construction is borne out by the regulations prescribed by the Minister of Transport under this section (b). These regulations, after prescribing the contents and form of certificates of insurance or security, make the following provision:

" 8. The following evidence that a motor vehicle is not being driven in contravention of Section 35 of the Act may be produced by the driver of such motor vehicle on the request of a police constable in pursuance of Section 40 of the Act as an alternative to the production of a certificate of insurance or a certificate of security:—

" (1) A duplicate copy of a certificate of security issued in accordance with Regulation 5 (1) (b) of these Regulations.

" (2) in the case of a motor vehicle of which the owner has for the time being deposited with the Accountant-General of the Supreme Court the sum of fifteen thousand pounds in accordance with the provisions of sub-section (4) of Section 35 of the Act a certificate in the form E set out in the Schedule to these Regulations, signed by the owner of the motor vehicle or by some person authorised by him in that behalf.

" (3) in the case of a motor vehicle owned by a local authority as defined in sub-section (6) of Section 35 and Section 44 of the Act, or by a police authority or by the receiver for the Metropolitan Police District a certificate in the form F set out in the Schedule to these Regulations signed by some person authorised in that behalf by such authority or receiver as the case may be."

" 9. Any certificate issued in accordance with sub-paragraph (2) or (3) of the preceding Regulation shall be destroyed by the person by whom it was issued before the motor vehicle to which it relates is sold or otherwise disposed of."

There remain to be dealt with under the heading of Criminal Offences certain further sections of the Road Traffic Act, 1930, and some other matters which bear particularly upon offences arising under the provisions of Part II of the Act. These are:

(1) Sections 112 and 113 of the Act.

(2) Section 8 of the Act.

(3) The position of persons aiding and abetting offences under Part II of the Act.

(4) Offences under the Minister's Regulations.

8. Section 112 (1).

Forgery, &c., of licences and certificates.

" If, with intent to deceive, any person—

" (a) forges within the meaning of the Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), or alters or uses or lends to or allows to be used by any other person a licence under any Part of this Act or a certificate of insurance or certificate of security under Part II of this Act; or

(a) This is borne out by S. R. & O. 1941, No. 926, Regulation 8. There is, however an exceptional case in which a copy of a certificate suffices, under Reg. 8 (1), but a "duplicate" may be produced (Reg. 7 of S. R. & O. 1941, No. 926).

(b) *Ibid.* As to the meaning of "prescribed," see s. 121 (1), and for the Minister's powers to make regulations under Part II. see s. 41, *ante*, pp. 237 *et seq.*

- " (b) makes or has in his possession any document so closely resembling
 " such a licence or certificate as to be calculated to deceive,
 " he shall be guilty of a misdemeanour and shall be liable—
 " (i) on conviction on indictment to imprisonment for a term not exceed-
 " ing two years ;
 " (ii) on summary conviction to imprisonment for a term not exceeding
 " four months or to a fine not exceeding one hundred pounds, or
 " to both such imprisonment and fine."

An offence under this subsection is committed when a person with intent to deceive, that is, with the intention of inducing someone "to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false" (c), does any one of the following acts :

(a) *Forges a licence (d) or a certificate of insurance or security.*—The word forges is expressly referable to the Forgery Act, 1913 (e), which enacts that forgery consists in making a false document in order that it may be used as genuine (f).

(b) *Alters a licence or a certificate of insurance or security.*—This is probably surplusage inasmuch as a false document in the definition of forgery quoted above and incorporated into the subsection includes a document to which a material alteration, whether by way of addition, insertion, obliteration, erasure, removal or otherwise has been made (f).

(c) *Uses a licence or certificate of insurance or security.*—This must, of course, be qualified by reference to the essential element in all the cases considered here, i.e. the intent to deceive. It would cover the case of a person knowingly using an expired certificate or licence (although this in itself would constitute another offence), or the case of a person who borrows another's licence or certificate and drives under the pretended cover of it (g).

(d) *Lends a licence or certificate of insurance or security.*—This again extends only to lending with the intent to deceive (g).

(e) *Allows another person to use a licence or certificate of insurance or security (g).*

(f) *Makes a document so closely resembling a licence or certificate of insurance or security as to be calculated to deceive.*—This must necessarily mean the making of a document which purports to be a valid licence or certificate, and which is not one in fact. Not only must such document be calculated to deceive, that is, such as might well from its appearance or content deceive a reasonable man, but it must also be made with intent to deceive (h), as above defined. This prevents this subsection from applying to the issue of invalid certificates of insurance by innocent persons, who by reason of their failure to comply with the necessary statutory provisions (i) are not in fact "authorised insurers," and are thus not entitled to issue certificates under Part II of the Act.

(g) *Has in his possession such a document as in (f) above.*—The Forgery Act, 1913, makes possession of certain forged documents a criminal offence "unless the person in possession has a lawful authority or excuse" (h). In

(c) *Per BUCKLEY, J., in Re London and Globe Finance Corporation, Ltd., [1903] 1 Ch. 728, at p. 732.*

(d) Any licence under the Road Traffic Act, 1930.

(e) 4 Halsbury's Statutes 787.

(f) *Ibid.*, s. 1. It may be noted that forging a policy of insurance or any assignment thereof or endorsement thereon with intent to defraud is a felony punishable with 14 years' penal servitude under the Forgery Act, 1913, s. 2.

(g) These offences would cover the suggested evasion of s. 35 by means of duplicate certificates issued under the Minister's Regulations. But such offences would be extremely difficult to prove.

(h) S. 112 (1), *ante*, p. 250.

(i) See fully, *ante*, pp. 227 *et seq.*

(h) Ss. 8, 9, and 10 (4 Halsbury's Statutes 793-795).

the present case there can be no question of lawful authority or excuse, because mere possession does not constitute the offence under the subsection; intent to deceive is essential to the offence, and where a person is in possession of such documents as are defined with intent to deceive there can be no question of a lawful authority or excuse.

9. Section 112 (2).

" If any person for the purpose of obtaining the grant of any licence to himself or any other person knowingly makes any false statement, or for the purpose of obtaining the issue of a certificate of insurance or of a certificate of security under Part II of this Act makes any false statement or withholds any material information, he shall be liable to a fine not exceeding fifty pounds or to imprisonment for a term not exceeding six months, or to both such imprisonment and fine."

This subsection creates three distinct offences which must be separately considered.

(a) *Knowingly making a false statement for the purpose of obtaining a licence.*—A person who for the purpose of obtaining the grant of any licence to himself or any other person knowingly makes a false statement is guilty of an offence for which he may be fined not more than £50, or imprisoned for not longer than six months, or both fined and imprisoned. The same penalties apply to the offences discussed under (b) and (c) below. No one who makes an untrue statement without knowing that it is false, or not believing that it is true, can be convicted under this subsection.

(b) *Making a false statement for the purpose of obtaining the issue of a certificate of insurance or certificate of security under Part II of the Act.*—The subsection does not say whether making a false statement in order that such certificate should be issued to another person is an offence, although this is expressly so provided in the case of licences. The absence of such equivalent language, together with the practical consideration that circumstances in which a certificate would be issued by insurers upon the statement of a person other than the assured must be uncommon, make it doubtful whether this offence is as wide in scope as that which precedes it in the subsection (1). Much could be said for both constructions, but it is submitted that the offence could be committed by an agent for a prospective insured person who makes false statements in order to obtain the issue of a certificate to his principal.

Again this offence differs from the similar offence relating to licences (m) by the absence of the word "knowingly." A false statement is merely a statement not in fact true, which does not necessarily involve knowledge or recklessness on the part of the person making it. Having regard to the fact that "knowledge" is expressly eliminated as an element in this particular offence, an omission which the context reinforces, it is difficult to say that the expression "false statement" has any subjective meaning, that, in fact, it postulates any state of mind on the part of the maker. It is, therefore, submitted with some reluctance that guilty knowledge (i.e. actual knowledge of falsity, recklessness or carelessness) is not an element in the offence here created, and that the making of a statement in fact untrue, however innocently, would expose the maker to the dangers of prosecution.

In *Jones v. Meatyard* (n), the defendant made an admittedly false statement, that of giving a false name, in order to obtain a cover note which included a certificate of insurance. The stipendiary magistrate dismissed the summons on the ground that no financial gain or advantage had accrued

(l) *I.s.* (a) under s. 112 (2).

(m) *Ante*, p. 259.

(n) [1939] 1 All E. R. 140.

to the defendant thereby. The Divisional Court held that the question whether gain or advantage was derived was immaterial, and by implication agreed with the suggested construction of this part of the section that once a statement is proved to be false and that the statement was made to obtain a certificate of insurance, the offence is proved without further evidence.

(c) *Withholding material information for a purpose similar to (b) above.*—The Road Traffic Act, 1930, contains no definition of "material" (o). It is submitted, however, that having regard to the object of the present subsection, information is "material" when it is such that its non-disclosure would entitle the insurers to avoid a contract affected by such non-disclosure. "Material information," then, is such information as the assured should have disclosed when making his proposal or offer of entry into a contract of insurance. The tests of materiality in this context are fully discussed elsewhere (p) in this work. It is suggested that, on analogy with the offence discussed in (b) above, the withholding of material information for the purpose of obtaining the issue of a certificate of insurance or security to another person is equally an offence. But while under the offence last considered guilty intention is submitted to be irrelevant, the position under the offence under present discussion appears to be otherwise. "Withholding," which consists in non-disclosure, must be read in conjunction with "for the purpose of." The withholding of material information innocently, without knowledge or belief on the part of the person concerned of its materiality would not, it seems, be a "withholding for the purpose of." It is submitted that this offence is not committed unless a person deliberately withholds material information knowing that if he disclosed it no certificate might be issued, and knowing that his failure to disclose it may result in the issue of a certificate. The submission made as to the offence of making a false statement does not apply in this case, since the subject-matter of this offence is intrinsically different.

10. Section 112 (3).

"If any person issues a certificate of insurance or certificate of security which is to his knowledge false in any material particular, he shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding one hundred pounds, or to both such imprisonment and fine."

It is an offence which can be made the subject of summary proceedings, but as to which an accused can claim right to trial by jury (q), punishable by the imprisonment or fine specified, to issue a certificate of insurance or security which the person issuing knows to be false in a material particular. Materiality in this context is different from materiality under section 112 (2) last considered. It is submitted that it should be construed in a sense similar to that in which it is used in relation to other documents, such as bills of exchange (r) or certificates, declarations and statements under the Perjury Act, 1911 (s). Upon these analogies a material particular is any

(o) "Material" is now given a definition by s. 10 (4) of the Road Traffic Act, 1934 (27 Halsbury's Statutes 545), for the purposes of that section. See *post*, p. 313.

(p) See chapter II, *ante*, pp. 100 *et seq.* and chapter VII, *post*, tit. "Misrepresentation and Non-disclosure."

(q) The maximum sentence being 6 months' imprisonment. Summary Jurisdiction Act, 1879, s. 17 (11 Halsbury's Statutes 329).

(r) Bills of Exchange Act, 1882, s. 64 (2 Halsbury's Statutes 68); 2 Halsbury's Laws, 2nd Edn. 713-14.

(s) 4 Halsbury's Statutes 772.

particular which affects the existence, validity, effect and availability of the certificate of insurance or security.

Merely to issue a certificate false in a material particular is not an offence. The element of knowledge of falsity is essential to the offence. In *Ocean Accident and Guarantee Corporation, Ltd. v. Cole* (t) the insurers had issued to their assured on June 11, 1931, a certificate which contained the statement "Date of commencement of insurance June 4, 1931." The assured had applied prior to June 4 for renewal of his existing policy from June 4, 1931, to June 3, 1932. Under the conditions of his policy no liability arose on the part of the insurers until the premium had been paid by the assured, and this was not done until June 11, 1931, the certificate being issued on the same day. The insurers were prosecuted and convicted under this section (u) of issuing a certificate of insurance to their knowledge false in a material particular, viz. "Date of commencement of insurance June 4, 1931." On case stated the insurers succeeded in quashing the conviction. The Court was in disagreement as to the retrospective effect of the acceptance of the premium, but agreed that there was no evidence that the material particular complained of was false to the appellants' knowledge and upon this ground quashed the conviction.

"Any person" in this subsection bears primarily the same meaning as elsewhere in the Act. But inasmuch as a certificate of insurance or security must be a certificate under Part II of the Act it is difficult to see to whom other than "authorised insurers" under Part II of the Act this subsection can apply (v). A document purporting to be a certificate of insurance or certificate of security which has not been issued by an authorised insurer cannot be a certificate under Part II of the Act, to which documents it is submitted that section 112 exclusively applies. The effect of the subsection now under discussion might therefore be held to be limited to authorised insurers. It is thought, however, that a person pretending to be an authorised insurer could be convicted under the subsection if he issued a certificate. The time within which a prosecution must commence has been explained (w).

11. Section 112 (4).

"If any police constable has reasonable cause to believe that any
 "licence or certificate of insurance or certificate of security produced to
 "him in pursuance of the provisions of this Act by the driver of a motor
 "vehicle is a document in relation to which an offence under this section
 "has been committed, he may seize the document, and when any document
 "is seized under this section, the person from whom it was taken shall,
 "unless the document has been previously returned to him or he has pre-
 "viously been charged with an offence under this section, be summoned
 "before a court of summary jurisdiction to account for his possession of
 "the said document and the court shall make such order respecting the
 "disposal of the said document and award such costs as the justice of the
 "case may require."

This subsection is self-explanatory. It entitles a police constable to whom a licence or certificate of insurance or security is produced under the Act (a) to seize such document where he suspects upon reasonable grounds that some offence under the three preceding subsections has been committed in relation to such document. When a document has been thus seized it

(t) [1932] 2 K. B. 100; see *ante*, p. 178.

(u) S. 112 (3).

(v) As to "authorised insurers," see *ante*, pp. 227 *et seq.*
 (w) By the effect of s. 33 of the Act of 1934 all the offences arising under s. 112 must be prosecuted within the same periods as are applicable to offences under s. 35 of the 1930 Act. See *ante*, p. 242.

(a) Under s. 5 (5) and s. 40, *ante*, pp. 249 *et seq.*, 252 *et seq.*

may be returned to the person from whom it was taken (b). If it is not so returned such person must be summoned before a Court of Summary Jurisdiction, which upon such summons will make an order for the disposal of the document seized and dealing with costs as the justice of the case requires. The purpose of summoning a person from whom such document has been seized is that he shall "account for his possession of the document." No penalty other than in relation to costs can be inflicted upon him if he fails to account for his possession of it, and he is entitled to refuse to answer any question his answer to which may tend to criminate him (c). The subsection does not provide that evidence shall be given on oath, but it would seem that this could be insisted upon under sections 1, 14 and 15 of the Summary Jurisdiction Act, 1848 (d). Such proceedings cannot be taken against a person who has been previously charged with any offence under section 112, whether he has been convicted or acquitted upon such charge (e). A person summoned to appear under this subsection may appeal by way of case stated from the order of the Court as to the disposal of the document in question upon the grounds that such order is erroneous in law or in excess of jurisdiction (f). No appeal can be made to Quarter Sessions, inasmuch as there being no offence and no conviction the relevant procedure is not applicable (g). Thus it appears that unless, as is unlikely, an aggrieved person could show that the order as to costs is erroneous in point of law or in excess of jurisdiction (h) so as to justify appeal by way of case stated, the Court's decision on costs cannot be questioned.

12. Section 112 (5).

"In this section the expressions 'certificate of insurance' and 'certificate of security' include any document issued under regulations made by the Minister in pursuance of his power under Part II of this Act to prescribe evidence which may be produced in lieu of a certificate of insurance or a certificate of security."

Certificate of insurance or certificate of security, wherever those words appear in section 112, mean, primarily, a certificate of insurance or security issued under and in accordance with the provisions of Part II of the Act (i). Their secondary meaning is a document issued under the Minister of Transport's Regulations made under Part II of the Act, which prescribe what evidence is to be produced in lieu of such certificate. These regulations have already been discussed (k) in connection with section 40 of the Act and will be found reproduced in the notes to that section.

13. Section 113 (1) and (2).

"(1) Save as otherwise expressly provided, all offences under this Act shall be prosecuted under the Summary Jurisdiction Acts.

"(2) A person guilty of an offence under this Act for which no special penalty is provided shall be liable in the case of the first offence to a fine

(b) S. 112 (4).

(c) See Powell on Evidence, 10th Edn., p. 192, and the Witnesses Act, 1806 (8 Halsbury's Statutes 190).

(d) 11 Halsbury's Statutes 270.

(e) Cf. Mahaffy and Dodson, Road Traffic Act, 1930. It is submitted that the wording of s. 112 (3) is unambiguous, and further that the principle *nemo debet bis vexari* falls to be applied here.

(f) Summary Jurisdiction Act, 1879, s. 33 (11 Halsbury's Statutes 341).

(g) *Ibid.*, s. 19; Criminal Justice Administration Act, 1914, s. 37 (11 Halsbury's Statutes 386).

(h) For example, should an order purport to be made against a person not before the Court.

(i) See *ante*, pp. 214 *et seq.*, 257 *et seq.*

(k) *Ante*, pp. 257-9.

"not exceeding twenty pounds, and in the case of a second or subsequent conviction, to a fine not exceeding fifty pounds, or to imprisonment for a term not exceeding three months."

By the effect of these provisions all the offences dealt with above, other than those arising under section 112 (1) (l) must be prosecuted before a Court of Summary Jurisdiction. Notwithstanding this, persons prosecuted under section 112 (2) and (3) have the right to claim trial by jury, the maximum penalties in those cases being in excess of three months' imprisonment. Where no penalty is expressly provided in a section created by an offence, subsection (2) of section 113 applies. Thus, of the offences dealt with above the penalties prescribed in this subsection apply to offences under sections 22, 40, subsections (1), (2) and (3) (m), and section 113 (3) (n). Offences under section 7 (4), 20 (3), 35 (1) and (2) (o), 112 (1), (2) and (3) (p) are governed by the specific penalties therein provided.

14. Section 113 (3).

"Where the driver of a vehicle is alleged to be guilty of an offence under this Act—

"(a) the owner of the vehicle shall give such information as he may be required by or on behalf of a chief officer of police to give as to the identity of the driver, and, if he fails to do so, shall be guilty of an offence, unless he shows to the satisfaction of the court that he did not know and could not with reasonable diligence have ascertained who the driver was; and

"(b) any other person shall, if required as aforesaid, give any information which it is in his power to give and which may lead to the identification of the driver, and, if he fails to do so, he shall be guilty of an offence."

The two provisions of this subsection are designed to enable the police authorities in every case to enforce the penal sections of the Act against persons in breach. The owner of any vehicle or any other person comes under an obligation, when so required by a chief officer of police (q), to give information as to the identity of the driver or information which may lead to his identification respectively in any case where it is alleged that the driver of a vehicle has been guilty of any offence under the Act. The obligation differs according to whether the request for information is made of the owner or of any other person. "Any other person," not being the owner of a vehicle, is only required to give such information which he is able to give, *i.e.* "which is in his power," as may lead to the identification of the offending driver. An owner, on the other hand, must give information as to the identity of the driver of his vehicle if he is alleged to have committed an offence. It is no defence to him that he cannot give the required information because he does not know, or upon any other ground, unless he proves that he could not with reasonable diligence have ascertained who the driver was.

The onus, thus, is placed upon an owner to find out, if he can, by using reasonable care, who has been driving his car, and if he fails to do this and is consequently unable to furnish the required information as to identity he will be liable to prosecution. Offences under this subsection are triable summarily, and the penalties specified in section 113 (2) are applicable.

(l) *Ante*, p. 259.

(n) *Post*, p. 265.

(p) *Ante*, pp. 261 *et seq.*

(m) *Ante*, pp. 249 *et seq.*

(o) *Ante*, pp. 242 *et seq.*

(q) As to meaning of this phrase see p. 256, *ante*, and s. 121 (1).

15. Miscellaneous.—In concluding this section upon criminal offences it remains to refer to three additional matters affecting criminal liability under Part II of the Road Traffic Act, 1930. These are, endorsements upon licences, the position of aiders, abettors and inciters of offences under the Act, and offences under the Minister of Transport's Regulations.

(1) *Endorsements on licences.*—Where a conviction under section 35 (1) and (2) of Part II is recorded, carrying with it the automatic disqualification (r) from holding or obtaining a licence under Part I, particulars of the conviction and disqualification must be endorsed on the offender's licence by virtue of section 6 (1) (b) of Part I (s). In the case of conviction for any other offence dealt with above, the Court may in its discretion order particulars of the offence to be endorsed on the offender's licence. In such case the provisions of Part I of the Act as to endorsements, their effect, notification and discharge apply (t).

(2) *"Aiding and abetting."*—Part II of the Act makes no provision for the prosecution and punishment of persons who aid and abet principals to commit offences (u). In relation to all of the offences dealt with above, the ordinary law applies to aiders and abettors, who are thus, by the provisions of the Summary Jurisdiction Act, 1848 (v), rendered liable to be proceeded against and convicted either together with, or before or after, the principal offender, and to be punished in the same manner as the principal offender (u).

"Aiding and abetting" is a distinct offence from the offences of causing or permitting specified in section 35. A person aids and abets another in the commission of a crime when he is present as a willing party at the place when and where the crime is committed, although he does not actively participate in the crime, or when, without being present on such occasion, he counsels or procures the commission of a crime by another (x). Although such a person may also be guilty of "causing or permitting," made a special offence under section 35 of the Act, the two offences are not necessarily coincident.

3. *Offences against Regulations.*—The power given to the Minister of Transport to make regulations under the Road Traffic Act, 1930, dealing with the various matters therein referred to, have already been mentioned (y). While various sections of the Act confer rule-making power on the Minister of Transport, section 111 provides generally for the manner in which his powers shall be exercisable. The section has already been reproduced in Part 6 of this chapter (a).

Of its subsections the first two were considered there. The fourth subsection is one commonly to be found in statutes conferring extensive rule-making powers upon responsible Ministers, and is designed to counter the submission which is sometimes made in proceedings for the enforcement of penalties for breach of such regulations—namely, that it must be proved that the Minister has properly complied with the formalities necessary for the

(r) Unless the Court for special reasons orders otherwise. See pp 243 *et seq.*, *ante*.

(s) The relevant wording is: "... shall, where a person is by virtue of a conviction disqualified from holding or obtaining a licence ..."

(t) See fully s. 8 of the Act.

(u) Cf. s. 10 (5) of the Act, which makes such special provision for the limited purposes of s. 10, "rate of speed."

(v) S. 5 (11) Halsbury's Statutes 275).

(x) In the case of offences under s. 113 (1), which are indictable, aiders and abettors are put in the same position by the Accessories and Abettors Act, 1861, s. 8 (4 Halsbury's Statutes 541).

(y) See generally, 9 Halsbury's Laws, 2nd Edn. 27-40.

(z) *Ante*, pp. 237 *et seq.*

(a) *Ante*, p. 235.

issue and enforcement of such regulations (b). The third subsection limits the penalties which the Minister may impose for the breach of regulations to be issued by him. The regulations in fact issued by the Minister of Transport under the Road Traffic Act, which are legion, prescribe various penalties for breach of their provisions. The penalty imposed under the rules is rarely the maximum specified in the subsection referred to. Order 926 of 1941 (c) may be aptly used to illustrate this. The order is issued under the general operation of section 111, but the rules themselves prescribe by Regulation 37 that the maximum fine for their breach shall be £5 and not the £20, the highest possible penalty which the Minister is empowered to impose under that section (d).

PART 9.—HOSPITAL CHARGES

Section 36 (2) (e).

"Where any payment is made (whether or not with an admission of liability) by

"(a) an authorised insurer under or in consequence of a policy issued in consequence of this Part of this Act; or

"(b) the owner of a vehicle in relation to the user of which a security under this Part of this Act is in force; or

"(c) the owner of a vehicle who has made a deposit under this Part of this Act,

"in respect of the death of or bodily injury to any person arising out of the use of a motor vehicle on a road or in a place to which the public have a right of access, and the person who has so died or been bodily injured has to the knowledge of the authorised insurer or such owner as the case may be received treatment at a hospital, whether as an in-patient or as an out-patient, in respect of the injury so arising, there shall also be paid by the authorised insurer or such owner to such hospital the expenses reasonably incurred by the hospital in affording such treatment, after deducting from such expenses any moneys actually received by the hospital in payment of a specific charge for such treatment, not being moneys received under any contributory scheme:

"Provided that the amount to be paid by the authorised insurer or such owner shall not exceed fifty pounds for each person so treated as an in-patient, or five pounds for each person so treated as an out-patient.

"For the purposes of this subsection the expression 'hospital' means an institution (not being an institution carried on for profit) which provides medical or surgical treatment for in-patients and the expression 'expenses reasonably incurred' means—

"(a) in relation to a person who receives treatment at a hospital as an in-patient, an amount for each day such person is maintained in such hospital representing the average daily cost for each in-patient of the maintenance of the hospital and the staff thereof and the maintenance and treatment of the in-patients therein; and

"(b) in relation to a person who receives treatment at a hospital as an out-patient, reasonable expenses actually incurred."

(b) The provisions of the Documentary Evidence Act, 1868 (8 Halsbury's Statutes 230), do not sufficiently dispose of this difficulty.

(c) S. R. & O. 1941, No. 926.

(d) *Ibid.*, No. 926, Rule 37.

(e) The words reproduced in the text are those substituted for the old s. 36 (2) by the Road and Rail Traffic Act, 1933, s. 33. By the National Health Service Act, 1946, 10th schedule, any requirement in this subsection for the payment of money to a hospital is to be construed, as from July 5, 1948 (the appointed day), in the case of a hospital vested in the Minister of Health as requiring payment to be made to the Regional Hospital Board for the area or, in the case of a teaching hospital, to the Board of Governors. Ss. 16, 17 of the Road Traffic Act, 1934, are similarly affected.

Section 36 (2) has now been replaced by section 33 of the Road and Rail Traffic Act, 1933, which is reproduced above (f). Under the repealed subsection insurers were made liable in certain circumstances to pay a sum not exceeding £25 in respect of expenses reasonably incurred by a voluntary hospital in affording treatment to third parties in respect of whose claims the insurers had made payments. The substituted provision makes fundamental changes (g). Insurers and the specified classes of owners of vehicles are by this subsection made liable to pay any hospital its reasonably incurred expenses, up to the maxima of £50 or £5, in respect of a third party who has received treatment for his injuries as an in- or out-patient. This liability exists whether or not a hospital has charged or received payment for such treatment rendered to the third party. Payments received must, however, be deducted from the total expenses reasonably incurred by the hospital and the insurer or owner is chargeable only with the balance, not exceeding £50 or £5, respectively (h).

Up to the passing of the National Health Service Act, 1946, hospital authorities have rightly made use of this subsection to charge for treatment received any person injured in a motor accident, where that person has a valid claim in a running-down action against an insured motorist for the injuries received, even though the injured person would not, owing to his own lack of means, have been charged anything for the treatment received. The committee on Alternative Remedies seemed to assume in their report (hh) that should a free State Health Service be set up, such charges would no longer be made. If this view be correct, the subsection under review will become in the main obsolete. But whether it be so or not, a further point arises where the injured person avails himself of medical facilities not provided by the free State Service. In such a case, special provision has been made under section 2 (4) of the Law Reform (Personal Injuries) Act, 1948, by virtue of which such expenses, if reasonably incurred, will be recoverable as special damages (i).

The subsection of the 1933 Act raises certain clear-cut and simple issues:

(i) *Liability of injured party to hospital charges.*—Such liability is either statutory—where treatment is received in a local authority's hospital (ii) or based upon contract. Where an injured person is received conscious into a voluntary hospital and submits to treatment, no question arises; where he is received unconscious, then it would appear that he is not liable for the costs of treatment received whilst unconscious, unless such treatment was given upon the instructions of a person who had authority, express or

(f) S. 33 (26 Halsbury's Statutes 898).

(g) Under the Road Traffic Act, 1930, s. 36 (2) (23 Halsbury's Statutes 637), the insurers were only liable where the hospital has made no charge for treatment. The new provision does not, however, it is submitted, entitle the hospital to make a profit out of insurers, and subject to the maxima claimable the hospital cannot receive more from any source than its reasonably incurred expenses.

(h) Where the hospital has charged but received no payment the insurers are liable for the whole amount to the specified maxima. But should the hospital subsequently receive payments it is submitted that any excess over the expenses incurred should be refunded to the insurers, etc.

(hh) Cmd. 6860 at pp. 24-25, and p. 49, dated July, 1946.

(i) S. 2 (4) of the Law Reform (Personal Injuries) Act, 1948, reads as follows:—

"In an action for damages for personal injuries (including any such action arising out of a contract) there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act, 1946, or the National Health Service (Scotland) Act, 1947, or of any corresponding facilities in Northern Ireland."

(ii) Public Health Act, 1875, s. 132 (13 Halsbury's Statutes 679), and Local Government Act, 1929, s. 16 (10 Halsbury's Statutes 893).

implied, to give them; or unless the instructions of an unauthorised person are ratified by the injured party after he regains consciousness. Inasmuch as the expenses of treatment whilst unconscious would form in the majority of cases a negligible proportion of the total expense incurred, the problem may be dismissed as interesting but scarcely practical.

(ii) *Liability of the party in default*.—The expenses of medical and hospital treatment to which an injured party has become liable through another's wrongful act form part of the damages which he is entitled to recover for the wrongful act. Such expenses are invariably found particularised as "Special Damages," but are only recoverable if the insured party has paid or is under liability to pay them. It is clear that, unless he expressly undertakes such an obligation, the party in default is not liable to the hospital directly for such charges and expenses (k).

(iii) *Liability of the insurers (kk)*.—This liability is the creature of statute, its incidence and extent being regulated entirely by section 33 of the Road and Rail Traffic Act, 1933. Under that section the insurers' liability is dependent upon two conditions:

(1) having paid any sum with or without an admission of liability in respect of the death or bodily injury to a third party arising out of the use of a motor vehicle on a road or in a place to which the public have a right of access (l);

(2) that the authorised insurers know that the person so killed or injured has received treatment in respect of such injury at a hospital.

Where these two conditions are present the liability of the insurers to pay the amount of reasonably incurred expenses, not exceeding £50 or £5 respectively, determined in accordance with its provisions, arises. Although neither the Road Traffic Act, 1930, nor the Road and Rail Traffic Act, 1933, provides machinery for the enforcement of the insurer's liability, in accordance with the general rules concerning the interpretation of statutes, it appears that the hospital would be entitled to sue for such sum as is properly due to it under the statute. Difficulty may arise when the deceased or injured third party concerned has received treatment for his injuries at more than one hospital. In such a case it seems that the insurers are liable to each such hospital for its reasonably incurred expenses up to the maximum amounts. Each such hospital would be able to qualify, the two essential conditions being present, as "a hospital" at which the third party has received treatment, for payment for which the insurers are liable under the section to make to "such hospital."

For the sake of completeness it may be noted that the Road Traffic Act, 1934 (m), confers additional rights upon medical practitioners and hospitals to remuneration and the recovery of expenses for emergency treatment to injured third parties. These leave unaffected the rights arising under the subsection under discussion, save to the extent that any payment made under that Act operates, *pro tanto*, to discharge any liability of the maker under the 1930 Act, as amended by the Road and Rail Traffic Act, 1933 (n).

(k) "Where, in an action for personal injuries, any party claims a sum for hospital expenses, the party against whom such claim is made may, in addition to or without any payment into court, pay to the hospital the amount for which he may be liable to the hospital under sub-section (2) of section 36 of the Road Traffic Act, 1930, and such payment shall not be deemed to be an admission of liability. Notice of the payment shall be given to all other parties to the action within seven days of the amount being paid." (R.S.C., O. 22, r. 5A, added by S. I., 1948, No. 939).

(kk) Including owners of motor vehicles covered by deposit or security.

(l) Such as, for example, the foreshore or a ferry.

(m) *Sa.* 16, 17 (27 Halsbury's Statutes 547, 548). See chapter V, *post*, pp. 341 *et seq.*

(n) *Ibid.*, s. 17. See chapter V, *post*, p. 349.

CHAPTER V

THE ROAD TRAFFIC ACT, 1934, PART II

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PART I.—INTRODUCTORY

I.—GENERAL OBSERVATIONS

Part II of the Act of 1934 (a) is the logical conclusion (in so far as it is complete) of the legislation of 1930 (b). The Third Parties Act of 1930 (c) was primarily designed to secure that upon the bankruptcy or insolvency of an insured motorist who had taken the precaution to insure against third party liability of any kind, including the kind arising out of the use of a vehicle on the road, his insurance should operate for the purpose for which it had been intended—namely, the satisfaction of the third party's claim (d). Whilst that Act applied to all insurance, it conferred no benefit upon the person injured by an insolvent but uninsured motorist. Part II of the Road Traffic Act, 1930 (e), was designed to prevent any person using a motor vehicle on the road unless he had provided security, by insurance or otherwise, whereby any liability incurred by him to a third party could be satisfied. This enactment was a considerable step towards the object of the principle which has been described. But it did not go far enough. Save for one section (f), it left untouched the principle that persons can make whatever contract they please. The consequence was that motor insurance policies continued in the form in which they had become customary (g). In this form they complied with the requirements of the Act with one hand, and with the other defeated the manifest object of it. They insured against any liability arising out of the use of the insured vehicle on the road, and at the same time provided that liability should not arise out of any use of the vehicle save that specified in the policy (h). Moreover, the policy bristled with conditions, the technical breach of which rendered the policy invalid, ineffective and useless to effect the object at which the Act aimed.

The words of Mr. Justice GODDARD, as he then was, in *Jenkins v. Deane* (i), may be referred to for a summary of some of the many loopholes which the Act of 1930 contained. The Act of 1934 was designed for the purpose of stopping those holes. This it was intended to effect by two methods. In the first place it compelled insurers to discharge any liability incurred by their assured in respect of fatal or bodily injury covered by the policy as soon as judgment in respect of it is obtained against him by a third party (j). In the second place (k) it rendered ineffective in regard to such liabilities certain clauses in a motor policy which allowed insurers to issue policies purporting to cover the liability required to be covered by the 1930 Act, whilst in fact not covering that liability if the insured vehicle was being used in any manner proscribed by the policy or if the assured had committed any technical breach of its formal terms (l).

(a) *I.e.* Part II of the Road Traffic Act, 1934 (27 Halsbury's Statutes 544). In Northern Ireland the statutory requirements for motor insurance are very much the same as those of the Road Traffic Acts, 1930 and 1934. In the Dominions, compare the British Columbia Insurance Act, 1925, the New Zealand Motor Vehicles (Third Party Risk) Act, 1928.

(b) *I.e.* the Third Parties (Rights against Insurers) Act, 1930 (28 Halsbury's Statutes 12), *ante*, chapter III, pp. 113 *et seq.*, and Part II of the Road Traffic Act, 1930 (23 Halsbury's Statutes 636), *ante*, chapter IV, pp. 159 *et seq.*

(c) 23 Halsbury's Statutes 12; *ante*, chapter III, pp. 113 *et seq.*

(d) See further, *ante*, chapter II, pp. 70 *et seq.*

(e) 23 Halsbury's Statutes 607; *ante*, chapter IV, pp. 159 *et seq.*

(f) *Viz.* section 38, *ante*, p. 219.

(g) As to this form and its deficiencies, see *post*, chapter VIII, Introduction.

(h) See, e.g., *Gray v. Blackmore*, [1934] 1 K. B. 95, and *Bright v. Ashfold*, [1932] 2 K. B. 153.

(i) (1933), 103 L. J. K. B. 250.

(j) Section 10, subsection (1), *post*, p. 278.

(k) By section 12, *post*, p. 316.

(l) As, e.g., in *Gray v. Blackmore*, [1934] 1 K. B. 95; and *Bright v. Ashfold*, [1932] 2 K. B. 153.

It will be seen, however, that the 1934 Act was not wholly successful in providing automatic relief to injured third parties. It may be said, of course, that the Road Traffic Act, 1934, was never intended invariably and in all circumstances to provide an insurance fund from which injured third parties could recoup their losses, if such losses were not paid by the tortfeasor responsible for them, and that the cases in which insurers in fact avoided liability to the third party were cases which the drafters of the Act had foreseen and for which they had specifically made allowance. When the Act was drafted, the principle that an insurer, who had issued a policy of insurance covering the use of a motor vehicle on the road, should invariably indemnify the driver of that vehicle in all the circumstances envisaged by section 36 (1) (b) of the Road Traffic Act, 1930, had not been accepted. For emphasis, it must be said again that the Act left untouched the principle that insurers and assured can make whatever contract they please, subject to section 38 of the Road Traffic Act, 1930, and section 12 of the 1934 Act.

In addition, the Act of 1934 allowed insurers to escape Road Traffic Act liability to the third party in the four following classes of cases :

(i) Where the liability arising from the accident was one not covered by the policy (*m*).

(ii) Where the assured or the driver was a person specifically excluded from the cover of the policy, or had been so misdescribed in the policy as not to be covered by its terms.

(iii) Where the policy had been or was avoided before judgment in the running-down action on the grounds of material non-disclosure or misrepresentation.

(iv) Where the policy, before the accident, had been cancelled by consent, or had automatically lapsed by the death or bankruptcy of the assured or by his parting with his interest in the insured vehicle.

Lastly, the Act did not in any way attempt to deal with remedies for third parties in cases where grave injuries had been inflicted on members of the public by drivers of motor vehicles who had forgotten to take out or renew a policy of insurance, or who had driven vehicles knowing full well that they were not covered, and had no means to pay heavy damages.

At this point, the reader not fully acquainted with Motor Insurance Law is referred once again to the Introduction which describes the next step after the 1934 Act taken to achieve complete satisfaction of injured third parties' claims. It will suffice to say here that in so far as insurers were entitled under the 1934 Act to avoid liability to third parties in the classes of cases mentioned above, in a number of cases where damages awarded to third parties were very heavy, opportunity was taken by the insurers to refuse to pay. The decision in *Rose v. Ford* (*n*) increased enormously the financial liabilities of insurance companies, and several of them were unable to meet their debts. It is hardly a matter of surprise that liability in bad cases, *i.e.*, where the assured had obtained cover virtually by false pretences, was avoided because the Act allowed that avoidance. But this situation could not continue for long, for two reasons. First, the feeling was growing that, the principle of compulsory insurance having once been accepted, the claim of an injured third party should not be allowed to fail because an insurer refused to accept liability under an issued policy by reason of a breach of condition under which the policy was issued, or of misrepresentation

(*m*) Cf. *Farr v. Motor Traders Mutual Insurance Society*, [1920] 3 K. B. 669, and *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590 (use of car for pleasure purposes warranted only to be used for commercial travelling); *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39 (warranted use in London and Wales; car destroyed by fire on journey from London to Wales); *Provincial Insurance Co. v.*

or non-disclosure of material facts by the assured. Secondly, the reputation of insurers in the United Kingdom was such that it came to be considered almost improper for them to avoid liability under a policy which was running at the time of the accident. It should be said here that only in rare instances was liability refused, but the number of such cases was sufficient to cause severe judicial comment to be made at the same time as legal relief was given to insurers.

In the end, as a result of the recommendations made by the Committee on Compulsory Insurance in July 1937, in 1946 an agreement was made between the Minister of Transport and the newly formed body representative of insurers in Great Britain called the Motor Insurers' Bureau.

The terms and effect of this agreement, and of the supplementary agreement between the individual insurers and the Motor Insurers' Bureau (the Domestic agreement) are fully discussed in chapter VI. It is sufficient to state here that by these agreements the rights of third parties injured in a road accident occurring after July 1, 1946, are fully safeguarded, and that where such a third party as defined by section 36 (1) (b) of the Road Traffic Act, 1930, has prosecuted to judgment a negligent driver of a motor vehicle, that judgment, if it remains unsatisfied by the tortfeasor within 7 days of the date when the judgment creditor is entitled to enforce it, will be satisfied by either the Motor Insurers' Bureau or the insurer concerned. The effect of this agreement is to render sections 10, 11, and 12 of the Road Traffic Act, 1934, almost wholly unnecessary. These sections give by their terms certain rights to third parties who have obtained judgment against a negligent driver to proceed by action direct against the insurer who has issued a policy covering the tortfeasor, to recover the sum awarded by that judgment and the costs thereof. The Motor Insurers' Bureau agreement ensures that that sum and the costs will be paid automatically in the event of a judgment being obtained, without further proceedings on the part of the third party. The agreement has not the character of a statute and cannot therefore by its terms repeal the relevant sections of the Act of 1934, but for practical purposes it has the effect of a statute, and so a minute examination of the effect of these sections of the Road Traffic Act, 1934, is no longer necessary. For the sake of completion, reference is made in the text to cases decided under these sections of the Road Traffic Act, 1934, but it must be borne in mind that the principles to be extracted from them are no longer of direct, practical advantage to third parties who suffer death or personal injuries after July 1, 1946.

II.—CONSTRUCTION OF THE ACTS OF 1930-1934

1. The many differences between the Third Parties Act, 1930, and this Act have already been examined in detail, and it is unnecessary therefore to contrast them again here.

2. Strictly speaking, the Road Traffic Act, 1930, cannot be contrasted or compared with this Act at all except by way of showing the chronological development of the legislation which it enacts. This is so because by section 42 of the Road Traffic Act, 1934, it is provided that :

Short title, citation, construction, commencement and extent.

" 42.—(1) This Act may be cited as the Road Traffic Act, 1934, and shall " be construed as one with the principal Act, and Parts I, II, III and IV

Morgan, [1933] A. C. 240 (lorry to be used only for carrying coal, carried wood) ; *Gray v. Blackmore*, [1934] 1 K. B. 95 (wrongful use for purposes of motor trade) ; *Piddington v. Co-operative Insurance Society, Ltd.*, [1934] 2 K. B. 236, *see post*, p. 575.

(n) [1937] A. C. 826 ; [1937] 3 All E. R. 359.

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"respectively of this Act shall be construed as one with Parts I, II, III and IV respectively of the principal Act, and this Act and the principal Act and the Road Traffic (Amendment) Act, 1931, may be cited together as the Road Traffic Acts, 1930 to 1934.

"(2) In this Act, unless the context otherwise requires, any reference to any other enactment shall be construed as a reference to that enactment as amended by any subsequent enactment, including this Act.

"(3) This Act shall come into operation on such day or days as the Minister may appoint, and the Minister may fix different days for different purposes and different provisions of this Act.

"(4) This Act shall not extend to Northern Ireland."

3. The effect upon the construction of the various sections of the 1930 Act which this union of the two (effected by the section just quoted) produces has already been considered (o). It was suggested that since the later enactment does not (except for direct or consequential and minor amendments) deal with the same subject-matter as the earlier, the interpretation of its provisions remains unchanged. The primary purpose of the Act of 1934 is to make provision whereby the objects of the Act of 1930 can be more readily and efficaciously enforced.

If this deduction be correct, it follows that the construction and interpretation of the later Act must where necessary be controlled by the earlier. This proposition, it is submitted, rests upon two bases. On the one hand the Act of 1930, enacting as it does the special obligation of insurance against third party risks, may be regarded as a special enactment, whilst the Act of 1934, which is expressed to be an amendment of the Act of 1930, and giving as it does more effective force to the provisions of that Act without enlarging its scope, may be regarded as a general enactment. In this case the rule *generalia specialibus non derogant* applies, and the provisions of the 1934 Act cannot be taken as amending or altering the interpretation of those of the 1930 Act by implication unless there is a clear and inevitable necessity to do so (p).

"The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative and a general enactment must be taken to affect only the other parts of the statute to which it may properly apply.

"Again, wherever two parts of a statute are contradictory, the court endeavours to give a distinct interpretation to each of them, by looking at the context" (q).

It is submitted, however, that upon a true construction of each section of the combined enactments it will not be found that there is any instance of repugnancy or inconsistency between them.

On the other hand, the provisions of the Act of 1934 throw light upon what was the real intention of the legislature in the Act of 1930. In so far as the enactments of 1930 were ambiguous, or really difficult of interpretation

"it is a legitimate method of determining what Parliament had done, to see what Parliament says subsequently, either expressly or by implication, that it had previously done" (r).

(o) *Ante*, p. 159.

(p) *R. v. Surrey JJ.* (1788), 2 Term. Rep. 304.

(q) *Per* ROMILLY, M.R., in *Pretty v. Solly* (1859), 26 Beav. 606.

(r) *Per* SARGANT, L.J., in *Ormond Investment Co. v. Betts*, [1927] 2 K. B. 326. As to the construction of incorporated statutes, see *Cape Brandy Syndicate v. Inland Revenue Comrs.*, [1921] 2 K. B. 403; *Charing Cross, West End and City Electricity Supply Co. v. London Hydraulic Power Co.*, [1914] 3 K. B. 773.

Applying this principle to the Act of 1934 it will be found that section 12 makes it clear that section 36 (1) (b) of the Act of 1930 did not mean what its plain words might have been thought to require, namely, that "any liability . . . arising out of the use of the vehicle on a road . . ." meant any liability arising out of any use and not merely out of such use as the insurers might see fit to allow. Thus, as has been pointed out under the Act of 1930, it was possible for insurers to issue policies which fully complied with the requirements of that Act if the vehicle insured was only covered whilst being driven in Oxford Street, at any rate according to the sense in which the Act was interpreted by the Courts (s) and by the Minister of Transport (t). Section 12 of this Act, by prohibiting clauses in a policy which restrict the insurance thereby given, puts it beyond doubt that such clauses were permissible in policies issued under the 1930 Act. In so far as the prohibition of such clauses in section 12 is as has been shown (u), and will appear again hereafter, strikingly incomplete, and in so far as it sanctifies the narrow construction of section 36 which has been indicated, it may be doubted whether it did not, in fact, achieve the exact opposite of the purpose for which it was intended (v).

Section 11 of the Act deals with the effect of section 1 of the Third Parties (Rights against Insurers) Act, 1930. But so far from assisting in the interpretation of that earlier enactment, it does the exact opposite.

It was shown in the chapter in which the Third Parties Act is treated (w) that there might be some doubt as to whether that statute did not, in the cases in which it operates, transfer the third party liability of the assured to his insurers at the same time as it transferred *his* rights against them to the third party. This doubt was carefully examined and was (it is submitted) demonstrated to be groundless. Now section 11 of the 1934 Act suggests—indeed almost insists—that the Third Parties Act did have the extraordinary meaning considered and rejected. This section, therefore, can only be explained on the assumption that it was inserted *ex abundanti cautela* to dispel doubts which (if they existed) rested upon very flimsy foundations.

It remains to give a brief account of the remaining sections of the Act. Section 13 of the Act imposes duties on persons against whom claims in respect of death or bodily injuries arising out of the use of a vehicle on the road are made to furnish information as to whether they are insured therefor or not. Section 14 makes it obligatory upon motorists insured under the 1930 Act to surrender to their insurers their insurance certificates upon the cancellation of their policies in certain circumstances. Section 15 makes the whole of Part II of the Act applicable to securities issued in lieu of policies under section 37 of the 1930 Act. Sections 16 and 17 impose new obligations upon motorists to make payment to doctors in respect of emergency treatment of injuries arising from the use of motor vehicles on

(s) In *Bright v. Ashfold*, [1932] 2 K. B. 153; and *Gray v. Blackmore*, [1934] 1 K. B. 95.

(t) Who has prescribed the form of insurance certificate as containing a statement of the "Limitations of Use" of the insured car, e.g. "limited to use in the county of Sussex." See *ante*, p. 193, and the Motor Vehicles (Third Party Risks) Regulations, S. R. & O. No. 926 of 1941, *ante*, p. 215.

(u) By noticing the various cases in which a third party who has obtained judgment against an assured in respect of death or bodily injuries may find that the assured was not covered by his policy and that there are no insurers who can be made to satisfy the judgment.

(v) Which was, *semble*, to secure that as far as possible any motor accident involving death or bodily injury to certain third parties should be covered by the policy issued in pursuance of Part II of the Road Traffic Act, 1930.

(w) Chapter III *ante*, pp. 117 *et seq.*

the road, and adds to the liabilities required to be covered by insurance under section 36 of the 1930 Act the liability to pay for such emergency treatment.

III.—TERRITORIAL LIMITATIONS OF THE OPERATION OF THE 1934 ACT

The next question (which may be disposed of briefly) is whether Part II of the Road Traffic Act, 1934 (*a*), and Part II of the Road Traffic Act, 1930 (*b*), operate beyond the limits of the United Kingdom (excluding Northern Ireland). Four questions arise here :

(1) Does section 10 (*c*) of the Act apply to judgments obtained outside the United Kingdom ?

(2) Does section 10 (*c*) apply to judgments obtained in the United Kingdom in respect of a liability incurred outside it (*d*) ? and

(3) Does section 12 (*dd*), which prohibits any clause in a motor policy issued for the purposes of the Act which restricts the insurance thereby granted by reference to any area or areas, apply to any clause limiting insurance by reference to the United Kingdom (excluding Northern Ireland) ?

(4) Does the Act apply to policies issued abroad ?

It is impossible to say that any general rule as to the extra-territorial operation of English statutes can be laid down in the present state of the authorities (*e*). The question in this case, it is submitted, answers itself when it is considered whether Part II of the Road Traffic Act, 1930 (*f*), can be said to apply outside the United Kingdom. That enactment applies only to insurance in respect of liability arising out of the use of a vehicle on a road (*g*), and "a road" is defined (*h*) as any road to which the public has access. This, it is submitted, must mean a road in the United Kingdom (*i*).

If this be correct, section 10 (*k*) of Part II of the Road Traffic Act, 1934, does not apply to judgments obtained in England in respect of motor accidents which occurred outside the United Kingdom. It follows, therefore, that there would be no reason to hold that the reference to area or areas in section 12 (*l*) includes any area or areas outside the United Kingdom. Generally, it is suggested that the decision in *Tomalin v. Pearson (S.) & Son, Ltd.* (*m*), to the effect that the Workmen's Compensation Acts have no application to accidents happening during employment beyond the territorial limits of the United Kingdom would apply.

Moreover, the exclusion in both Acts of 1930 (*n*) and 1934 (*o*) of their application to Northern Ireland strongly suggests that the legislature

(a) 27 Halsbury's Statutes 534.

(b) 23 Halsbury's Statutes 607, *ante*, chapter III (c) *Post*, p. 278.

(d) See *Machado v. Fontes*, [1897] 2 Q. B. 231, as to the power to sue in the English courts in respect of liability incurred abroad.

(dd) See further, *post*, p. 316.

(e) See Maxwell on the Interpretation of Statutes, 7th Edn., pp. 134 *et seq.*

(f) 23 Halsbury's Statutes 607; *ante*, chapter IV.

(g) *Ibid.*, sections 35, 36, *ante*, pp. 163, 188.

(h) By *ibid.*, section 121, *ante*, p. 176.

(i) See *Adam v. British and Foreign S. S. Co.*, [1868] 2 Q. B. 430; *Russell v. Cambesfort* (1889), 23 Q. B. D. 526; *Re Sawers, Ex parte Blain* (1879), 12 Ch. D. 522; *Re A. B. & Co.*, [1900] 1 Q. B. 541; *The Zollverein* (1856), Sw. 96; 27 L. T. (o. s.) 160; *Grant v. Anderson & Co.*, [1892] 1 Q. B. 108; *R. v. Jameson*, [1896] 2 Q. B. 425.

(k) *Post*, p. 278.

(l) *Post*, p. 316.

(m) [1909] 2 K. B. 61.

(n) The Road Traffic Acts, 1930 (23 Halsbury's Statutes 607) and 1934 (27 Halsbury's Statutes 534).

(o) By section 123 of the 1930 Act, and section 42 of the Act of 1934.

intended both these statutes to apply only to the United Kingdom, since the United Kingdom includes Northern Ireland unless that country is expressly excluded. It is not clear that the Act does not apply to policies issued abroad (*p*). This question is, however, too complicated and of insufficient practical importance to merit discussion here (*q*).

IV.—DIFFICULTIES AND ANOMALIES OF CONSTRUCTION IN THE ACT

A careful examination of the provisions of the Act of 1934 will, it is submitted, lead to the conclusion that the drafting of the Act proceeded with one eye continually looking at a motor policy in the form and containing the terms and conditions commonly used by insurers in 1934 (*r*). It remains to consider further the relation between the language and provisions of the Act and the hitherto common form of motor insurance policy. It may be stated shortly at this stage that whilst a not very large proportion of the total number of motor policies in use have hitherto been identically similar, practically all have conformed to a common structure and a uniform phraseology (*s*). But there is nothing immutable in this fact. The standard form is not like the Twelve Tables; the language of motor insurance is not dead.

Whilst the form and phraseology indicated have been developed by insurers to give effect to rights derived solely from the Common Law, it does not by any means follow that when the exercise of those rights is strictly circumscribed by statute and new and onerous obligations added to them, a new form and a different method of construction will not evolve.

That the Act was designed upon the assumption that motor policies and the method of their making would continue unchanged, and that some of the provisions of this statute may, in course of time, be legitimately evaded by the unexpected change coming to pass, need only be indicated here. It is enough to refer the reader to the phrase in section 10 of the Act, "covered by the policy," and to remind him that a policy of motor insurance, whether made by means of a proposal form or an automatic money-in-the-slot machine, is and will remain a contract, and the fundamental rule of English law still lives that people can make whatever contract they please provided they do not infringe some statute or rule of law (*t*).

The limited operation of section 12 has been noticed (*u*). It is only desirable at this stage to point out one more of the many defects or loopholes which the Act may be found to contain.

It may be suggested that a logical if not moral defect in the Act is this: it allows insurers in certain circumstances to escape the obligation to satisfy a judgment obtained in respect of death or personal injuries against the assured if they can show that the policy was obtained by concealment or false representation of a material fact (*v*). The Act ignores the circum-

(*p*) See Regulation 22, *ante*, p. 240.

(*q*) Since, although it might well occur that a third party desired to enforce judgment against a foreigner, the question would depend largely on the law of the country in which the policy was issued. Moreover, the Regulations which govern the question may at any time change. See *ante*, p. 239, and chapter VI, *post*.

(*r*) As to this form of policy, which has been severely criticised by the Courts, see *post*, pp. 478 *et seq*.

(*s*) As to the aptness and propriety of this structure and phraseology, see *post*, p. 478, and the judicial opinions upon it there quoted.

(*t*) See, e.g., *per* Lord BLACKBURN in *Calcutta and Burmah Steam Navigation Co., Ltd. v. De Mattos* (1864), 33 L. J. Q. B. 214. The effect of the Motor Insurers' Bureau Agreements is to render almost all conditions in a policy ineffective as against "third parties," although they remain in full force and effect against the assured himself. See chapter VI, *post*.

(*u*) *Ante*, p. 275.

(*v*) By virtue of subsection (3) of section 10; see *post*, p. 303.

stance that many if not most motor policies insure against a number of other risks besides those required to be covered by subsection (1) (b) of section 36 of the principal Act (*w*). But the undisclosed or misrepresented fact which entitles insurers to escape the obligation to pay the third party need not, according to the provisions of section 10, be a fact material to the third party risk (*a*). It is sufficient if it be material to any risk insured by the policy. Thus if X takes out a comprehensive policy insuring him *inter alios* against third party liability and against theft of the car, and fails to disclose, for example, that a previous car owned by him had been borrowed by thieves on several occasions (*b*), or that he intended to keep it on an unguarded open space (*c*), the insurers can under the terms of section 10 evade any obligation to satisfy a judgment obtained against X by a third party in respect of death or bodily injuries arising out of the use of the vehicle on the road (*d*). The case of *Richards v. Brain and Port of Manchester Insurance Co.* (*e*), reveals another startling defect in this legislation.

Whilst the Act thus leaves it open to insurers considerably to lighten the burdens which it attaches to motor policies conforming to the hitherto accepted standard, it may be that the innate conservatism of marine insurers will be found to have been inherited by their motor brethren. Although motor insurance law is no longer in its infancy, it may not be inapposite to quote the following passage :

"The main principles of marine insurance law are well settled. The difficulties that occur in practice arise chiefly out of the crabbed and obscure language of the time-honoured Lloyd's policy, which was framed with reference to the conditions of commerce in a bygone era. New wine has continually to be put into the old bottle, often with inconvenient results" (*f*).

In the first edition of this book, published in early 1935, it was said :

"Only the future will know whether motor insurance follows the same course or whether the fact that marine insurance, in spite of many minor and incidental enactments, has developed without restriction or interruption in the common law is the real reason for this rigidity."

The intervening years have produced a remarkable compromise. The forms of the standard policies of motor insurance remain almost unchanged. Many policies bristle with conditions which the assured must perform and obey. But against "third parties" these conditions are made one and all of no effect by the Motor Insurers' Bureau agreements.

PART 2.—THE ACT

I.—AMENDMENT AS TO PROVISION AGAINST THIRD PARTY RISKS

1. Section 10 (1).

Duty of insurers to satisfy judgments against persons insured in respect of third-party risks.

"If, after a certificate of insurance (*g*) has been delivered under subsection (5) of section thirty-six of the principal Act (*h*) to the person

(*w*) See *ante*, chapter II, p. 78, as to the different classes of insurance included in a "comprehensive" policy.

(*a*) See further as to this, *post*, p. 303.

(*b*) See *Farrar v. Hetherington* (1931), 47 T. L. R. 465.

(*c*) Cf. *Carlton v. Park* (1921), 8 Ll. L. R. 818.

(*d*) See *post*, p. 303.

(*e*) (1934), 50 Ll. L. R. 88; see *post*, chapter IX.

(*f*) Chalmers Marine Insurance, 4th Edn., p. 3. Cf. the judicial remarks on the form and phraseology of motor policies, quoted, *post*, p. 478.

(*g*) Or a certificate of security, see section 15, *post*, p. 340.

(*h*) Although a certificate of security is not delivered under this subsection.

"by whom a policy (i) has been effected, judgment in respect of any such liability as is required to be covered by a policy (i) under paragraph (b) of subsection (1) of section thirty-six of the principal Act (being a liability covered by the terms of the policy) (k) is obtained against any person insured by the policy (i), then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy (i), the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

1. "*Certificate of insurance.*"—By virtue of section 15 (l) "*certificate (m) of insurance*" includes "*certificate of security*" (a).

2. "*Has been delivered under subsection (5) of section thirty-six of the principal Act.*"—Subsection 5 and its requirements have been fully dealt with and set out in the last chapter (b). Its short effect is that a policy of insurance issued under section 36 of the principal Act (c) is of no effect for the purposes of that Act unless and until an insurance certificate shall be delivered (d).

As has been noted, "*certificate of insurance*" includes "*certificate of security*" in this subsection. But subsection 5 of section 36 of the Principal Act makes no reference to certificate of security. That certificate is dealt with by subsection (2) of section 37 (e) of the principal Act, whereof the effect is, *mutatis mutandis*, precisely the same as that of subsection (5) of section 36. This seems to be a draftsman's error, and it is an error which is not, it is apprehended, cured by the general words of section 15 (f) of this Act. It is therefore necessary, in order to make section 10 effectively applicable to securities (and that that is the intention of the legislature, regard to section 15 places beyond doubt), to interpolate the words: "or under subsection (2) of section 37." It is submitted that this should be done, upon the principle that the Court will not allow the plain object of an Act to be defeated by a patent omission (g). "It has been said that it is a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law" (h).

It is submitted that the omission of the words above suggested would

(i) Or a security. section 15, *post*, p. 340.

(k) Or any person having a security in force; section 15, *post*.

(l) See *post*, p. 340.

(m) As to certificates generally, see *ante*, p. 214.

(a) As to securities generally, see *ante*, p. 222.

(b) *Ante*, p. 214.

(c) *I.e.* the Road Traffic Act, 1930 (23 Halsbury's Statutes 607)

(d) As to the effect of a policy in respect of which a certificate has not been delivered, see *ante*, p. 217, and as to rights under the Third Parties Act, 1930, under such a policy, *ante*, chapter III.

(e) As to section 37 generally, see *ante*, p. 222.

(f) As to this, see *post*, p. 340.

(g) See *All-Gen v. Beauchamp*, [1920] 1 K. B. 650; *Salmon v. Duncombe* (1886), 11 App. Cas. 627; *R. v. Vasey*, [1905] 2 K. B. 748; *Williams v. Evans* (1876), 1 Ex. D. 277; *R. v. Kingsley* (1851), 16 L. T. (O. S.) 408; *R. v. Eltridge*, [1909] 2 K. B. 24; but see *Underhill v. Longridge* (1859), 29 L. J. M. C. 65; *London County Council v. Aylesbury Dairy Co., Ltd.*, [1898] 1 Q. B. 106; *Thompson v. Gould & Co.*, [1910] A. C. 409, *per* Lord MERSEY, at p. 420; *Fickers, Sons and Maxim, Ltd. v. Evans*, [1910] A. C. 444, *per* Lord LORENBURN, at p. 445; *Fredericks v. Payne* (1862), 1 H. & C. 584; *Re Knatchbull's Settled Estates* (1884), 27 Ch. D. 349; *Sparrow v. Oxford, Worcester and Wolverhampton Rail. Co.* (1852), 2 De G. M. & G. 94; *R. v. Denton (Inhabitants)* (1864), 5 B. & S. 821; *Interpretation Act*, 1889, ss. 1, 2 and 19 (18 Halsbury's Statutes 992, 1001).

(h) *Per* Lord HOBHOUSE in *Salmon v. Duncombe* (1886), 11 App. Cas. 627, at p. 634.

reduce this section to a nullity, since persons desiring to avoid the consequences of the section could take out securities instead of policies (i).

3. "To the person by whom a policy has been effected."—"Person" here includes the plural, and also includes a corporation or company, etc. (j). "Effected," etc., presumably means "Who is the assured under the policy and who has paid the premium or otherwise given consideration therefor."

4. "Judgment."—This means final judgment (k) in an action or cross-action (l) which may be obtained either in the High Court of Justice or in a County Court, or in various other courts (such as the Mayor's and City of London Courts or the Liverpool Court of Passage) in which a common law action for tort or contract can be brought. It is submitted also, that a judgment obtained in the Scottish Courts might be sufficient for the purposes of this subsection (m), and that payment of the sum thereby awarded could be enforced in England (n). The question whether a collusive judgment or one obtained by fraud comes within the section is considered later (nn).

5. "In respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section thirty-six of the principal Act."—"Such" does not, it is submitted, mean "of a like kind" but "of the very kind" specified in the paragraph referred to. The liabilities required to be covered by that paragraph are fully explained, and the words of the statute set forth in the last chapter (o). It need only be pointed out that many difficulties may arise where insurers dispute the meaning of subsection (1) (b) of section 36, as, for example, in cases where it is alleged that the plaintiff was not a person coming within proviso (i) of the subsection (p), and that the judgment contemplated might be in respect of liabilities other than those mentioned and in addition thereto. It is apprehended that the subsection would apply, in such cases, despite the difficulties of administration which will be pointed out hereafter (q).

6. "Being a liability covered by the terms of the policy."—This is defined by subsection (5) of this section (r) as meaning :

"a liability which is covered by the policy or would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy."

Such liability must, of course, be one in respect of the death of or bodily injury to a third party, as is required to be covered by a policy (or security) under section 36 (1) (b) of the principal Act (s), or fees for emergency treatment (t).

To ascertain the true meaning of the words "covered by the terms of the policy" as defined by subsection (5), it is necessary to examine the meaning of—

- (a) "covered" ;
- (b) "the terms of the policy" ;
- (c) "to avoid or cancel the policy."

(i) As to the limited extent to which the section could, even on this construction, be so avoided, see *post*, p. 294.

(j) See *ante*, p. 121.

(k) As to what constitutes a final judgment, see *Collins v Paddington Vestry* (1880), 5 Q. B. D. 368.

(l) *I.e.* on a counterclaim.

(m) Since the Act applies to Scotland, section 41.

(n) See *Williams v Swansea Canal Navigation Co.* (1868), L. R. 3 Exch. 158; *Mountfield v. Ward*, [1897] 1 Q. B. 326.

(nn) *Post*, p. 295.

(o) *Ante*, p. 188.

(p) *E.g.* where it is said that he was being carried in the vehicle by reason of or in pursuance of a contract of employment. See further, *ante*, p. 198.

(q) See *post*, p. 290.

(r) *Post*, p. 314.

(s) See *ante*, p. 188.

(t) By section 36 (1) (b) of the principal Act as amended by section 16 (4) of this Act.

Of these in turn :

(a) The word "covered" is used here in the sense in which it is used in the phrase "covered by the policy" as referring to some risk or loss which is inside the class of risk or losses insured by the policy.

(b) "*The terms of the policy.*"—The meaning and effect of the various terms of a motor policy are examined in detail in a later chapter (u). It is sufficient here to state that the terms of a motor policy may be divided into three classes :

(i) Those which merely define the subject-matter of the insurance or describe and limit the risk insured (a) ;

(ii) Those which amount to stipulations or promises the breach of which constitutes a breach of contract and may disentitle the assured from making a claim under the policy (b) ;

(iii) Those which amount to stipulations, the breach of which entitles the insurers to treat the policy as void—that is to say, to avoid the policy altogether (c).

It must also be carefully observed at this point that in most motor policies the proposal form is incorporated with and made part of the policy (d) ; the answers to questions in the proposal form are made contractual terms in the policy, and the truth of these answers and of every term in the proposal form is made the basis of the policy (d). Thus as a rule most of the terms and clauses of a motor insurance contract which are to be found in the proposal form are of the same class as those the breach of which vitiates the whole policy (e) : such as are not of this class are generally mere descriptions of the risk (f). It must, therefore, be borne in mind that when "the policy" is anywhere referred to, whether in the provisions of a statute (g) or in the text of this book, the proposal form may be included in that phrase (h).

(c) "*To avoid or cancel the policy.*"—The word "avoid" is often, even sometimes in legal language (i), used in the loose or popular sense of "evade" (j). In its correct, or at any rate in its legal sense (k), the word means "make void." "Avoid the policy" does not therefore mean "evade

(u) *Post*, chapter VIII.

(a) See *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240. *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 660. See the cases set out on pp. 284–287. *post*.

(b) See *post*, chapter VIII, and see *Stevens & Sons v. Timber and General Mutual Accident Association* (1933), 102 L. J. K. B. 337, and cases there cited.

(c) These are stipulations which go to the root of the contract; see *post*, p. 493, and see *Dawsons v. Bonnin*, [1922] 2 A. C. 413, and *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240.

(d) See *post*, chapter VIII, and cases there cited.

(e) See, e.g., *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(f) As, e.g., in *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240.

(g) As, e.g., in the subsection now considered.

(h) As to the purpose and effect of the proposal form generally, see *post*, chapter VII, p. 395.

(i) See further chapter IX as to the meaning of "avoid," and note that the words in the section have no reference to automatic avoidance by death, etc.; see also *per* Lord CRANWORTH, *Edwards v. Hall* (1855), 6 De G. M. & G. 74. Cf. chapter III, *ante*, p. 137, as to meaning of "avoid" in section 1 (3) of the Third Parties Act, 1930 (23 Halsbury's Statutes 13). And see *Summs v. Registrar of Probates*, [1900] A. C. 323, and for a statutory example of this use, section 5 (3) of the Regulation of Railways Act, 1889 (14 Halsbury's Statutes 243).

(j) An interesting etymological investigation might be made as to how far the use of the word avoid in its popular sense is due to a cockney corruption of "evade."

(k) See *per* Lord READING in *Slabbing v. Liverpool and London and Globe Insurance Co., Ltd.*, [1917] 2 K. B. 433.

liability under the policy." A policy may be avoided, in this sense, by the breach of any term therein which goes to the root or basis of the whole contract and gives the insurers the right to declare that the policy is extinct (*l*). A policy is also avoided in this sense where the assured has made a false representation concerning or has failed to disclose a fact material to the risk, or has obtained the policy by fraud. But liability under a policy may be evaded (*m*), in cases where the assured has committed some breach of contract which disentitles him to make a particular claim under the policy, although the claim is in respect of a loss which comes within the risks insured by the policy. The distinction between "avoid the policy" and "evade liability thereunder" may be put in another way, in a sense in which it has frequently been recognised by the Courts in motor and other insurance cases (*n*).

Where insurers are entitled to avoid the policy, they may "repudiate the policy." Where they are merely entitled to "evade liability" thereunder they do not repudiate the policy, but they repudiate liability under it (*o*). In many cases of course a policy is avoided automatically and the insurers are not "entitled" to treat it otherwise (*p*).

The meaning of the word "cancel" needs little explanation. It connotes "declare the policy extinct" (*q*). Insurers are entitled to cancel a policy of motor insurance in any of the following circumstances:

(i) Where there is a clause in the policy giving them the right to "do so—as, for example, that which is often inserted stipulating that either party may cancel the policy on 7 days' notice and providing that if this is done a specified proportion of the premium shall be returnable (*r*).

(ii) Where the insurers and the assured have agreed to cancel the policy (*s*).

(iii) In any case where the insurers are entitled to avoid or repudiate the policy (*l*).

It will be seen therefore that the expression "a liability covered by the terms of the policy" has two possible meanings:

1. It may mean "a liability in respect of which an indemnity is enforceable under the terms of the policy or which would be so

(*l*) See *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Heyman v. Darwins*, [1942] A. C. 356; [1942] 1 All E. R. 337.

(*m*) Strictly speaking, there is no such thing as evading liability under the policy: either there is liability under and in accordance with the terms of the policy, in which case it cannot be evaded, or there is no liability, in which case no question of evading it arises. But the phrase must be used for convenience of terminology.

(*n*) See, e.g., *Stevens & Sons v. Timber and General Mutual Accident Insurance Association* (1933), 102 L. J. K. B. 337; *Golding v. London and Edinburgh Insurance Co.* (1932), 43 L. L. R. 487; *Woodall v. Pearl Assurance Co.*, [1919] 1 K. B. 593; *Siebbing v. Liverpool and London and Globe Insurance Co., Ltd.*, [1917] 2 K. B. 433; *Heyman v. Darwins, Ltd.*, [1942] A. C. 356; [1942] 1 All E. R. 337.

(*o*) See *per* Lord READING in *Siebbing's Case*, *supra*, note (*n*), at p. 437; and see *Golding v. London and Edinburgh Insurance Co.* (*supra*), and Lord PORTER's judgment in *Heyman v. Darwins, Ltd.*, [1942] A. C. 356; [1942] 1 All E. R. 337.

(*p*) See note (*i*), *ante*.

(*q*) See *Bamberger v. Commercial Credit Mutual Assurance Society* (1855), 15 C. B. 676; *Adamson v. Newcastle S.S. Freight Insurance Association* (1879), 4 Q. B. D. 462; *Re Jamieson and Newcastle S.S. Freight Insurance Association*, [1895] 2 Q. B. 90.

(*r*) As to this clause, see *post*, chapter VII.

(*s*) Provided the agreement is made for good consideration and is otherwise binding; see *ante*, chapter I.

(*t*) "Cancel" has strictly three meanings: (1) cancel in the sense of destroy, as used in cancellation of a stamp, or "delivery up and cancellation" of a void policy; (2) cancel in pursuance of an agreement to do so; (3) cancel in the sense of "declare void."

enforceable but for the fact that the insurers are entitled to avoid or cancel the policy" (*i.e.* "terms" in the subsection refers to all classes of terms in the policy).

2. It may mean a "liability within the risks specified in the policy or which would be within the risks specified in the policy but for the fact that the insurers are entitled to avoid or cancel the policy, etc., or are entitled to evade liability thereunder" (*i.e.* "terms" in the subsection refers only to terms descriptive of risk) (*u*).

Nevertheless, it is apparent that, if the first meaning is to be given to these words, the whole object of this Part of this Act would be defeated. If only for that reason the second interpretation, however illogical, must be adopted.

It is submitted, therefore, that "liability covered by the policy" means—

(1) Liability which comes within (or arises out of) a risk apparently insured by the express terms of the policy, *whether or not* it is a—

(2) Liability in respect of which the insurers are entitled to refuse an indemnity on the ground that the assured has committed some breach of the terms of the policy (*v*).

The effect of this interpretation may be shown by the following examples [*none of which is affected by the provisions of section 12 (u)*] illustrating what is not and what is "covered by the terms of the policy." Other examples will be found later (*i*).

A X has falsely described himself or his vehicle in his proposal form. Whether or not this misdescription is material, or did or did not induce the issue of the policy, X or his vehicle, as the case may be, is not the person or vehicle "insured by the policy," and a liability incurred by X or caused by his vehicle, is not a "liability covered by the policy" (*a*).

B A motor policy contains a term stipulating that the insured vehicle shall not at any time be used for the purpose of carrying goods of any sort and providing that the due observance of this term shall be a condition precedent to the insurers' liability to make any payment under the policy. X, the assured, carries goods in his car in breach of this term. No accident happens at the time, but subsequently (*b*), when X is not carrying goods in the car he carelessly knocks down a third party. The insurers cannot repudiate X's claim in respect of this accident (*c*) and the liability to the third party is one "covered by the terms of the policy"—although on one view, it is a liability which by the terms of the policy is not covered, and in

(*u*) In this sense "covered by the terms of the policy" would mean *prima facie* covered by the terms of the policy without reference to anything which the assured had done or not done except the act whereby the liability was incurred. Cf. *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39, where CHARLES, J., said: "Here is a policy which without the intervention of some evidence is good"—of a policy which contained the clause: "The company will not be liable for injury . . . caused by driving the vehicle in an unsafe condition." This, however, could be said of every policy, since the onus is always on the insurers to show that they come within an exception.

(*v*) See, e.g., *Golding v. London and Edinburgh Insurance Co.* (1932), 43 Ll. L. R. 487; *Heyman v. Darwins, Ltd.*, [1942] A. C. 356; [1942] 1 All E. R. 337.

(*w*) *Post*, p. 316.

(*x*) In the text and notes under s. 12, *post*, pp. 316 *et seq.*

(*a*) See *Newcastle Fire Insurance Co. v. Macmorran & Co.* (1815), 3 Dow. 255, and see *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 50 T. L. R. 528. See also the facts in *Jones v. Meatyard*, [1939] 1 All E. R. 140.

(*b*) See *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240, *per* Lord BUCKMASTER, at p. 247.

(*c*) See *Stevens & Sons v. Timber and General Mutual Accident Insurance Association* (1933), 148 L. T. 315, and the cases there cited.

repudiating liability in respect of it the insurers rely upon the terms of the policy and nothing else (d).

C. The same motor policy provides that the car is not covered when being used for the purposes of the motor trade. X causes an accident and thereby incurs liability to a third party whilst using the car for the purposes of the motor trade. This liability comes outside the risks insured against by the policy and is therefore not a liability "covered by the terms of the policy" (e).

D. A policy contains a term to the effect that the truth of statements made in the proposal form shall be deemed to be the basis of the contract. In answer to the question whether he was entitled to a "No claim Bonus" from his previous insurers, the assured had untruthfully but inadvertently stated that he was not. The insurers are entitled to avoid the policy (f), but any third party liability which the assured has incurred is one which "would be covered by the policy but for the fact that the insurers are entitled to avoid the policy" (g).

The following decided cases illustrate the limits of the right given to insurers by this subsection to refuse payment for a liability which falls outside the risks apparently insured by the express terms of the policy.

(a) With regard to vehicle insured.

In *Laycock v. Road Transport and General Insurance Co., Ltd.* (gg), a motor trader's policy insured motor vehicles of which, among other things, the make, horsepower, registered number and date and time of departure were to be entered in a register kept for the purpose prior to each and every departure from the insured's premises or garage. The motor vehicle which caused the death of the third party was not insured by the policy in that some or all of the particulars were not entered in the special register kept by the assured prior to its departure from the garage for the journey on which it was engaged at the time of the accident. Accordingly, the policy and the certificate of insurance had no application.

In *Bullock v. Bellamy* (h) the assured was covered while personally driving any other private car (other than his own Morris) not belonging to or hired to the assured for pleasure purposes. At the time of the accident the assured was driving another car, a Chrysler, and the question in the case was whether or not the Chrysler belonged to him. The assured had taken out the car on a trial run prior to making a decision whether he would keep the car in place of his own Morris. He paid a sum of £10 cash as security pending his decision, and wrote to his insurance brokers asking for a transfer of the insurance from the Morris to the Chrysler. On that same day an accident occurred owing to his negligence, and two days later he decided not to complete the purchase of the Chrysler on the grounds that it used too much petrol. On the peculiar facts of this case it was decided that the property in the Chrysler had not, at the time of the accident, passed to the assured, and therefore the driving of the Chrysler was at the time of the accident covered by the terms of the policy.

(b) With regard to the driver insured.

(1) In *Richards v. Port of Manchester Insurance Co.* (i), an insurance company issued a policy to a motor trader who hired out cars for driving by the hirers. The policy enabled the assured to issue sub-policies to his customers in respect of each hiring, but contained a clause that Jews (*inter alia*) would not be covered. The assured hired a car to a Jew, who injured

(d) If the carrying of the goods was subsequent to the accident, s. 38 of the principal Act would apply; see *ante*, p. 219. Section 12, if it is submitted, would not apply. See *ost*, p. 320.

(e) *Cf. Gray v. Blackmore*, [1934] 1 K. B. 95.

(f) *Cf. Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(g) Assuming, of course, that it was otherwise within the policy.

(gg) (1940), 67 Ll. L. R. 250.

(h) (1941), 67 Ll. L. R. 392.

(i) (1934), 50 Ll. L. R. 88.

a third party. On these facts, the negligent driver was clearly not covered by the terms of the policy.

(2) In *Burton v. Road Transport and General Insurance Co. (j)*, the policy covered the assured, who was a second-hand car dealer, "or any person in the policy holder's employ who is driving on his order or with his permission." At the time of the accident, the car concerned, which was owned by the assured, was being driven by one Westwood, who, according to a prior arrangement, took delivery of the car in order to give a demonstration drive to a prospective purchaser. On the facts, Westwood was held to be the agent of the assured to obtain a sale of the car, and that, on the authority of *Morgan v. Parr (k)*, he was in the employ of the assured within the meaning of the phrase used in the policy.

(3) In *Spraggon v. Dominion Insurance Co. (l)*, a hirer driving policy was issued by the insurers to one Warnes, and it provided indemnity to persons hiring cars from Warnes who did not come within the category of "excluded hirers." Many classes of persons were specified as being excluded, and in particular no person could be a hirer "until the insured shall have satisfied himself by an actual driving test that the prospective hirer is a qualified, careful and competent driver of motor cars. No person shall be a hirer until he has completed a hirer driving proposal form. No person shall be a hirer unless he holds a current driving licence which must be the continuation without a break of a driving licence issued at least 12 months prior to the date of the hire and be free from endorsements." A man named Trundle was driving the insured car at the time of the accident, and he had not passed the driving test, he had not posted the proposal form to the insurers as required, and his driving licence had been endorsed. It was held that he was an excluded hirer and was not covered by the policy. The third party's claim against the insurers therefore failed (ll).

(4) In *General Accident Assurance Corporation v. Shuttleworth (m)*, the insurers were not liable while any car was being driven by the policy holder unless he held a licence to drive such a car. Shuttleworth drove while disqualified and the insurers were held not to be on risk when an accident occurred during his driving (n).

(c) In relation to the user of the insured vehicle.

(1) In *Levinger v. Licences and General Insurance Co. (o)*, the description in the policy of the use of the vehicle which was to be insured was for "social, domestic and pleasure purposes and any business or trade purposes of the insured," this last being described as "carrying on or engaged in the business or profession of millinery." The car involved in the accident from which the third party's claim arose was owned by a millinery company, and was driven by one of its employees. Mrs. Levinger had started the millinery business with her own money and had provided the car for the firm. Unfortunately, she insured the car in her own name, and not that of the company. The third party obtained judgment against the company, and this action was brought by Mrs. Levinger for a declaration that the insurers were liable to indemnify the millinery firm. It was held that the company had no interest in the policy, nor was the business which was insured that of the company. The action failed.

(2) In *Passmore v. Vulcan Boiler and General Insurance Co., Ltd. (p)*, the plaintiff assured was a business representative. At the time of the accident she was a passenger in the insured car and was being driven on her firm's business by a Mrs. Cook, also a business representative and employed

(j) See also on this point *Paget v. Poland* (1947), 80 Ll. L. R. 283, *post*, p. 527.

(k) [1921] 2 K. B. 379.

(l) (1940), 67 Ll. L. R. 532.

(ll) See also on this point *Haworth v. Dawson* (1947), 80 Ll. L. R. 19, *post*, p. 652.

(m) (1938), 60 Ll. L. R. 301.

(n) See also *Lester Brothers v. Avon Insurance Co.* (1942), 72 Ll. L. R. 109.

(o) (1936), 54 Ll. L. R. 68.

(p) (1935), 154 L. T. 258; *Broad v. Waland* (1942), 73 Ll. L. R. 263.

by the same firm. The plaintiff interfered with the driving of the car and an accident occurred thereby which caused injury to a third party. The plaintiff was found liable to pay damages to the injured third party. The policy insured the car while being used for social, domestic and pleasure purposes and for the business of the assured. The business was described in the policy as "carrying on or engaged in the business or profession of representative and no other." It was held that the car although being used for the business of the plaintiff was also being used for the business of Mrs. Cook, and that therefore it was being used otherwise than in accordance with the description of use.

(3) In *Wyatt v. Guildhall Insurance Co., Ltd.* (g), the description of use was for social, domestic and pleasure purposes and used by the insured in connection with his business or profession of company director, and it excluded use for hiring. A stranger who was being carried on an isolated occasion for a reward which had been agreed before the journey started was injured by the negligent driving of the assured. It was held that the use insured did not cover the case of a car which was being used to convey people for payment from one place to another, and the injured passenger's claim against the insurers failed.

(4) In *Jones v. Welsh Insurance Corporation, Ltd.* (r), the description of use was for social, domestic and pleasure purposes and for use in connection with the assured business or profession as motor mechanic. The assured in his spare time farmed a few sheep, and at the time of the accident which caused injury to a third party the car was being used to convey some sheep, and was being driven by the assured's brother on his order. It was held that the assured must be regarded as carrying on a business of sheep farming as a sideline, as he sold his sheep for profit. At the time of the accident his car was therefore being used for the carriage of goods in connection with a business other than that stated in the policy, and the injured third party could not recover from insurers. Secondly, this was not a question of the actual nature of the goods carried or their physical characteristics within the Road Traffic Act, 1934, section 12 (d).

(5) In *Herbert v. Railway Passengers Assurance Co.* (s), the assured at the time of the accident was riding as a passenger in the side car of his motor cycle and a friend was driving the motor cycle at his request and on his behalf. In the proposal form which was the basis of the contract of insurance the assured had declared that he alone would drive and that no one else would do so. The description of use clause contained this exception that "the company shall not be liable in respect of any accident incurred while any motor cycle is being driven by or is for the purpose of being driven by him in the charge of any person other than the insured." It was held that the user at the time of the accident was not covered by the terms of the policy.

(6) In *McCarthy v. British Oak Insurance Co., Ltd.* (t), the insured car was being driven at the time of the accident by a friend of the assured with his permission. The driver had paid for the petrol and oil consumed on a journey to Southend to see the illuminations, and had been repaid by his passengers, for whose pleasure he had undertaken the journey. The policy excluded use for hiring, and it was contended on the authority of *Wyatt's Case* that this was a case of hiring. It was held that the car was being used for pleasure purposes, and that driving for hire involved a genuine business contract for a stipulated reward.

(7) In *Darcy v. Pearl Assurance Co., Ltd.* (u), the description of use of the insured lorry excluded from the cover occasions when the lorry was used on hire for purposes other than the assured's greengrocery business. At the time of the accident the lorry was in the service of a laundry, and the cover did not extend to such use.

(g) [1937] 1 K. B. 653. [1937] 1 All E. R. 792.

(r) [1938] 1 All E. R. 650.

(s) [1939], 63 Ll. L. R. 54.

(t) [1937] 4 All E. R. 149.

(u) [1938] 3 All E. R. 1.

(8) In *O'Brien v. Trafalgar Insurance Co., Ltd.* (v), the policy insured one Bratton in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road. The third party was knocked down by the car on a road inside a Royal Ordnance Factory to which the public in wartime had no access, and the cover of the policy was held not to extend to such use.

(9) In *Bonham v. Zurich General Accident and Liability Insurance Co., Ltd.* (w), the policy excluded use for hiring. The proposal form, which was made the basis of the contract of insurance, contained a question, "Will passengers be carried for hire or reward?" to which the answer no was made. In fact, three fellow employees were carried by the assured regularly to and from his work, and two of them voluntarily paid him a small sum of money, without being required to do so, and were being so carried at the time of the accident. It was held that though this was no hiring, it was a carriage of passengers for reward, and so the cover of the policy did not extend to it.

7. "*Is obtained against any person insured by the policy.*"—The meaning of the words "persons insured by the policy" was discussed in chapter IV, where it was shown that section 36 (4) gave a right to any person whom the policy by its terms purported to cover to claim that he is insured by that policy and may sue the insurers direct for an indemnity thereunder, even though there was no privity of contract between him and the insurers (x). The question is also raised by these words whether a policy obtained by a false representation as to the identity of the assured "insures" such person.

In *Jones v. Meatyard* (y), Meatyard gave a false name as his own to insurers in order to obtain better financial terms in the issue to him of a cover note. Applying the law as to mistake in contract to the facts of this case, it is submitted that in fact no contract of insurance was effected. But it must be remembered that now by the Motor Insurers' Bureau agreements (z) it is sufficient, so far as third parties are concerned, that the vehicle which caused them damage is mentioned in the policy as being covered: whether the driver is himself covered by the policy is immaterial.

8. "*Notwithstanding that the insurer may be entitled to avoid . . . the policy.*"—The circumstances in which insurers are entitled to avoid the policy have been explained (a). The words "*is entitled to*" are vital. They show that the section has no application to a policy which has been *automatically avoided*, as when the assured dies (b), becomes bankrupt (c), or parts with the insured vehicle (d).

9. "*Or cancel.*"—The circumstances in which a policy may be cancelled by the insurer have been described (e). It seems doubtful whether the cancellation here referred to is cancellation in the sense of repudiation on the ground of breach of condition or non-disclosure, etc., or cancellation by mutual consent or by notice and return of premium (f).

10. "*Or may have avoided.*"—This must mean: in spite of the fact that the insurer has taken advantage of a breach of condition or a failure to disclose,

(v) (1945), 109 J. P. 107.

(w) [1945] K. B. 292; [1945] 1 All E. R. 427.

(x) *Tattersall v. Drysdale*, [1935] 2 K. B. 174.

(y) [1939] 1 All E. R. 140.

(a) *Ante*, p. 280.

(c) *See ante*, p. 115.

(d) *See Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1931), 146 L. T. 26 (H. L.). In all these cases the policy comes to an end willy nilly and cannot be revived. *See post*, chapter IX.

(e) *Ante*, p. 280.

(f) Since the insurers are always entitled to avoid the policy by mutual consent or in pursuance of any clause entitling them so to do. On the other hand, this may be intended to make clear (what is in effect provided by the next subsection) that insurers cannot evade their obligation under this subsection by cancelling the policy by agreement or notice after the third party liability has been incurred.

(z) *See* chapter VI, *post*.

(b) *See post*, chapter IX, "Termination of policy."

etc., and repudiated the policy or declared it to be void—in other words, in spite of the fact that the insurer has exercised his option of treating the policy as void (g).

11. "*Or may have . . . cancelled.*"—Here "cancelled" must be understood in the sense of cancellation under the cancellation clause (or by mutual consent), or at any rate in that sense in addition to the sense of "repudiate." In this phrase, therefore, "cancelled" seems to be used rather in contrast to "avoided" (h).

12. "*The insurer shall.*"—The word "shall" is imperative (i). It means that there is an absolute duty upon the insurer to do what is required by the succeeding words of the subsection.

13. "*Subject to the provisions of this section.*"—This is equivalent to "except in the cases specified hereafter in this section," or "except as hereinafter provided." The exceptions referred to are fully explained below (k).

14. "*Pay to the persons entitled to the benefit of the judgment.*"—It should be noted that this subsection brings about two radical changes in the previous law:

(1) It directly alters the contractual rights as between insurers and assured;

(2) It gives to third parties rights which they never had before, except to the limited extent to which they might acquire them under the Third Parties Act, 1930.

Of these changes in turn:

(1) (A) Under the previous law of contract, where the assured was entitled to an indemnity under a motor policy he could (at any rate in theory) demand payment of the sum due in respect thereof to him (l), and the insurers were not entitled to pay that sum to the third party without his consent. That this was the strict legal position is, it is submitted, decided law (m). In practice, however, the insurers almost invariably paid the sum due in respect of the indemnity to the third party. Nevertheless, unless they did so with the express or implied consent of the assured (n) they acted in breach of their contract with him, and at any rate in cases such as *Hood's Case* (o) it is at least doubtful whether, under the old law, insurers who paid the third party could not be compelled to pay again (p).

(B) Under the previous law of contract, in any case where an assured claimed under a policy to be entitled to an indemnity in respect

(g) But not, apparently, if instead of so exercising his option he has merely refused to recognise the particular claim as being one covered by the policy. See, e.g., *Woodall v. Pearl Assurance Co.*, [1919] 1 K. B. 593.

(h) See *ante*, p. 280.

(i) See *Salford Corporation v. Achers* (1846), 16 M. & W. 85; *Bowman v. Blyth* (1857), 7 E. & B. 47; *Young & Co. v. Royal Leamington Spa Corporation* (1883), 8 App. Cas. 517; *Noseworthy v. Buckland-in-the-Moor* (1873), L. R. 9 C. P. 233.

(k) *Post*, p. 297.

(l) Unless, of course, there was anything in the contract which deprived him of that right. Cf. note (n), *infra*. But that was the nature of an indemnity. See chapter II, pp. 74 *et seq.*, and cases there cited.

(m) See *Re Harrington Motor Co., Ex parte Chaplin*, [1928] Ch. 105, and see the cases cited *ante*, p. 71, note (u). The principle seems to have been doubted by GREEN, L. J., in *Israelson v. Dawson*, [1933] 1 K. B. 301, and *France v. Piddington* (1932), 43 Ll. L. R. 491.

(n) Most policies contain a clause giving insurers "complete discretion" in settling any third party claim; how far this gives them the right to pay the indemnity to the third party direct is considered *post*, chapter IX.

(o) *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793.

(p) See *ante*, p. 76.

of third party liability incurred by him, and the insurers disputed this claim, or contended that the policy was avoided, they could by contract agree with the assured to pay him some smaller sum in full discharge of his claim to an indemnity (q). Such an agreement was valid and binding, and if made before the assured commenced to become bankrupt or, being a company, to go into liquidation, etc., would even defeat such rights as a third party might otherwise acquire under the Third Parties Act, 1930 (r).

(C) It is submitted that both the above rights are, so far as concerns claims covered by the Act (s), now (at any rate for all practical purposes) repealed.

The assured has now no right to insist upon payment to him of the indemnity provided by the policy, and, if that sum or any part thereof is paid to the assured, the insurers may become obliged to pay a second time to the third party (t).

(D) The result is that the subsection takes effect as if, in the phrase "notwithstanding that the insurer may be entitled to avoid or cancel, etc." were the words "*and notwithstanding that the insurers have discharged or compromised their liability under the policy to the assured*" (u).

(E) This result, it is submitted, follows (in spite of the rule that such an enactment as this must be construed strictly (v)) from the peremptory words of the subsection which say "if after a certificate of insurance has been delivered . . . the insurer shall, notwithstanding, etc., pay . . ." and from the general scope and object of the whole section.

(2) The whole position of a third party in relation to insurers (as it was before the enactment now under consideration was passed) has been fully discussed in a previous chapter of this book (w). At this point no useful purpose is served by enlarging upon this radical change in the position which this section effected.

15. "*To the persons entitled to the benefit of the judgment.*"—These, it must be remarked, are not necessarily the persons to whom the judgment was awarded—namely, the plaintiffs in the action. A judgment can be assigned (x), and, if it is assigned, the assignee is the person entitled to the benefit thereof (a). On the other hand, in certain cases the nominal plaintiff—that is to say, the person to whom the judgment is awarded—is in fact suing in a representative capacity on behalf of other persons who will be entitled to the benefit of the judgment when it is obtained (b).

This often happens in actions brought in respect of the death of some person killed in a motor accident. The action is brought under the Fatal

(q) For an example of such an agreement, see *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793. As to discharge of contract by agreement, see 7 Halsbury's Laws, 2nd Edn. 234 *et seq.*

(r) 23 Halsbury's Statutes 12.

(s) *I.e.* claims required to be covered by s. 36 (1) (b) of the Road Traffic Act, 1930.

(t) *Cf. Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793, where the insurers were obliged to pay a second time to the assured's trustee in bankruptcy.

(u) *Cf. Hood's Case (supra)* and *Rowe v. Kenway and United Friendly Insurance Co.* (1921), 8 Ll. L. R. 225.

(v) See *per cur. Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A. C. 70, at p. 80.

(w) Chapter III, *ante*, pp. 113 *et seq.*

(x) Law of Property Act, 1925, s. 136 (15 Halsbury's Statutes 313).

(a) See *Goodman v. Robinson* (1886), 18 Q. B. D. 332; *Re Freshwater, Yarmouth and Newport Rail. Co.* (1913), 29 T. L. R. 568.

(b) *As, e.g., in the case of an infant suing by his next friend.* See R.S.C., O. 16, r. 16, and notes thereto in the current Annual Practice.

Accident Acts, 1846 to 1908 (c), and now it may also be under the Law Reform Act, 1934 (d), by some person (who may or may not himself be entitled to the benefit of the judgment), on behalf of and for the benefit of certain of the deceased person's dependent relatives.

In such an action these, clearly, are persons "entitled to the benefit of the judgments," and not the nominal plaintiff. Nevertheless it is submitted that as used in this subsection the words would be limited in application to:

- (1) The plaintiff in the action in which the judgment was awarded;
- (2) Any person to whom the rights under the judgment have been assigned.

It follows, therefore, that the dependants of a deceased person (e) for whose benefit an action is brought could not demand payment from the insurers direct to themselves of the amount of the judgment obtained in such action, and that the insurers would not discharge their obligation by making any payment to such persons direct.

It remains to be repeated that the benefit of a judgment may be assigned by agreement (f) or by operation of law. It is in the case of bankruptcy or liquidation that assignment by operation of law occurs. On the other hand, it must be carefully noted that the benefit of a judgment in respect of death or personal injuries does not always pass by operation of law in bankruptcy or liquidation. It would only so pass where the claim was by an employer for the loss of services of his servant caused by the injury, or where, in the case of death, the action in which the judgment was recovered was one brought under the Law Reform (Miscellaneous Provisions) Act, 1934 (g), for the benefit of the estate of the deceased person, which estate was being administered in bankruptcy.

16. "*Any sum payable thereunder in respect of the liability.*"—It must be stressed that the sum made payable by the insurers under this section is not necessarily the full amount of the judgment. It is *such amount of the total sum awarded by the judgment as represents damages in respect of death or personal injuries or in respect of fees for emergency treatment* (h).

"The liability" referred to means the liability which is required to be covered by a policy under paragraph (b) of subsection (1) of section 36 of the principal Act (i), viz. "liability in respect of the death of or bodily injury to any person."

This, it is conceived, need not create any difficulty in practice. Where an action arising out of a motor accident is brought in respect both of bodily injuries (or death) and damage to property, that part of the claim which relates to damage to property is usually (k) for a fixed or liquidated sum: £x. The judgment awarded to the plaintiff in such an action may be in the form of one lump sum which includes both such damages as the Court thinks sufficient to compensate for the personal injuries and such sum as the Court thinks represents the damage to property. But the latter sum is not necessarily the amount claimed, and, unless the judgment itself contains specific directions to that effect (which as a rule it does not) it is not possible to say

(c) 12 Halsbury's Statutes 335, 337, 340.

(d) 27 Halsbury's Statutes 220. See *ante*, chapter I, pp. 52 *et seq.*

(e) Assuming them not to be the actual plaintiffs.

(f) See *ante*, p. 288, notes (x) and (a).

(g) 27 Halsbury's Statutes 220.

(h) For fees payable for emergency treatment, by s. 36 (1) (b) of the principal Act as amended by s. 16 (4) of this Act.

(i) See *ante*, p. 188, for this section and the effect and meaning thereof.

(k) But not always; as, for example, where the plaintiff claims damages for the loss of use of his vehicle.

what part of the lump sum awarded represents damages for personal injuries and what part damages to property. It might seem, therefore, that an insurer could evade his liability under section 10 (1) on the ground that it is not his business to determine what part of the damages awarded to the third party relate to liability for personal injury so as to make that section operative.

In this connection the following points must be noted :

A. By Order 41, rule 1 (l) : In every judgment " the forms in Appendix F shall be used, with such variations as circumstances require." The forms referred to are to be found in the Appendix to the Rules of the Supreme Court (m) and those appropriate to actions for personal injuries and damage to property arising out of the use of a vehicle on a road are Forms No. 7 (for trial with a jury) and No. 11 (for trial without a jury). Neither of these forms provides for the award in the judgment of anything but one lump sum. The qualification in the rule that such variations as circumstances may require may be made shows, however, that there is nothing to prevent the Court directing that the judgment shall specify what portion of the total sum awarded represents damages in respect of the personal injuries. It would, however, be within the discretion of the Court to order that this indication should be given in the judgment, and there seems nothing in this Act to suggest that that discretion must be exercised in any particular way.

Moreover, in cases of trial by jury it would be necessary to direct the jury to make a similar apportionment or division of the damages awarded by them.

B. It is perhaps a defect that this Act does not contain some such provision as is found in Order 22, rule 14 (g) (n), which enjoins that where proceedings are brought under the Fatal Accidents Acts, 1846 to 1908 (o), for more than one person and the amount to be recovered to be divided amongst such persons,

" the judge or jury as the case may be shall divide and apportion the share
" to be paid to each of the said persons and the amount so apportioned shall
" be specified in the order or judgment made or directed in the High Court."

In cases under the Fatal Accident Acts, on the other hand, it has been held that the above rule gives the judge power to apportion the damages where the jury has not done so (p). It is apprehended that this Act does not, by itself (q), give the Court any power either to compel the jury to apportion damages as between personal injuries and damage to property, or to make that apportionment itself where the jury fails or refuses to do so.

C. It has been held that where there is a claim in respect of personal injuries and another claim in respect of damage to property arising out of the same accident there are in reality two separate causes of action in respect of each claim (r). Where there are two separate causes of action joined in one action, the jury and judge must specify what sum is awarded in respect of each cause of action in the verdict or judgment as the case may be (s). It would seem, therefore, that in cases where damages are claimed for injury to

(l) R.S.C. See the current Annual Practice and the notes to this rule therein.

(m) See the current Annual Practice.

(n) R.S.C. See the current Annual Practice and notes to this rule therein.

(o) 12 Halsbury's Statutes 335, 337, 340.

(p) See *Bulmer v. Bulmer* (1883), 25 Ch. D. 409; *Sanderson v. Sanderson* (1877), 36 L. T. 847; *Condliff v. Condliff* (1874), 29 L. T. 831.

(q) But he nevertheless has such power See *post*.

(r) *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141, approved in *Wilson v. United Counties Bank, Ltd.*, [1920] A. C. 102, *per* Lord ATKINSON, at p. 131.

(s) *Weber v. Birkett*, [1925] 1 K. B. 720; on appeal, [1925] 2 K. B. 152.

Particular care will, it is submitted, be needed in cases where there is a counterclaim (c) or a payment into court (d).

18. "*And any sum payable in respect of interest on that sum.*"—Here it is made clear what is omitted in relation to costs, that the interest is on that sum—namely, the sum awarded in respect of the liability for personal injuries or death (e). Before the Law Reform Act, 1934 (f), whilst interest accrued on all judgments, none could be given as damages in respect of personal injuries or death (g). Now by section 3 of that Act it is provided that :

Power of courts of record to award interest on debts and damages.

" 3.—(1) In any proceedings tried in any court of record (h) for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment :

" Provided that nothing in this section—

" (a) shall authorise the giving of interest upon interest ; or

" (b) shall apply in relation to any debt upon which interest is payable
" as of right whether by virtue of any agreement or otherwise ; or

" (c) shall affect the damages recoverable for the dishonour of a bill
" of exchange.

" (2) Sections twenty-eight and twenty-nine of the Civil Procedure Act, 1833 (g), shall cease to have effect."

In running-down actions, it is not normal for the Court (h) to award interest on damages. But it may be apposite to quote here an extract from the Report of the Law Revision Committee upon the recommendations of which it is supposed the above enactment was passed :

" We have come to the conclusion that the time has come when the old and rigid Rule (regarding the recovery of interest) should now be altered.

" The courts, including all appellate tribunals, should have the power to award interest in every case in their discretion where it is not already provided for by statute, or by the contract, or otherwise.

" In practically every case a judgment against the defendant means that he should have admitted the claim when it was made and have paid the appropriate sum for damages (i). There are, of course, some cases where it is reasonable that he should have had a certain time for investigation, and in those cases the Court might well award interest only from the date when such reasonable time had expired. This is often done at present in claims under insurance policies. There is no doubt that the present state of the law provides a direct financial motive to defendants to delay proceedings.

(c) See *Medway Oil and Storage Co v. Continental Contractors*, [1929] A. C. 88. And see the current Annual Practice, notes to Order 65, r. 1, and the cases there cited.

(d) As to costs when there has been payment into court, see *Powell v. Fickers, Sons and Maxim, Ltd.*, [1907] 1 K. B. 71, and *Fitzgerald v. Tilling (Thomas), Ltd.* (1907), 96 L. T. 718, and see the current Annual Practice, notes to Order 22, and cases there cited.

(e) Or medical fees.

(f) 27 Halsbury's Statutes 220. As to the other provisions of this Act, see *ante*, pp. 53 *et seq.*

(g) 13 Halsbury's Statutes 112.

(h) A County Court is a Court of Record, as is practically every Court in which damages for death or personal injuries can be awarded. See 8 Halsbury's Laws, 2nd Edn. 527, 528.

(i) It is difficult to see how this could apply to cases where the injury becomes worse after the claim was first made (as often happens) or particularly when the claim as originally made was excessive.

" It has often been suggested that although this might at once be conceded so far as debts, damages for breach of contract and special damages are given, as for instance in running down cases, or indeed for, say, libel or slander, or for pain and suffering in personal injury, they might be left as they are, as standing on a different basis.

" There seems, however, to be no reason for a different rule in these latter cases.

" To take as an extreme example, a libel action in which the defendant is held liable. The Court is in effect deciding that he has defended the case wrongly and without sufficient grounds. He ought, that is to say, to have admitted the claim when made and have offered a proper sum by way of damages. In any event the Court will have a discretion which can be exercised in cases accordingly where it would be unreasonable to award interest.

" In Admiralty cases the rule is thus stated in *Liesbosch Dredger v. Edison S.S. (k)*, where the damage claimed was for the loss of a vessel owing to the wrongdoer's tort: ' It is on the true value of the vessel so ascertained that the interest at 5 per cent. from the date of the collision will run, as further damages, on the principles of the Court of Admiralty ' stated by Sir C. Butt in *The Kong Magnus (l)*, that is damages for the loss of the use of the money representing the lost vessel as from the date of the loss until payment ' "

It should be noted that the amount of interest, and whether any at all is to be awarded, must be determined by the judge and not by the jury (m). Further, the following remarks on the question of when interest is likely to be awarded in running-down cases may be usefully suggested here :

1. Where the plaintiff originally claimed (as not infrequently happens) considerably more than the amount awarded him by the Court, the basis of the principle (n) goes, unless it can be suggested that the defendant ought to have paid the sum due, although a much larger sum was demanded.

2. The principle will not necessarily apply in cases where money has been paid into Court.

3. The principle does not seem to apply to sums awarded in respect of loss of future earnings—in such a case the invariable practice is to award a sum calculated by reference to estimated loss in the future as from date of judgment. In so far as a sum awarded is in respect of future earnings, it is difficult to see why any interest should be payable thereon.

4. It is submitted that the Court need not award a specific sum for interest, but may award interest at x per cent. from a named date, the rate being the general rate of interest that money can earn at that date (o).

2. General effect of subsection (1).—The following general observations upon the effect of subsection (1) of section 10 may here be made :

1. It is remarkable that this subsection contains no provision, such as is to be found in the British Columbia Insurance Act, 1925, whereby the insurer is only obliged to pay if the assured fails to satisfy the judgment

(k) [1933], A. C. 449, at p. 468.

(l) [1891], P. 223.

(m) This, it is submitted, must necessarily be implied from the words of the section itself. See also *Riches v. Westminster Bank*, [1943] 2 All E. R. 725. Income tax is payable on such interest when awarded (*Riches v. Westminster Bank, Ltd.*, [1947] A. C. 390; [1947] 1 All E. R. 460 (H. L.)).

(n) I.e. the principle that the defendant ought to have paid up as soon as a claim was made, suggested in the extracts from the Law Revision Committee's Report quoted above.

(o) *Kuluhundis v. Norwich Union Fire Insurance Society*, [1937] 1 K. B. 1; [1936] 2 All E. R. 242.

obtained against him. It is clear that insurers are under this subsection obliged immediately to pay the amount of the judgment in the circumstances indicated in the section. It should be noted that the third party in order to enforce his judgment against an insurer must proceed by way of action. He cannot merely execute the judgment which he has obtained against the assured against the insurers. They have, it is submitted, a reasonable time within which to do so. "Immediately," however, is an elastic term (*p*), and in this context it should, it is submitted, be held equivalent to "a reasonable time" (*q*). What is a reasonable time is a question of fact in each case, but it is suggested that it would expire at the end of the period of three months from the issue of the writ in the action in which judgment was obtained (*r*), if that period expired after the date of such judgment, or (as would more usually be the case in High Court proceedings), if that period had expired before the date of judgment, as soon as the plaintiff could levy execution (*s*) upon the defendant in pursuance of the judgment. This depends upon the time specified in the judgment for payment of the sum thereby awarded (*t*), and if none be specified the insurer would be obliged to pay forthwith (*u*), that is, without any delay. But although this would be their strict obligation, it is thought that in any proceedings commenced against insurers to enforce payment under this section, the plaintiff might be in danger of having to pay his own costs if he did not allow the insurers a more liberal interpretation of the phrase "reasonable time." In any case, as a result of the Motor Insurers' Bureau agreements (*v*), if the accident from which his rights arose occurred after July 1, 1946, the plaintiff will have no need to bring an action against insurers, for they will have paid the amount of the judgment obtained against their assured, together with costs, within seven days of the execution date thereof, provided that the assured has not satisfied the debt himself.

2. Whilst imposing the peremptory obligation upon insurers to pay the amount of the judgment obtained against the assured, the Act makes no general provision for any right of the insurers to recover from their assured the sum so paid in cases where the assured has by a breach of condition disentitled himself to any indemnity under the policy. But it might be that insurers would be held entitled in such cases to recover any sum so paid from their assured in an action for money paid to his use (*w*). The position here should be contrasted with that under section 12 of this Act and that under section 38 of the principal Act (*x*), where insurers can only recover

(*p*) See *Barker v. Lewis and Peat*, [1913] 3 K. B. 34; *Arnold v. Dimsdale* (1853), 2 E. & B. 580.

(*q*) See *per Cockburn, C. J.*, in *R v. Berkshire Jf* (1870), 4 Q. B. D. 469, and other similar cases where it is held that under a statute requiring something to be done "immediately" a reasonable time is allowed.

(*r*) Since that is the last date upon which insurers can commence proceedings under sub-s. (3) of this section. See *post*, p. 303.

(*s*) See Order 41, R.S.C., and the notes thereto in the current Annual Practice: see also the Motor Insurers' Bureau agreements, chapter VI, *post*.

(*t*) See Order 41, r. 17, and notes in the current Annual Practice.

(*u*) Order 42, r. 1, R.S.C.

(*v*) See chapter VI, *post*.

(*w*) See this question further discussed *post*, pp. 327-8, as to the right of insurers to recover from a person not a party to the contract of insurance a sum paid by them which has discharged his liability. Some of the defences suggested there might be available to an assured under this subsection.

(*x*) As, for instance, where the breach relied on was that of having made a false but immaterial statement in the proposal form. *Aliter*, in cases where the loss would not have occurred but for the breach, e.g. where the third party liability was incurred by reason of the vehicle being driven in an unsafe condition, in which case the insurers are expressly given the right to recover by the proviso to s. 12. See *post*, p. 327.

money which they would not have had to pay out for the provisions of that Act if they inserted a term in the policy entitling them so to do. The insurers could, of course, in any case claim damages from their assured for any breach of contract committed by him, but under the present form of policy these would be usually merely nominal (a), except where the third party liability was caused by the breach (b).

3. The Act makes no provision as to the procedure to be pursued by a person entitled to the benefit of a judgment against insurers who fail or refuse to discharge their obligation under this subsection. But immediately upon any such failure or refusal on the part of insurers a cause of action arises against them in respect thereof, and could be enforced by action (d).

In any such action (e) the defence open to the insurers (apart from the defence that the liability was not covered by the policy and the defences open to insurers under subsections (2) and (3)) would be that the judgment in respect of which they were sued had been obtained by collusion between the plaintiff and defendant or by fraud (f). Collusion would in practice not occur frequently, since judgment in respect of liability to voluntary passengers does not come within the subsection, and in most cases, therefore, the plaintiff and defendants would be strangers before the accident occurred, and would be unlikely to become friends after that event.

Whilst it is doubtful whether even these defences could be raised, since a judgment is deemed to be inviolate and unquestionable unless set aside in proceedings duly constituted for that purpose (g), it is submitted that they could (h). In this connection it should be noted that the position between a third party claiming payment in respect of a judgment under this Act is essentially different from that of a third party who seeks to enforce the assured's rights under the Third Parties Act, 1930 (i). In exceptional circumstances, a judgment obtained by default against an assured may be set aside by insurers under the Rules of the Supreme Court. In *Windsor v. Chalcraft* (k) insurers were informed of the issue of the writ in the running-down action against their assured, but received no further information, and had no knowledge that the writ was served. Judgment by default was obtained for £2,250 against the assured, and the insurers were held entitled

(a) See *Brittain v. Lloyd* (1845), 14 M. & W. 762; *The Orchis* (1890), 15 P. D. 38; *Spencer v. Parry* (1835), 3 Ad. & El. 331; *Lubbock v. Tribe* (1838), 3 M. & W. 607; *Phillips v. Muller* (1875), L. R. 10 C. P. 420; *Sleigh v. Sleigh* (1850), 5 Exch. 514, at p. 516; *Re Fox, Walker & Co., Ex parte Bishop* (1880), 15 Ch. D. 400; *Underhay v. Read* (1887), 20 Q. B. D. 209.

(b) *E.g.* where caused by defective condition of vehicle.

(d) Or in the case of bankruptcy or liquidation of the insurers by proof in such bankruptcy or liquidation.

(e) Which, in view of the Motor Insurers' Bureau agreements, will only be necessary in respect of accidents which occurred before July 1, 1946.

(f) See further, and as to the analogous position under the Third Parties (Rights against Insurers) Act, 1930 (23 Halsbury's Statutes 12), *ante*, p. 153.

(g) *Flower v. Lloyd* (1879), 10 Ch. D. 327; *Re Swire, Mellor v. Swire* (1885), 30 Ch. D. 239; *Baker v. Wadsworth* (1898), 67 L. J. Q. B. 301; *R.M.K.R.M. (Firm of) v. M.R.M.V.L. (Firm of)*, [1926] A.C. 761; *Kinch v. Walcott*, [1929] A.C. 482. There are, however, cases in which it has been held that a collusive judgment can always be questioned.

(h) See *Wyatt v. Palmer*, [1899] 2 Q. B. 106.

(i) 23 Halsbury's Statutes 12; *ante*, chapter III. As to the insurer's rights to dispute a judgment obtained against the assured in proceedings under that Act, see *ante*, p. 153.

(A) [1939] 1 K. B. 279; [1938] 2 All E. R. 751.

by the Court of Appeal under Order 27, r. 15 (*l*), to set aside the judgment and to enter an appearance to the writ, even though the nominal defendant in the circumstances was not so entitled.

4. Whatever may be the correct answer to the question last considered, there remains the question as to whether the right (and as compared with an insurer the privilege) of the giver of a security to limit his liability thereunder which is expressly given him by section 37 of the principal Act is affected by this subsection. There are no express words in this Act which take away that right. Nevertheless, it may be that, having regard to the general object of this Act, and construing subsection (4) of this section in the sense shown hereafter (*m*), the Courts would hold that the giver of a security is obliged by this subsection to pay the full amount of the judgment, although that sum exceeds the sum to which he has limited his undertaking in the security. But, for the reasons which are given in a later section (*n*) of this chapter, it is submitted that this construction would violate the rule that rights given by one statute are not to be taken away by another except by clear words (*o*).

5. It would seem that in cases where the person entitled to the benefit of the judgment is the judgment debtor of some third party, such third party could attach the debt due from the insurers in garnishee proceedings (*p*).

3. Section 10 (2).

" No sum shall be payable by an insurer under the foregoing provisions of this section—

- " (a) in respect of any judgment, unless before or within seven days after
 - " the commencement of the proceedings in which the judgment
 - " was given, the insurer had notice of the bringing of the proceedings; or
- " (b) in respect of any judgment, so long as execution thereon is stayed
 - " pending an appeal; or
- " (c) in connection with any liability, if before the happening of the
 - " event which was the cause of the death or bodily injury giving
 - " rise to the liability, the policy was cancelled by mutual consent
 - " or by virtue of any provision contained therein, and either—
 - " (i) before the happening of the said event the certificate
 - " was surrendered to the insurer, or the person to
 - " whom the certificate was delivered made a statutory
 - " declaration stating that the certificate had been
 - " lost or destroyed, or
 - " (ii) after the happening of the said event, but before the
 - " expiration of a period of fourteen days from the
 - " taking effect of the cancellation of the policy,
 - " the certificate was surrendered to the insurer, or the
 - " person to whom the certificate was delivered made
 - " such a statutory declaration as aforesaid, or

(*l*) Order 27, r. 15: " Any judgment by default whether under this order or under any other of these rules, may be set aside by the Court or a judge, upon such terms as to costs or otherwise as such Court or judge may see fit." And see *Jacques v. Harrison* (1884), 12 Q. B. D. 165.

(*m*) *Post*, p. 313.

(*n*) *Post*, p. 340.

(*o*) See Maxwell on the Interpretation of Statutes, 7th Edn., pp. 152 *et seq.*, and the cases there cited. " Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in clear language," (*op. cit.*, p. 153). Moreover, in this case the two statutes are to be read as one; s. 42. See further, *ante*, p. 286, and see also *Pretty v. Solly* (1859), 26 Beav. 606; *De Winton v. Brecon Corporation* (1859), 26 Beav. 533, *post*, p. 341.

(*p*) Provided the debt was immediately due. See Order 45, r. 1, and the notes thereto in the current Annual Practice, and see *White, Son and Pail v. Stemnings*, [1911] 2 K. B. 418; *Kennell v. Westminster Improvement Comrs.* (1855), 11 Exch. 349.

- " (iii) either before or after the happening of the said event,
 " but within the said period of fourteen days, the
 " insurer has commenced proceedings under this
 " Part of this Act in respect of the failure to surrender
 " the certificate."

" No sum shall be payable . . . unless before or within seven days after the commencement of the proceedings . . . the insurer had notice of the bringing of the proceedings."—The commencement of the proceedings is the issue of the writ therein (q).

Four questions arise upon the construction of this paragraph. These are :

1. Is notice a condition precedent to the obligation of the insurers to pay under subsection (1) ?
2. What form of notice is required, written or not written, and if not written, actual or constructive notice ?
3. By whom must the notice be given ?
4. To whom must the notice be given ?

1. It seems clear that notice is required as a condition precedent to the insurers' liability. The subsection, which must be construed strictly, says " no sum shall be payable unless . . ." It is submitted that clearer words could hardly be required.

2. The question as to what form the notice is to take is more difficult. Since it is merely provided that the insurers must have *had* notice, and there is no requirement that notice shall be served, or even given (r), by any particular person, it is submitted that neither written nor express notice is necessary (s). On the other hand, it is submitted that there must be actual notice (t), and that constructive notice would not be held to be sufficient (u). In the words of LINDLEY, M.R., "' unless he shall have had notice ' means a great deal more than ' unless he shall have some vague information ' which, if followed up, will lead to such notice " (i). It must in any case be a notice in the sense that it is given formally, it must not be a mere piece of casual conversation (u). It must be shown that the insurers in fact knew of the proceedings commenced against their assured, and it would not, it is submitted, be sufficient to show merely that they ought to have known (u), though proof of the latter fact would no doubt help considerably in establishing the former. But it must be carefully observed that the fact of which notice is necessary is not the commencement of the proceedings—i.e. the issue of the writ—but the " bringing " of them. It is conceived that this must mean either knowledge (x) that proceedings had been commenced or that they were threatened. It is apprehended that difficulties may arise under this paragraph of the subsection in cases where a cautious solicitor, acting for a client desiring to bring an action in respect

(q) *Clarke v Brallaugh* (1881), 8 Q. B. D. 63, per Lord COLERIDGE, *Galland v Burton* (1885), 30 Ch. D. 231, [C.] at p. 166. And see Order 2, r. 1, R.S.C., and notes thereto in the current Annual Practice. As to the difficulties which might arise when a writ is issued but not served, see further *post*, p. 299.

(r) *Wilson v Nightingale* (1846), 5 Q. B. 1034, *R v Shurmier* (1886), 17 Q. B. D. 323.

(s) *Re Walker, Ex parte Nicholl* (1884), 13 Q. B. D. 469.

(t) *Cf. Re, Friedlander, Ex parte Ostler* (1884), 13 Q. B. D. 471.

(u) *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421, per LINDLEY, M.R., at p. 436. The Courts dislike applying the principles of constructive notice to commercial transactions. See *Houghton & Co v Nothard, Lowe and Wells*, [1928] A.C. 1.

(v) See *Hunt v. Luck*, [1901] 1 Ch. 45.

(w) *Herbert v. Railway Passengers Assurance Co.*, [1938] 1 All E. R. 650.

(x) See, however, *Mildred v. Mapons* (1883), 8 App. Cas. 874, where it is said that knowledge and notice are not necessarily the same thing. Per Lord BLACKBURN, at p. 885, and per SELBORN, L.C., at p. 898.

of personal injuries sustained in a motor accident against a public authority, takes out a writ at once but does not *serve* it until some time after, when negotiations for a settlement have failed. In such a case it might well happen that the insurers would not have notice of the bringing of the proceedings until after seven days from their commencement, *i.e.* from the date on which the writ was issued. Writs are issued but not served in cases such as these for the purpose of making sure that the injured person's claim shall not be defeated by the Public Authorities Protection Act (*a*), which provides that no action against public authorities or against individuals in respect of an act done by them in pursuance of a public duty shall lie unless it be commenced within six months of the injury complained of (*b*).

This point arose in *Cross v. British Oak Insurance Co., Ltd.* (*c*), in which case the insurers had notice of the issue of a third party notice in proceedings in which the assured was defendant. The person brought in as third party counterclaimed against the assured, but no notice was given to insurers of the counterclaim. The counterclaim succeeded against the assured, and the judgment sum awarded on the counterclaim was claimed from the insurers. DU PARCQ, J., as he then was, considered that as under the proviso to subsection 3 of section 10 the insurer must give notice to "the person who is the plaintiff in the said proceedings," and as a defendant does not become a plaintiff until he counterclaims, proper notice of the bringing of the proceedings had not been given to the insurers. He thought that the words "proceedings in which judgment was given" used in subsections (2) and (3) of section 10 did not refer to the issue of the writ, but rather to the service of the writ, because of the great length of time which might elapse between issue and service of the writ. The point is not wholly clear, but it has become of secondary importance in view of the Motor Insurers' Bureau Agreements.

3. It is thought that, in spite of the contrary impression which may be produced with regard to the provisions of section 13 of the Act (*d*), it is not necessary that notice should emanate from the person making the claim or suing as plaintiff in the action against the assured. The subsection states "unless the insurer had notice," and he would have notice whether it came from one source or another. If the statute required the notice to be given by the plaintiff or by any particular person it would, it is submitted, have said so. Moreover, if notice was required from the person to whom the liability had been incurred, it might enable the insurers in certain cases to be shielded by the wrongful act of an assured who failed to comply with section 13 (*d*).

4. The notice or knowledge must be given to the insurers or their agent. In this connection it should be observed that a person who is an agent for one purpose is not necessarily an agent whose knowledge will be imputed to his principal (*e*). The words of PORTER, J., as he then was, on the authority of insurance agents to receive such notice should be noted (*f*).

(a) 13 Halsbury's Statutes 455.

(b) *Ibid.*, s. 1. The limitation period was increased to one year by the Limitation Act, 1939.

(c) [1938] 2 K. B. 167; [1938] 1 All E. R. 383.

(d) *Post*, p. 329. See *Herbert v. Railway Passengers Assurance Co.* (*supra*).

(e) *Wells v. Smith*, [1914] 3 K. B. 722; *Re Fenwick, Stobart & Co., Ltd., Deep Sea Fishery Co.'s, Ltd., Claim*, [1902] 1 Ch. 507; *Wyllie v. Pollen* (1863), 3 De G. J. & Sm. 506; *Re Solvency Mutual Guarantee Society, Hawthorn's Case* (1862), 31 L. J. Ch. 625; *Gale v. Lewis* (1846), 9 Q. B. 730; *North British Insurance Co. v. Hallett* (1861), 7 Jur. (N. S.) 1263; *Rendal (A&S) v. Arcos, Ltd.*, [1937] 3 All E. R. 577; *Evans v. Employers Mutual Insurance Association, Ltd.*, [1936] 1 K. B. 505; *Cornhill Insurance Corporation v. Assenheimer* (1937), 58 Ll. L. R. 27.

(f) *Herbert v. Railway Passengers Assurance Co.*, [1938] 1 All E. R. 650, at p. 651.

Since notice is a condition precedent to the insurers' liability, it is submitted that in any action brought against insurers under this section for the recovery of the amount awarded the onus of proof would be upon the plaintiff to show that the insurers had had the necessary notice. The defence that no notice was given to insurers must be specifically pleaded by them (g).

"... so long as execution thereon is stayed pending an appeal."—This supports the view, stated above, that the obligation of the insurers to pay the amount of the judgment is co-terminous with the right of the person to whom it is awarded to levy execution in respect thereof. Difficulty arises as to what is meant by "execution stayed." It clearly connotes execution stayed by order of the court (h). Does it also include execution stayed by consent between the parties to the action? A stay of execution pending appeal can be granted by the court of first instance, or, if refused there, by the Court of Appeal. It is submitted that, in cases where the defendant did not object to a stay (which had been refused by the Court of first instance) and desired to avoid the expense of an application to the Court of Appeal which he might ultimately have to bear, a valid agreement to refrain from levying execution would be a sufficient stay within the meaning of this paragraph of the subsection (i).

It is submitted that "pending appeal" includes "pending an application for a new trial." Although an application for a new trial technically differs from an appeal, and is governed by a different Order (k), the two are in substance the same (l), and it would, it is apprehended, be so held (m).

It should be noted that stay of execution (pending appeal (n) or pending an application for a new trial (o)) is only granted in special circumstances. It is not thought that the fact that an insurance company was liable to satisfy the amount of judgment would be regarded as a special circumstance (p).

"In connection with any liability, if before the happening of the event . . . the policy was cancelled by mutual consent or by virtue of any provision therein. . . ."—It is difficult to see why the phrase "in connection with any liability" is used in this paragraph. The result must be the same, since there is nothing in the "foregoing provisions" of the section to require payment by insurers except in respect of a judgment.

"Was cancelled."—It is submitted that, for reasons which appear hereafter, "cancelled" must be read as "validly cancelled" (q).

"Cancelled by mutual consent."—A policy may effectively be cancelled by mutual consent provided there is a binding contract to that effect (r).

(g) *Baker v. Provident Accident and White Cross Insurance Co., Ltd.*, [1939] 2 All E. R. 600.

(h) See Order 58, r. 16, R.S.C., and the notes thereto in the current Annual Practice.

(i) *Ante*, p. 297.

(k) Order 39, R.S.C., whereas an appeal is governed by Order 58, R.S.C.

(l) *Hechscher v. Crosley*, [1891] 1 Q. B. 224.

(m) But see *Ponnammamma v. Arumogam*, [1905] A. C. 383.

(n) *Mouk v. Bartram*, [1891] 1 Q. B. 346.

(o) *The Annot Lyle* (1886), 11 P. D. 114.

(p) As to what are special circumstances, see *Re Queensland Mercantile Agency Co.* (1891), 61 L. J. Ch. 48; *Barker v. Lavery* (1885), 14 Q. B. D. 760; *Athins v. Great Western Rail. Co.* (1886), 2 T. L. R. 400; *Bloor v. Liverpool Docking Co.* (1943), 76 Ll. L. R. 39. Cf. *Windsor v. Chalcraft*, [1939] 1 K. B. 279; [1938] 2 All E. R. 751, *ante*, p. 296. (Usually terms are imposed on the appellant, e.g., the injured third party is awarded a certain proportion of the damages forthwith).

(q) Cf. *post*, p. 301.

(r) As to discharge of a contract by agreement see 7 Halsbury's Laws, 2nd Edn. 244 *et seq.* See, for an example of cancellation by mutual consent, *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793.

In motor insurance the premium is usually paid at the outset, and in any such contract therefore the insurers must give some consideration, either by return of part of the premium or otherwise (s).

"Cancelled by virtue of any provision therein."—This may mean either—

(i) The cancellation clause often inserted in a motor policy which has already been described (t) ; or

(ii) Some condition or term of the contract, the breach of which entitles the insurers to repudiate the policy and declare it void (a), and in any event

(iii) validly and rightfully cancelled. If the cancellation is wrongful it is ineffective for the purposes of this subsection unless the assured gives it validity by accepting it as a repudiation of the contract instead of treating it (as he would be entitled to do) as a nullity.

It is submitted that cancellation by virtue of any provision in the policy is not limited to cancellation by virtue of only one provision—namely, the cancellation clause. If this were the interpretation accorded to these words, the absurd result would follow that where the insurers became entitled to and did cancel the policy on the ground of some breach of condition (as, for instance, non-disclosure or misrepresentation of a material fact) months before the third party liability had been incurred, they would be obliged in order to escape the obligations under subsection (1) to take proceedings against their assured for a declaration under subsection (3). On the other hand, it might be argued that cancellation under a cancellation clause is cancellation by mutual consent, for that in effect is precisely what it is, although the consent is given when the policy is issued. It must be admitted, however, that there may be considerable doubt as to whether "cancellation by virtue of any provision in the policy" does not refer exclusively to a cancellation clause, having regard to the use of the same phrase in section 14. The difficulties in applying that section in cases where the insured disputes the validity of a purported cancellation made, for example, on the ground that he had misrepresented a material fact in the proposal form, are considered later (b). Moreover, a strong argument in support of the limited interpretation of the phrase might be based upon the contention that cancellation by virtue of a breach of condition is not cancellation by virtue of a provision in the policy, but cancellation by virtue of something *dehors* that document—namely, the wrongful act of the assured. Nevertheless, it is submitted that the phrase "cancellation by virtue of (not, be it noted, "under," or "in pursuance of") (c) any provision in the policy includes any kind of cancellation which the insurers may validly effect in reliance upon the breach of any term or condition in the policy (d). In cases where the assured disputed the right of the insurers so to cancel the policy, they must take proceedings under section 14, in which proceedings the

(s) *Aliter* if the premium is not paid. In cases where the premium is paid by equal instalments the insurers would not, as a rule, be willing to cancel the policy unless some further sum was paid to them to make the total sums paid equal to a short period premium, which is generally at a much higher rate than the annual premium.

(t) *Ante*, p. 282, and see further *post*, chapter VIII.

(a) In certain cases there might here be a cancellation by mutual consent, as where the insurers agreed to return the premium in consideration of the assured's forgoing all claims under the policy.

(b) *Post*, chapter IX.

(c) Cf. *Ardine v. Economic Printing and Publishing Co., Ltd.* (1898), 79 L. T. 622 ; *Sturge v. Great Western Rail. Co.* (1881), 19 Ch. D. 444.

(d) It is doubtful whether cancellation by virtue of an implied term—e.g. on breach of the duty of good faith by making a fraudulent claim—is encompassed. Is an implied term a "provision contained" in the policy?

dispute must be determined, although in those proceedings the Court has no power to make any declaration as to the insurers' rights or to order the delivery of or cancellation of the certificate or the policy.

It is noticeable that this paragraph does not refer to cancellation apart from a provision in the policy—*i.e.* cancellation where the insurers discover that the policy was obtained by non-disclosure or by false statements. In practice both non-disclosure or false statements would usually be covered by a condition in the policy, and so the omission is perhaps not so important as it might be (*e*).

"(i) *Either before . . . the event . . . the certificate was surrendered to the insurer.*"—This refers to the certificate mentioned in subsection (1)—*i.e.* a certificate delivered under subsection (5) of section 36 of the principal Act (*f*). The assured is under the statutory duty imposed by section 14 of this Act to surrender his certificate when the policy has been cancelled by reason of the matters referred to in this paragraph.

"*Or the person . . . made a statutory declaration stating that the certificate was lost or destroyed.*"—It should be noticed that, although the certificate might in fact have been lost or destroyed before the event giving rise to the liability, and could not, therefore, be surrendered before that date, it is not sufficient if the statutory declaration is made after that event.

A statutory declaration is one made by virtue of the Statutory Declarations Act, 1835 (*g*) (*h*). The form in which and the method by which it may be made is described below (*i*). It must be delivered to the insurers as if it were a certificate (*k*).

"(ii) *After the happening of the said event, but before the expiration . . . of fourteen days from the taking effect of the cancellation. . . .*" It must be emphasised that although the certificate may, under this subparagraph, be returned (or a declaration be made) after the happening of the event, the cancellation must under this paragraph have taken effect *before* the event. The first subparagraph could have been made superfluous by adding the prefix "before or after" to this subparagraph.

It is noticeable that whilst under this subparagraph the certificate may be returned (or a declaration made) within fourteen days after the taking effect of the cancellation, the assured commits an offence under section 14 of the Act if he does not perform his statutory duty thereunder of surrendering the certificate (or making a declaration) within seven days (*l*).

"(iii) *Either before or after . . . but within fourteen days the insurer has commenced proceedings. . . .*" The proceedings referred to as being under "this part of this Act" are presumably criminal proceedings against the assured under section 14, and will be further considered below in connection with that section, where the possibility of civil proceedings is considered (*m*). It is remarkable that the requirements of this part of the subsection are satisfied if proceedings are merely commenced. Nothing is said as to their being brought to a successful conclusion. Nor is there any power in proceedings under this part of this Act to obtain an Order of the Court for

(*e*) In cases where the policy was cancelled on the ground of false representation or non-disclosure not covered by a condition in the policy, insurers would be obliged to argue that non-disclosure and false representation avoid the policy by virtue of an implied condition therein (as to which, see *post*, chapter VII), and that an implied condition is one "contained in the policy."

(*f*) *Ante*, p. 214.

(*g*) 8 Halsbury's Statutes 194.

(*h*) Interpretation Act, 1835, (18 Halsbury's Statutes 902).

(*i*) Under s. 14, *post*, p. 334.

(*k*) By Regulation 16, Third Party Risks Regulations, 1941, S. R. & O. 1941, No. 926.

(*l*) See *post*, p. 334.

(*m*) *Post*, pp. 334, 338.

delivery up or cancellation of the certificate. Nevertheless it is submitted that these omissions will be seen to be more apparent than real when it is remembered that "cancelled" in the operative part of this paragraph of the subsection must mean "validly cancelled." Where, therefore, the proceedings, although commenced within the requisite fourteen days, prove to be abortive in the sense that the assured succeeds in showing that he is under no duty to surrender his certificate, the cancellation will not have been valid and the requirements of this paragraph of the subsection not satisfied.

Certain general observations on this subsection are necessary :

1. If, as the view has been expressed, it is a condition precedent to the liability of insurers under subsection (1) that they should have had notice of the proceedings against their assured, the plaintiff in any action against insurers based on subsection (1) would be obliged to discharge the burden of proving (n) that there had been such notice (o).

2. The burden of proving that they came within the exceptions specified in paragraph (1) of subsection (2) is upon the insurers. The exception is expressed as "if" (*et seq.*), and the general rule that the burden is on the party who seeks to show that he comes within an exception to prove it would seem to apply. Moreover, the relevant facts would be more peculiarly within the knowledge of the insurers (p).

4. Section 10 (3).

"No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it :

"Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within seven days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled, if he thinks fit, to be made a party thereto."

"If, in an action commenced before, or within three months after . . ."

5. Action for declaration.—It should be noted here that actions by insurers for a declaration that they are entitled to avoid the policy on the grounds permitted by this subsection will not, since the Motor Insurers' Bureau agreements came into existence (q) be brought at any time after the assured's liability to the third party arose, *i.e.*, after the accident giving rise to the liability under the policy. A full discussion of the effect of this subsection as expressed in reported cases between 1935 and 1946 is therefore

(n) As to burden of proof generally, see 13 Halsbury's Laws, 2nd Edn. 542.

(o) *Mills v. Barber* (1836), 1 M. & W. 425, at p. 427; *Talbot v. Von Boris*, [1911] 1 K. B. 854, at p. 863.

(p) See *R. v. Thomas* (1870), 22 L. T. 138; and see Powell on Evidence, 10th Edn., p. 140.

(q) The agreements affect all claims by third parties arising from accidents occurring after July 1, 1946.

unnecessary. On the other hand, one of the few conditions on which insurers are still entitled to refuse payment to a third party under the Domestic Agreement is given by this sentence in that agreement (r), that the insurer who has issued a policy covering the vehicle involved in the accident ceases to be concerned (with the liability to the third party) "when before the date on which the Road Traffic Act liability was incurred the Insurer has obtained a declaration from a Court of competent jurisdiction in Great Britain that the insurance is void or unenforceable." The rare occasions on which the insurer will take the course of obtaining such a declaration are considered in the following chapter. At this point these features of the action for a declaration should be noticed.

(1) By this subsection (which is still legally operative) a substantive right is conferred upon insurers to claim a declaration even where there is no dispute or question raised by the defendant as to the matters sought to be declared. Normally, the Court will not entertain an action claiming only a declaratory judgment where the defendant does not dispute the claim (s). But where insurers seek a declaration that the policy is void for misrepresentation, he will be entitled to proceed by virtue of this subsection even though the defendant assured does not appear, and if he obtains his declaration costs will normally be awarded to insurers (t).

(2) In almost all motor insurance policies, there is an arbitration clause making an award in arbitration proceedings a condition precedent to the right to sue under the policy. This clause, however, does not affect the insurer's right to bring an action in open Court for a declaration that the policy is void for misrepresentation, for such a claim is not based upon any term in the policy. Indeed, the claim is in such circumstances that the policy is void *ab initio*, and is as though it had never existed (u). The matter is discussed at length in a later chapter (v), but it should be noted here that the right to avoid a policy for misrepresentation has been held not to arise from an implied term in the policy (w).

(3) In so far as insurers in Great Britain will from July 1, 1946, only bring actions for a declaration that the policy is avoided before the liability to third parties has been incurred under the policy, the action must necessarily be brought against the assured himself, no third party being concerned, in the protection of his own interests, to prevent the declaration from being obtained. The proviso to this subsection will therefore not be brought into operation in claims brought in relation to accidents after July 1, 1946.

(4) When claiming a declaration that the policy is avoided under this subsection, insurers have a heavy burden to discharge. As is shown below, provisions in the policy itself normally make the truth of any statement made by the assured in the proposal form and the due fulfilment of other terms of the policy a condition precedent to any liability of the insurers to make any payment under the policy. Under this subsection,

(r) Clause 1, subparagraph (vi).

(s) *London Passenger Transport Board v. Moscrop*, [1942] A. C. 332; [1942] 1 All E. R. 97; *Harman v. Crilly*, [1943] K. B. 168; [1943] 1 All E. R. 140; *Ewer v. National Employers' Mutual General Insurance Association, Ltd.*, [1937] 2 All E. R. 193.

(t) *Heatherington v. Neale* (1936), *Lloyds List Newspaper*, 24th June.

(u) *Toller v. Law Accident Insurance Society, Ltd.*, [1936] 2 All E. R. 952.

(v) Chapter IX, post.

(w) *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295; [1941] 1 All E. R. 123.

insurers have to show (a) that the assured was guilty of non-disclosure or misrepresentation, (b) that the policy was obtained by such misrepresentation or non-disclosure, (c) that the non-disclosure or misrepresentation was material, *i.e.*, that it was such that had they been informed of the fact not disclosed or falsely represented, they would not have issued the policy, either at all or at the premium at which it was in fact issued (x).

"*Apart from any provision contained in the policy.*"—For the construction of policies and the many problems and difficulties connected with the effect on a motor policy of a false statement or a material concealment the reader is referred to later chapters, where they will be fully discussed (a).

The provisions referred to are of three kinds :

1. That frequently found at the foot of the proposal form, whereby the assured warrants the truth of every statement contained therein and that he has not withheld any material information. This warranty makes the truth of any *immaterial* statement in the proposal form a term of the contract and may make unstated facts material which would otherwise be immaterial (b).

2. (a) The term also frequently found at the foot of the proposal form which states that the "warranty of truth and disclosure" (as it may conveniently be called) is of a promissory nature and shall be the basis of the contract between the assured and the insurers (c).

(b) The clause often found at the head of the policy (whether or not the term last mentioned also appears in the proposal) to the effect that the proposal form and the warranties therein shall be the basis of the contract (d).

These last two provisions, whether found in the proposal or in the policy or in both places, have the effect of making the truth of any statement contained in the proposal, whether it is material or immaterial, a condition the breach of which entitles the insurers to avoid the contract (e).

3. The condition usually found amongst the conditions at the foot of the policy which states that the due fulfilment of the other terms and conditions of the policy shall be conditions precedent to any liability of the insurers to make any payment under the policy.

The combined and several effects of these provisions may in any given case result in some perfectly innocent and innocuous mis-statement, or some completely irrelevant and purely technical breach of contract being a ground upon which the insurers can avoid the policy (f).

Two examples may be given here to illustrate the effect of such provisions in policies in which they are contained :

(i) X is asked in his proposal form to give a full account of all convictions for motoring offences experienced by him or any servant

(x) The fact that the proposer failed to make a proper disclosure, even of a fact which might not have been considered to be material *if it had been disclosed*, may in itself be a material factor which entitles the insurer to avoid the policy (*Locker and Woolf, Ltd. v. Western Australian Insurance Co., Ltd.*, [1930] 1 K. B. 408; *Merchants and Manufacturers Insurance Co. v. Davies*, [1938] 1 K. B. 196; [1937] 2 All E. R. 767). Though it is difficult to see how the policy would be obtained by the non-disclosure in such cases.

(a) *Post*, chapters VII, VIII and IX.

(b) See further, as to the effect of this, *post*, chapter VIII.

(c) See further, as to this, *post*, chapters VII and VIII.

(d) See further, *post*, chapters VII and VIII.

(e) *Dawson & Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(f) See, e.g., *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139.

in his employ during the past ten years. X gives a full account of several convictions for excessive speed, careless driving, etc., but omits to mention conviction of one of his drivers (suffered seven years ago) for having a noisy exhaust on his motor cycle. It matters not that X never knew of, or had forgotten this conviction. The failure to state it may (according to the exact terms of the policy) entitle the insurers to repudiate liability and avoid the policy (g).

(ii) X is asked "Where is the vehicle garaged?" and by mistake gives the wrong address. This mistake may entitle the insurers to avoid the policy (h).

It is at provisions such as these that may take effect in these ways that the words "apart from any provision" seem primarily to be aimed. But in point of strict necessity the words are superfluous in this subsection, since the ensuing words provide that

- (a) The false or undisclosed statement must be material; and
- (b) It must have induced the insurers to issue the policy.

Where those conditions can be satisfied insurers have always been entitled to avoid the policy, and no provisions therein could enlarge their right to do so.

"He is entitled to avoid it."—The meaning of the term "avoid" has been discussed above in relation to its use in subsection (1) (i).

"Obtained by . . ."—As has been pointed out, the insurer must not only show that the non-disclosure or false representation was of some material fact, but he must go further and show that it induced him to issue the policy. This seems to be a departure from the common law on the subject (k). It was always idle for an insurer to show that, for example, the assured had omitted to state a material fact, if that fact was at the relevant time known to the insurer (l). But apart from certain exceptions such as this, it was the failure to disclose or the false representation, as the case might be, which vitiated the contract, and not the fact that the insurer was thereby induced to issue a policy (m).

No doubt in some cases this would follow, but in many it would not. This provision, therefore, certainly detracts from the rights of insurers, upon whom the burden will rest, in any action under this subsection, to show that had they been informed of the fact not disclosed or falsely represented, they would not have issued the policy, either at all or at the premium at which it was in fact issued (n). This it may in some cases be difficult for an honest insurer to do. For example, A. B., the assured, might have stated, as the fact was, that he had driven cars for twenty years. He might have omitted to state that he had ever had any accident, when in fact he was involved in a substantial smash two years ago. Having regard to the wide meaning given to the word material by subsection (5) of this section,

(g) See *Sivers v Mainwaring* (1932), *Times*, 23rd March, and cf. *Revell v. London General Insurance Co* (1934), 50 Ll L R 114.

(h) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(i) *Ante*, p. 280.

(k) See *post*, chapter VII, as to the effect of non-disclosure and misrepresentation.

(l) See *Carter v. Boehm* (1766), 3 Burr. 1905, at p. 1910; and see further *post*, chapter VII.

(m) See *post*, chapter VII.

(n) This was the test laid down by the Privy Council in *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co., Ltd.*, [1925] A. C. 344, at p. 351. See also *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

there seems little doubt that it could be proved that this was a material non-disclosure. But could an insurer who had issued A. B. a policy at an ordinary rate of premium honestly say that he would not have done so had he known of the one accident? Nevertheless, as Lord GREENE, M.R., stated in *Merchants and Manufacturers Insurance Co. v. Davies* (o) :

"Underwriters may well regard a fact as material which is concealed from them, and disregard it if a frank disclosure is made."

On the other hand, it must be carefully observed that all the insurer has to prove is that had he known the true facts he would not have issued *that policy at that premium* ; it will be no answer to a claim by him for a declaration to say that, had he known the truth, he would have issued a policy with slightly different terms, or at a different premium. Thus if the policy insures against third party liability and against loss by fire, it is enough for the insurer to show that he would not have issued the policy had he known of some fact material to the risk of fire, and it is irrelevant to say that he would still have granted the insurance against third party liability. On the question of fact whether a prudent underwriter would consider the non-disclosure or misrepresentation as material in the sense described above, expert evidence may be given (p). It should be remembered that it is a crime knowingly to make a false statement for the purpose of obtaining motor insurance (q).

"*Non-disclosure.*"—The subject of non-disclosure generally and in particular relation to motor insurance policies is fully discussed in a subsequent chapter (r). It need only be pointed out here that whilst the insurer must, for the purposes of this subsection (s), prove that the policy was obtained by the non-disclosure, he need not show that the failure to disclose was deliberate or intended to induce the issue of the policy. Nor need he show that the fact undisclosed was within the knowledge of the assured, provided that it ought to have been within his knowledge (t).

"*Of a material fact.*"—"Material" is defined by subsection (5) as being "*of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions.*"

It should be noted that the "risk" to which the facts are material is not merely the risk required to be covered by section 36 of the principal Act, but any risk to be covered by the proposed insurance. Thus if the vehicle was to be insured, *inter alia*, against fire, the fact that it was usually garaged in a building containing a furnace would be material to the risk of fire, though quite immaterial to the risk of causing bodily injury to third parties on the road. Nevertheless insurers can take advantage of the non-disclosure of such a fact in proceedings under this subsection (u).

In any particular case the question whether an alleged non-disclosure relates to a material matter is a question of fact. This question of fact can be and usually is proved by the evidence of underwriters or others engaged

(o) [1938] 1 K. B. 196 ; [1937] 2 All E. R. 707.

(p) *Merchants and Manufacturers Insurance Co., Ltd. v. Davies*, [1938] 1 K. B. 196 ; [1937] 2 All E. R. 707 ; *Ionides v. Pender* (1874), L. R. 9 Q. B. 531 ; *Glücksman v. Lancashire and General Assurance Co.*, [1925] 2 K. B. 593.

(q) By s. 112 (2) of the Road Traffic Act, 1930. See *ante*, p. 261.

(r) Chapter VII, *post*, pp. 388 *et seq.*

(s) But not otherwise.

(t) See, e.g., *Holt's Motors, Ltd. v. South East Lancashire Insurance Co., Ltd.* (1930) 35 Com. Cas. 281 ; 37 Ll. L. R. 1 ; see *post*, chapter VII and authorities there cited.

(u) Since there is nothing to show the contrary.

in insurance business (*v*). It should be noted that a statement of belief (*w*), of expectation (*x*) or of intention (*a*) is a statement of fact (*b*).

One further point should be noted. If the statement made is in fact false, it matters not that it was made innocently, though an innocent misrepresentation made by an assured does not vitiate the policy unless he knew or ought to have known the truth. Further, the assured will be judged by the manner in which he answers a question, and it may be that he will be held to have asserted that he has the knowledge which he purports to impart, and secondly that that knowledge is what he is imparting. For instance, where he answered "No" to the question "Have you or has any person who to your knowledge will drive been convicted of any offence in connection with any motor vehicle: if so, state nature of the offence, its date and the amount of the fine or if the licence was endorsed or suspended," it was held that his answer meant that he knew that no one who would drive had been convicted, and not that he meant "No, to the best of my knowledge and belief" (*c*).

"By a representation of fact false in some material particular."—This phrase must be read in conjunction with the definition of material in subsection (5). With that definition this phrase has two meanings.

1. The meaning in which it has received judicial interpretation on a number of occasions before the Road Traffic Act of 1934 came into operation (*d*). In this sense the word "material" refers to some material falsity in the statement: some substantial falsity (not an irrelevant inaccuracy which might make the statement technically false) making the statement one which creates a wrong impression (*e*).

It should be noted that, under the terms and conditions of a policy outlined above (*f*), a statement which is merely technically and not substantially false might vitiate the policy. Such falsity is, of course, quite inadequate for the purposes of this subsection since it is false in a material particular neither in the sense just explained nor in that about to be stated, and, on the other hand, is not a statement which entitles the insurers to avoid the policy on grounds apart from any provision in the policy (*g*).

2. By reason of the provisions of subsection (5) (*h*) of this section, it is not sufficient for insurers to show, in an action under this subsection, that the statement was false in some material particular in the sense defined above—namely, as giving a wrong impression. They must go further and show that the particular was material in the sense of being of such a nature as to influence a prudent insurer in accepting the risk, etc. In other words, the particular must not only be substantial but also relevant to the risk,

(*v*) See *Yorke v. Yorkshire Insurance Co.*, [1918] 1 K. B. 662, and the cases cited by McCARDIE, J., at p. 670.

(*w*) See Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 20; 19 Halsbury's Statutes 851.

(*x*) *R. v. Cooper* (1877), 2 Q. B. D. 310.

(*a*) *Kettlewell v. Refuge Assurance Co.*, [1908] 1 K. B. 345.

(*b*) "The state of a man's mind is as much a matter of fact as the state of his digestion," *per* BOWEN, L. J., in *Edgington v. Fismaurice* (1885), 29 Ch. D. 459, at p. 483.

(*c*) *Zurich General Accident and Liability Insurance Co v. Livingston*, [1940] S. C. 406, followed in *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295; [1941] 1 All E. R. 123.

(*d*) See, e.g., *Gluckstein v. Barnes*, [1900] A. C. 240; *Pash v. Gurney* (1873), L. R. 6, H. L. 377; *Aaron's Reefs v. Twiss*, [1896] A. C. 273.

(*e*) *R. v. Kylsant* (Lord), [1932] 1 K. B. 442.

(*f*) *Ante*, p. 305, and see further, *post*, chapters VII and VIII.

(*g*) *Cf.* the provisions of s. 20 (4) of the Marine Insurance Act, 1906 (9 Halsbury's Statutes 858): "A statement is true if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer."

(*h*) *Post*, p. 314.

and the false impression must concern a matter material to the risk (*k*). But, as has been shown, it is sufficient if it is material to any risk insured by the policy, and a false statement of fact quite irrelevant to the third party risk will suffice, if it is material to any risk covered by the policy.

6. Examples of facts considered material within the meaning of section 10 (3).

(1) In *Locker and Woolf, Ltd. v. Western Australian Insurance Co., Ltd.* (*l*), it was held that in a proposal for fire insurance, a previous refusal of motor insurance on the ground of non-disclosure and misrepresentation of material facts in the proposal therefor by one of the partners (who made both the motor and the fire proposals) was a material fact which should be disclosed not only in answer to the question "Has this or any other insurance of yours been declined by any other company?" but also under the general duty to disclose. The judgments of the Court of Appeal indicated that the character and record for honesty of a proposer are material facts.

(2) In *Norman v. Gresham Fire and Accident Insurance Society, Ltd.* (*m*), the cancellation of policies by other insurers for non-payment of premium was held to be a material matter which must be disclosed. Indeed, since the Motor Insurers' Bureau agreements, the financial condition of the assured would appear to be a matter of the greatest moment to insurers (*n*).

(3) In *Cleland v. London General Insurance Co.* (*o*), it was held that the question in a proposal form "Have you or your driver ever been convicted or had a motor license indorsed?" required the disclosure of convictions for offences having nothing to do with motoring. *Semble*, such convictions if the offences involved dishonesty are material and must be disclosed apart from any question in the proposal form. (See (*1*) above.)

(4) In *Taylor v. Eagle Star, etc., Insurance Co.* (*p*), evidence was adduced that the assured had been convicted of certain drinking offences and that he had also been convicted upon charges of permitting a car to be used without a policy of insurance and of driving a car with no road fund licence in force. These convictions had not been disclosed. The arbitrator found as a fact that the assured was under a general duty to disclose the convictions and that they were material.

(5) In *Merchants and Manufacturers' Insurance Co., Ltd. v. Davies* (*q*), certain convictions for motoring offences were not disclosed. The assured in an action for a declaration commenced by insurers under section 10 (3) applied for discovery of documents in the plaintiff company's possession to show that insurance had been granted to persons who had been convicted of similar motoring offences without an increase in premium. The Court of Appeal refused the application, on the grounds that whether or no such insurance had been granted in the past by the plaintiff there was all the difference in the world between a case where an underwriter accepts a risk after receiving full information as to previous convictions and may well be willing to issue the policy to a person who makes a frank disclosure, and the case where

(*k*) See further, *post*, chapter VII.

(*l*) [1936] 1 K. B. 408.

(*m*) [1936] 2 K. B. 253; [1936] 1 All E. R. 151.

(*n*) See also, on this point, *Cornhill Insurance Corporation v. Assenheim* (1937), 58 Ll. L. R. 27.

(*o*) (1935), 51 Ll. L. R. 156.

(*p*) (1940), 67 Ll. L. R. 136.

(*q*) [1938] 1 K. B. 196; [1937] 2 All E. R. 767.

no disclosure is made. SLESSER, L.J.'s, comments on the "moral hazard" in this case are illuminating.

(6) In *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne* (v) the assured warranted in the proposal form that the car would not be driven by any person who to his knowledge had been convicted of a motor car offence or by anyone under 21 years of age or with less than six months car driving experience. To his knowledge his son, aged 17½, whom he had taught to drive 4½ months ago, would often drive the car. The son had 2 convictions for motoring offences, of which the father was unaware. It was held that there were two misrepresentations of material facts, as to the age and as to the convictions of his son.

(7) In *Guardian Assurance Co., Ltd. v. Sutherland* (s), the untrue statement that the proposer was the owner of the car to be insured was held to be a material misrepresentation.

(8) In *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.* (t), the material misrepresentation alleged was that questions concerning defective vision and physical infirmity had not been correctly answered. But the allegations were not proved.

(9) In *Broad v. Waland* (u), the age of the assured was stated in the proposal to be 21 years, and it was also stated that immediately before the date of the proposal he had held a British driving licence for six months. In fact, the assured was 19½, and he had only driven irregularly under a provisional licence for five months. The underwriter plaintiff proved clearly that he would not have issued cover to the assured if his true age had been stated. The mis-statement as to the driving experience was held immaterial, but the mis-statement of the age gave a right to the plaintiff to avoid the policy.

7. Examples of facts considered not material within the meaning of section 10 (3).

(1) In *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison* (v) the assured stated that he had driven motor cars for three years, and that he had driven cars regularly and continuously in the United Kingdom for the twelve months prior to the proposal. Neither answer was strictly true, in that he first drove a car two and a half years before the proposal date but had driven it and other cars only within an extensive works area, and had driven regularly for eleven months on the roads under a provisional licence prior to the proposal. Non-disclosure of a material fact was alleged in that he had failed to pass a driving test and that he held only a provisional licence to drive. Neither answer was held to be a material misrepresentation, nor was there non-disclosure of a material fact. The plaintiffs would clearly not, on the evidence, have required a higher premium, nor would they have required a further limitation of liability if they had known the true facts. The decision on this point was followed in *Broad v. Waland* (*supra*).

(2) In *Mackay v. London General Insurance Co.* (w) the assured stated in the proposal form that no other insurer had required from him

(v) [1941] 1 K. B. 295, [1941] 1 All E. R. 123.

(s) [1939] 2 All E. R. 256.

(t) [1944] 2 All E. R. 243; affirmed, [1945] K. B. 250, [1945] 1 All E. R. 316.

(u) [1942] 73 Ll. L. R. 263.

(v) [1942] 2 K. B. 53, [1942] 1 All E. R. 529.

(w) [1935] 51 Ll. L. R. 201.

an increased premium or special condition, and that he had not been convicted before. In fact, when aged 18, three years before, he had insured a motor cycle with an excess of £2 10s., and had been fined ten shillings in a magistrates' court for having inefficient brakes. Both answers were held to be quite immaterial (x).

"Or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it."—"If he has avoided the policy," means if he has repudiated or cancelled it (a).

"That ground" is the ground previously specified and discussed above—namely, the ground that the policy was obtained by non-disclosure or false representation.

The meaning of "apart from any provision" has already been explained.

"Provided that . . . not . . . entitled to the benefit of this subsection."—

The benefit of this subsection is the right to evade the obligation imposed by subsection (1) to pay the amount of the judgment obtained by the third party against the assured in respect of personal injuries or death.

"As respects any judgment obtained in proceedings commenced before the commencement of that action."—It must be carefully noted that the proviso does not apply where the insurers commence their action for a declaration against their assured before the third party commences his against that person. In actions arising out of accidents occurring after July 1, 1946, the Motor Insurers' Bureau agreements will operate, and the third party will have no need of the benefit granted by this proviso.

"Unless before or within seven days after the commencement of that action."

—The action referred to is, of course, the action commenced by the insurer against his assured for a declaration that he is or was entitled to avoid the policy.

"He has given notice."—There is no doubt here, as there is in regard to notice under subsection (2) (a) as to whether the notice must be actual or constructive, and if actual, whether it must be expressly given by the person against whom advantage of it is sought to be taken (b).

On the other hand, contrary to the case of notice under subsection (2) (a) there was considerable doubt whether the notice must be in writing. It has been settled now that the fact that the notice must be express and must specify certain matters shows that written notice is intended (c).

"Specifying the non-disclosure or false representation on which he proposes to rely."—It is not thought that the insurers need do more than indicate clearly in a summary form the facts upon which they propose to base their case. The notice must specify all the grounds on which the insurers intend to rely at the trial (d).

"Any person to whom notice of such an action is so given shall be entitled, if he thinks fit, to be made a party thereto."—The person to whom notice is given is, and can only be, the plaintiff in the running-down proceedings against the assured, or the person entitled to the benefit of the judgment.

It should be carefully observed, however, that the effect of so specifying that plaintiff is to make it clear that he has no right to be made a party to

(x) This was not an action brought for a declaration, but an attempt by the assured to obtain indemnity under his policy, but as he had warranted the truth of his statements in the proposal form, the insurers were held not liable to him. See also *Revell v. London General Insurance Co.* (1934), 50 Ll. L. R. 114; *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413, and *Farra v. Hetherington* (1931), 47 T. L. R. 465.

(a) *Ante*, p. 280.

(b) *Cf. ante*, p. 297.

(c) See note (d), *infra*.

(d) *Contingency Insurance Co. v. Lyons* (1940), 65 Ll. L. R. 53; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

the insurers' action unless he has had the notice specified. It follows that insurers cannot come within the proviso unless they prove not only that some notice was given, but that such notice was sufficient to satisfy the requirements of the subsection in regard to specifying the non-disclosure or false representation. It seems clear, moreover, that the onus of proof is upon the insurer to show that he comes within the exception.

This part of the proviso seems considerably to enlarge any power which the Court would have under Rule 11 of Order 16 (e).

It is not clear what is meant by "be made a party thereto." There are two different ways in which the third party might become a party to the action between insurers and assured :

1. He might be joined as defendant with the assured.
2. He might be joined as defendant with the assured and be permitted to counterclaim against the insurers in respect of his rights under subsection (1) of this section. He could only counterclaim, of course, if he had already obtained judgment against the assured, and it is doubtful whether he could do so then, since it might be said that the cause of action did not arise until the insurers failed to obtain the declaration against the assured.

It is submitted, however, that upon the true construction of subsection (3) it merely provides means whereby insurers can escape their liability under subsection (1), which, as has been shown, arises immediately upon judgment being obtained against their assured.

The procedure to be adopted by a third party desiring to be joined in the proceedings between insurer and assured would presumably be by application under Order 16, Rule 11 (f).

Where the third party had not already obtained his judgment against the assured in the running-down proceedings and could not, therefore, counterclaim against the insurers, it is difficult, in the absence of specific provision, to see what advantages he would obtain by being made a party to the proceedings, save that of seeing that his future rights against the insurers are preserved (g).

"Be made a party thereto."—These words were considered in *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne* (g). There was an obvious danger, said SCOTT, L.J., of the injured third party being deprived of the pecuniary safeguard which was the subject of subsection 10 (1), through the possibility of the policy being avoided in proceedings under the first part of subsection (3) without his knowledge and even by collusion between the insurer and the insured. The proviso creates two conditions precedent to the insurer's right to get his declaration. The third party gets full notice of the ground of the insurer's claim and is given an unqualified right to become a party in the insurer's action. He may therefore be treated for all purposes as a defendant in that action, and if he appears as such, he is entitled to have the insurer's case proved against him by proper evidence. In this case the evidence of material misrepresentation adduced by the insurers was good against the assured, but was not evidence against the third party, as it consisted of admissions made by the driver of the car. A declaration was therefore refused as against the third party, and in the Court's discretion, was refused against the assured also. Costs of both assured and third party were awarded against the insurers.

(e) R.S.C. See notes to this rule in current Annual Practice. And see *Raleigh v. Goschen*, [1898] 1 Ch. 73; *Hood Barrs v. Frampton, Knight and Clayton*, [1924] W. N. 287; but see *Montgomery v. Foy, Morgan & Co.*, [1893] 2 Q. B. 321.

(f) As to which, see note (e), *supra*.

(g) [1941] 1 K. B. 295; [1941] 1 All E. R. 123.

8. Section 10 (4).

" If the amount which an insurer becomes liable under this section to
 " pay in respect of a liability of a person insured by a policy exceeds the amount
 " for which he would, apart from the provisions of this section, be liable
 " under the policy in respect of that liability, he shall be entitled to recover
 " the excess from that person."

It is submitted that this subsection was intended to apply to clauses in a policy where—

1. The assured agrees to bear the first £x of any claim ; or
2. The insurers have limited their liability in respect of third party claims under the policy to a certain sum.

Stipulations of the first kind are not uncommon in motor insurance policies (*h*). As to the second method of limiting the insurers' liability, whilst the giver of a security under section 37 of the principal Act is clearly entitled to limit his liability to £5,000 or £25,000, as the case may be (*i*), it is doubtful whether a policy under which the insurers purported to limit their liability to a certain figure would be valid or effective under section 36 of the principal Act so far as claims required to be covered by that section are concerned. This question has already been discussed (*k*), and it has been submitted that a policy containing any such limitation would not be such a policy as section 36 requires (*l*). It has also been pointed out that clauses of the first kind mentioned above are in substance only another method whereby insurers restrict their liability under the policy and, therefore, either both are or neither is permissible under section 36 (*l*). However this may be, it is difficult to see to what else this subsection could be intended to apply. If it is intended to show that insurers who have been compelled to pay to a third party the amount of a judgment obtained by him against the assured can recover such sum from the assured in circumstances where he had—as by breach of a condition in the policy—disentitled himself to any indemnity under the policy, it does not seem to have words apt to effect this intention, since the words are applicable only to cases where the insurer would have been obliged under the policy to pay the assured something, whereas in cases where the insurers are entitled to avoid the policy on any ground no sum at all is payable by them to the assured. Moreover, the more explicit language of the provisos to section 38 (*m*) of the principal Act and the proviso to section 12 (*n*) of this Act indicate that this was not the intention of this subsection (*o*). Since the Act came into operation in January, 1935, this point has not been argued, and there is no authority to suggest that the less includes the greater, and that this subsection does give insurers the right to recover any sum which they have been compelled to pay by virtue of this section which they would not otherwise have been obliged to pay to anybody, whether such sum be the excess over a smaller sum or not.

It is confidently submitted that the suggested meaning of this section is the correct one. As to recovery from the assured of sums paid to third parties by insurers by virtue only of section 38, Road Traffic Act, 1930, and of sections 10 and 12 of the Road Traffic Act, 1934, and of the Motor Insurers' Bureau Agreements, see chapters VI and IX, *post*.

(*h*) See further as to such, *post*, chapter IX.

(*i*) See chapter IV, *ante*, p. 222.

(*k*) *Ante*, p. 195.

(*l*) See further, *ante*, p. 195. Often such clauses merely require the assured to repay a certain sum, when they are of course valid under s. 36.

(*m*) *Ante*, p. 219.

(*n*) *Post*, p. 328.

(*o*) See further as to comparison between this subsection and those provisos, *post*, p. 328.

9. Section 10 (5).

"In this section the expression 'material' means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions, and the expression 'liability covered by the terms of the policy' means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy."

The meaning and effect of this subsection have already been explained (*p*) in dealing with the various parts of the preceding subsections of this section to which it relates (*q*).

10. Section 10 (6).

"In this Part of this Act references to a certificate of insurance in any provision relating to the surrender, or the loss or destruction, of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates, and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy."

"*Policies under which more than one certificate is issued.*"—There are policies not relating to any specified vehicle or vehicles (*r*), or policies which do relate to the use of a specified vehicle, but also cover the driving of another vehicle by the assured in respect of which an additional certificate may be issued (*s*).

"*Where any copy has been issued of any certificate.*"—Where a policy not relating to any specified vehicle or vehicles is issued and is intended to cover the use of more than ten vehicles at one time, the insurers may, provided they obtain the consent of the Minister of Transport so to do, issue duplicate copies of a certificate, authenticated by the Minister (*t*).

The implications and effect of this subsection upon the various provisions of the preceding subsections should be noted.

11. Section 11.

Bankruptcy, etc., of insured persons not to affect certain claims by third parties.

"Where a certificate of insurance has been delivered under subsection (5) of section thirty-six of the principal Act to the person by whom a policy has been effected, the happening in relation to any person insured by the policy of any such event as is mentioned in subsection (1), or subsection (2), of section one of the Third Parties (Rights against Insurers) Act, 1930, shall, notwithstanding anything in that Act, not affect any such liability of that person as is required to be covered by a policy under paragraph (b) of subsection (1) of section thirty-six of the principal Act, but nothing in this section shall affect any rights against the insurer conferred by that Act on the person to whom the liability was incurred."

"*Where . . . the happening . . . of any such event . . . shall . . . not affect any such liability. . .*"—Twelve years after this section came into operation, its meaning, and its intended meaning, is still wrapped in obscurity.

Upon the face of it, it appears to provide that, in spite of the bankruptcy or liquidation, etc., of an insured person, his liability to a third party in

(*p*) *Ante*, p. 307.

(*q*) *I.e.* subsections (1), (2), and (3).

(*r*) See Regulation 5 (1) (a) of the Motor Vehicles (Third Parties' Risks) Regulations, 1941 (S. R. & O. No. 926 of 1941), *ante*, p. 215.

(*s*) See Regulation 7, *ibid.*, *ante*, p. 215.

(*t*) See Regulation 5 (1) (b), *ibid.*, *ante*, p. 215.

respect of the death of or bodily injury to any person arising out of the use of a vehicle on the road shall be preserved *in situ*, notwithstanding anything in the Third Parties Act (u) to the contrary. It can therefore only be concluded that this section was inserted in the Act *ex majore cautela* in order to allay the fears or doubts of certain persons that the effect of the Third Parties Act was the same as that of section 7 of the Workmen's Compensation Act, 1925 (v)—namely, that upon the bankruptcy (etc.) of an insured person his liability to a third party was transferred (though not extinguished) from him to his insurers. The following dictum may, it is submitted, be applied here in explanation of the true meaning and effect of this subsection: "In construing an Act of Parliament, when we find provisions put in by way of precaution not absolutely required, it is by no means necessary to infer that, because those provisions are put in, therefore everything not included in the exception is to be included in the general provision which we find in the Act of Parliament, and which by itself would not include the thing excepted" (w).

"But nothing in this section shall affect any rights against the insurer conferred by that Act on the person to whom the liability was incurred."—Upon whatever construction the preceding part of the section is taken, this proviso seems equally unnecessary. It is submitted, therefore, that this is clearly an example of the kind of proviso mentioned in the dictum quoted above (x), inserted only from excessive caution and to dispel any doubts that there might be in persons who doubted both the effect of the Third Parties Act, 1930 (y), and the effect of this section.

Concurrence of operation of the Third Parties Act, 1930, and section 10 of the Road Traffic Act, 1934.—Although, as has been submitted, the sole effect of section 11 of the Road Traffic Act, 1934 (a), is to dispel certain unfounded doubts as to the effect of the Third Parties Act, there is one effect of that Act to which it does not refer.

Under the Third Parties Act (b), upon the bankruptcy (etc.) of an insured person his rights against his insurers are automatically and at once transferred to and become vested in the third party to whom he has incurred a liability covered by the terms of his policy (c). In cases where a person insured under a motor policy has incurred liability of the kind required to be covered by section 36 of the Road Traffic Act, 1930 (d), becomes bankrupt, his rights under his policy are thereby transferred to and vested in such third party. If such third party obtains judgment against the assured and then proceeds to enforce payment of the sum thereby awarded against the insurers under section 10 of the Road Traffic Act, 1934 (e), what is his position?

In the first place he has the rights given him by the Third Parties Act—namely, such rights as the assured had, subject to such defences as would have been available to the insurers in an action against them by the assured (f). In the second place he has the right to immediate payment of the judgment debt conferred on him by subsection (1) of section 10 of this Act. The third party would no doubt ignore his rights under the Third

(u) 23 Halsbury's Statutes 12; *ante*, chapter III.

(v) 11 Halsbury's Statutes 513.

(w) *Per* Lord HERSCHELL in *West Derby Union v. Metropolitan Life Assurance Society*, [1897] A. C. 647. See also *Fryer v. Morland* (1876), 3 Ch. D. 675, *per* JESSELL, M.R., at p. 689; *Smyth v. R.*, [1898] A. C. 782; *McLaughlin v. Westgarth* (1906), 75 L. J. P. C. 117.

(x) *Of* Lord HERSCHELL, *supra*, note (w).

(y) See chapter III, *ante*, p. 120.

(a) 27 Halsbury's Statutes 534.

(b) S. 1, sub-s. (1), *ante*, p. 120.

(c) *Of* any other kind.

(d) 23 Halsbury's Statutes 607; *ante*, chapter IV, p. 188.

(e) 27 Halsbury's Statutes 534.

(f) See further, *ante*, chapter III, p. 133.

Parties Act, and in any action against the insurers rely solely upon section 10 of this Act. In such case, the insurers cannot say: "It is true you have rights under section 10, but since the assured's rights against us have been transferred to and vested in you by the Third Parties Act, 1930 (g), you are in the same position as the assured against whom we should have a complete defence and a counterclaim, and we propose to avail ourselves of this counterclaim against you"? Any such contention would be based upon the assumption that the Third Parties Act (g) operates to transfer to the third party not only the rights of the assured, but also his liabilities. This assumption is, that the third party is under the Third Parties Act put in the same position as the assured's trustee in bankruptcy (or liquidator, etc.) was before that Act was passed (i). It is confidently submitted that that is not so, and that the words in that Act, "the assured's rights shall . . . be transferred to and vest in the third party" (k), mean only what they say, and do not operate to transfer the assured's liabilities. In other words, the assignment effected by the Third Parties Act is an assignment not of the policy but of the right to payment under the policy (l), and the assured's liabilities are transferred to the third party only in so far as they refer to passive obligations and in the sense that they may be set up by the insurers in defence to the claim for payment. If this be the correct position, the insurers could in no circumstances counterclaim against a third party asserting rights under the Third Parties Act (m), in respect of any liability of the assured to them. Still less could they rely upon or enforce any such liability in cases where the third party proceeded under section 10 of this Act, ignoring and not in any sense relying upon his rights under the Third Parties Act.

In any case, as has been repeatedly stated, injured third parties no longer require to avail themselves of the Third Parties Act, 1930, and of section 10 of the Road Traffic Act, 1934, in cases of "Road Traffic Act liability" arising out of accidents occurring after July 1, 1946 (mm).

12. Section 12.

Avoidance of restrictions on scope of policies covering third-party risks.

"Where a certificate of insurance has been delivered under sub-section (5) of section thirty-six of the principal Act to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters:—

- "(a) the age or physical or mental condition of persons driving the vehicle; or
- "(b) the condition of the vehicle; or
- "(c) the number of persons that the vehicle carries; or
- "(d) the weight or physical characteristics of the goods that the vehicle carries; or
- "(e) the times at which or the areas within which the vehicle is used; or
- "(f) the horse power or value of the vehicle; or
- "(g) the carrying on the vehicle of any particular apparatus; or
- "(h) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the Roads Act, 1920 (10 & 11 Geo. 5, c. 72);

(g) S. 1 (1) (23 Halsbury's Statutes 12) *ante*, p. 120.

(i) See *Re Harrington Motor Co., Ex parte Chaplin*, [1928] Ch. 105.

(k) Third Parties Act, 1930, s. 1, sub-s (1), *ante*, p. 120.

(l) As to the distinction between these assignments, see *ante*, p. 94.

(m) 23 Halsbury's Statutes 607; *ante*, chapter III, pp. 120 *et seq.*

(mm) By reason of the M.I.B. agreements, see *post*, chapter VI.

" shall, as respects such liabilities as are required to be covered by a policy
 " under paragraph (b) of subsection (1) of section thirty-six of the principal
 " Act, be of no effect :

" Provided that nothing in this section shall require an insurer to pay
 " any sum in respect of the liability of any person otherwise than in or towards
 " the discharge of that liability, and any sum paid by an insurer in or towards
 " the discharge of any liability of any person which is covered by the policy
 " by virtue only of this section shall be recoverable by the insurer from that
 " person."

Once again it must be repeated that this section need no longer be relied upon by injured third parties who bring a claim in respect of " Road Traffic Act liability " arising from an accident which takes place after July 1, 1946, in view of the overwhelming benefits afforded to them by the Motor Insurers' Bureau agreements. Whereas conditions of the nature defined by this section may still be contained in any insurance policy, and are still effective against the assured.

" So much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters."—At the outset it is necessary to note the great importance of the phrase " purports to restrict." It is submitted that the express terms of the policy (including the proposal form), as well as implied (u), are aimed at, but that the right of insurers to avoid the policy on the ground of misrepresentation, non-disclosure, or fraud is not touched by this section (o). It must be remembered that this section is clearly one which must be construed strictly (p). It cannot be given any wider meaning than its words necessarily bear. It must be emphasised, therefore, that although a term in a policy which, for example, expressly entitled the insurers to refuse payment if the assured has failed to disclose the truth in regard to his age is made of no effect by this section, it does not follow that the insurers could not avoid the policy if the assured fails to comply with that term, on the ground that the policy was obtained by a false statement or a non-disclosure concerning a material fact (q).

The parts of a policy which could restrict the insurance by reference to any of the matters specified are as follows :

1. Any clause in the policy specifying or limiting the risk insured (r) ;
2. Any stipulation in the policy, the breach of which entitles the insurers to evade payment under the policy (s) ;

(n) E.g. the implied term that the vehicle shall be in a roadworthy condition. See *Barrett v. London General Insurance Co.* (1934), 50 Ll. L. R. 88.

(o) I.e. s. 12 does not cut down the rights left to insurers by sub-s. (3) of s. 10. Clearly it could not touch non-disclosure or false (but not fraudulent) representations unless the rules as to these are based upon an implied term of the contract. As to whether this is so, see *post*, chapter VII. In any case fraud would not be effected, since this is something altogether *dehors* the contract. See e.g., *Monro v. Bognor Urban District Council*, [1915] 3 K. B. 167; cf. *Woodall v. Pearl Assurance Co.*, [1919] 1 K. B. 593.

(p) Since it so extensively cuts away common rights. See *Vandepille v. Preferred Accident Insurance Corporation of New York*, [1933] A. C. 70, at p. 80.

(q) *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1940] 4 All E. R. 205; affirmed, [1941] 1 K. B. 295; [1941] 1 All E. R. 123; *Broad v. Waland* (1942), 73 Ll. L. R. 263.

(r) See, e.g., *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240; *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 660.

(s) See, e.g., *Golding v. London and Edinburgh Insurance Co.* (1932), 43 Ll. L. R. 487; *Woodall v. Pearl Assurance Co.*, [1919] 1 K. B. 593. And see *Stebbing v. Liverpool and London and Globe Insurance Co., Ltd.*, [1917] 2 K. B. 433, and see *ante*, p. 281, as to evading.

3. A stipulation, the breach of which entitles the insurers to avoid the policy (*t*).

The distinction between a clause which merely limits or describes the risk and one which amounts to a condition or warranty has already been mentioned and will be further described in a subsequent chapter (*tt*).

The relevant words in the section may therefore be paraphrased as "*so much of the policy as purports to restrict the right of the persons insured thereby to claim an indemnity in respect of such liabilities as are required to be covered by section 36 (1) (b) of the principal Act shall be of no effect, save in so far as the duty of good faith is concerned*" (*u*).

That this is the meaning and effect of this section is, it is submitted, made clearer by reference to the provisions of section 10 (*v*). Under that section insurers can only evade payment of a judgment in respect of a liability covered by the terms of the policy (*u*) by showing that the policy is void (or voidable) on the ground of non-disclosure or false representation and apart from any provision in the policy (*a*). They cannot evade sub-section (1) of section 10 by showing that they would be entitled to cancel or avoid (*b*) the policy or evade payment thereunder on the ground of some breach of stipulation, if the liability is one in respect of which there is otherwise an indemnity enforceable by the assured (*c*).

"*By reference.*"—It is apprehended that this phrase spreads the net as wide as possible: any clause in a policy, whatever its nature and effect may be, which directly or indirectly restricts the right to an indemnity by requiring the truth of a statement or stipulating that something shall or shall not be done in regard to any of the various matters which are subsequently specified, is aimed at and hit by the section.

Before proceeding to examine the particular provisions of this section, the reader must be reminded (as has already been shortly explained) (*d*) that the proposal form in a motor insurance contract is generally incorporated with and forms part of the policy (*e*), and that any inaccurate statement in the proposal form may be a breach of contract entitling the insurers to avoid the policy or to evade liability thereunder (*f*).

Treatment.—Each paragraph of this section will be explained in the following manner: after any general observations that may be necessary have been made, examples will be given by way of illustration of the meaning and effect of each paragraph. These will be of two, and in some cases three, classes. Class A will show what, it is submitted, the paragraph does affect; Class B what it does not; and Class C, where it appears, contains doubtful instances.

(*t*) See, e.g., *Dawsons, Ltd v Bonnin*, [1922] 2 A C 413. See *post*, chapter IX, and *ante*, p. 281, as to avoiding policy.

(*tt*) Chapter VIII, *post*.

(*u*) *I.e.* the section does not cut down the rights left by s. 10 (3). It must be admitted that the reference in the title to the section (*ante*, p. 316) to "scope" of policies suggests that limitations of risk only are aimed at.

(*i*) As to the meaning of "covered by the terms of the policy," see *ante*, p. 283.

(*u*) *Ante*, p. 283.

(*a*) As to the precise grounds upon which the insurers can rely, see *ante*, p. 304.

(*b*) "Avoid" in its proper sense, *i.e.* to make or declare void.

(*c*) Thus the interpretation above given to s. 12 is complementary to that given to s. 10 (1), *ante*, p. 283.

(*d*) *Ante*, p. 281.

(*e*) See *post*, chapter VII.

(*f*) See further as to this, *post*, chapter VII.

(a) "The age or physical or mental condition of persons driving the vehicle."

(A) *This, it is submitted, hits the following :*

(1) Inaccurate but immaterial (g) answers in the proposal form to any question concerning the age (h) or physical defects or infirmities of the assured or of anyone who to his knowledge is likely to drive the vehicle (i).

(2) Any clause which the policy might contain which stipulated that the car should not be on risk or that there should be no right to an indemnity when driven by any person suffering from any physical defect (k).

(3) Any clause in the policy which provided that the risk should not attach, or that there should be no right to an indemnity, or that the policy should be avoided if the liability was incurred at a time when the vehicle was being driven by an intoxicated or a drugged or a mad driver (l).

(B) *The following are not, it is thought, hit by these words :*

(1) A false representation or non-disclosure of a material fact concerning the age or physical or mental condition of the assured or of any person who to his knowledge is likely to drive the car (m).

(2) A clause in the policy to the effect that the vehicle should not be driven by persons of a particular class, profession, race, or religion (n).

(3) A clause in the policy that the policy should not cover the vehicle when being driven knowingly and deliberately in breach of some law relating to driving—e.g. the speed limit in built-up areas (although in this case the mental attitude of the driver would be the determining factor (o)).

(4) A false statement, whether in the proposal form or not, concerning the physical condition of the assured (p) (or of anyone who to his knowledge was likely to drive) provided such statement was substantially and materially false (q), and an immaterial statement concerning the identity of the assured (r).

(g) But see note (1), *infra*. See, e.g., *Mundy's Trustees v. Blackmore* (1928), 32 Ll. L. R. 150; *Jeter-Barnes v. License and General Insurance Co., Ltd.* (1934), 49 Ll. L. R. 231.

(h) Cf. *Bond v. Commercial Union Assurance Co.* (1930), 30 Ll. L. R. 107, where it was held that the assured's failure to disclose that his son who was a bad risk was likely to drive was a material non-disclosure entitling insurers to avoid the policy apart from any provision therein. See also *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295; [1941] 1 All E. R. 123; *Broad v. W'aland* (1942), 73 Ll. L. R. 263.

(i) The physical condition or age of the non-driving assured would doubtless be material to a comprehensive policy insuring such assured's life.

(k) See *post*, chapter VIII, as to this type of clause.

(l) Cf. *Tinslie v. White Cross Insurance*, [1921] 3 K. B. 327; *James v. British General Insurance Co.*, [1927] 2 K. B. 311.

(m) Since this would entitle insurers to avoid the policy on this ground under sub-s. (3) of s. 10, *ante*, p. 303; cf. *Bond v. Commercial Union Assurance Co.* (1930), 30 Ll. L. R. 107; *National Farmers Union Mutual Insurance Society, Ltd. v. Dawson*, [1941] 2 K. B. 424; *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295; [1941] 1 All E. R. 123; *Broad v. W'aland* (1942), 73 Ll. L. R. 263.

(n) This is a common clause in some hire-drive policies; see, e.g., *Carlton v. Park*, (1921), 8 Ll. L. R. 818; *Horne v. Poland*, [1922] 2 K. B. 364; *Richards v. Port of Manchester Insurance Co.* (1934), 50 Ll. L. R. 88; *Spraggan v. Dominion Insurance Co.* (1941), 69 Ll. L. R. 1.

(o) See *Haseldine v. Hoshen*, [1933] 1 K. B. 822.

(p) See note (1), *supra*.

(q) See *ante*, p. 306. See chapter VII, *post*.

(r) *Newcastle Fire Insurance Co. v. Macmorran & Co.* (1815), 3 Dow. 255.

(b) "The condition of the vehicle."

(A) *This seems to hit :*

(1) Any clause providing that the vehicle shall be kept in a safe or roadworthy (s) condition or that the policy does not cover the vehicle when in an unsafe condition (t).

(2) Inaccurate (but not materially false) answers in the proposal form to questions concerning the condition in relation to safety or soundness of the vehicle (u).

(B) "Condition of the vehicle" does not, it is submitted, touch any of the following :

(1) Statements in the proposal form concerning the condition of the vehicle which are substantially and materially false (v).

(2) Non-disclosure of a material fact concerning the condition of the vehicle (w).

(3) Clauses of any kind relating to the age (a), make, type, carrying capacity, weight, type of engine or other matters describing and identifying the insured vehicle (b).

(C) *It is doubtful whether it touches :*

Clauses (c) relating to towing or trailing (d), carrying an excessive load, or leaving the vehicle in a dangerous position (e).

(c) "The number of persons that the vehicle carries."

(A) *This catches any clause which*

(1) Prohibits the carrying of more than a specified number of passengers in (or on) the vehicle at any one time (f).

(2) Any clause which provides that the risk shall not attach at any time when the vehicle is carrying more than a certain number of persons (g).

(3) An inaccurate but immaterial statement in the proposal form as to the number of persons which the assured intended to carry at any one time (g).

(B) *But does not affect :*

(1) Any clause prohibiting the carrying of passengers of a particular class—as, for example, passengers carried for hire or reward in the case of a private car (h).

(s) See *Barrett v. London General Insurance Co.*, 1935 1 K. B. 238, *Trickett v. Queensland Insurance Co.*, 1939, A.C. 159, 53 Ll. L. R. 225.

(t) *Jones and James v. Provincial Insurance Co. Ltd.* (1929), 46 T. L. R. 71, *Crossley v. Road Transport and General Insurance Co.* (1925), 21 Ll. L. R. 219, *Donney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39.

(u) Cf. *Allen v. Universal Automobile Insurance Co.* (1933), 45 Ll. L. R. 55.

(v) Since these vitiate the policy.

(w) Cf. *Mundys Trustees v. Blackmore* (1928), 32 Ll. L. R. 150.

(a) *Santer v. Poland* (1924), 19 Ll. L. R. 29, *Faxman v. Motor Union Assurance Society* (1923), 15 Ll. L. R. 206, *Allen v. Universal Automobile Insurance Co.* (1933), 45 Ll. L. R. 55.

(b) See, as to how far this section affects clauses describing and identifying the subject-matter, i.e. the vehicle, as opposed to the risk insured, *post*, chapter VII.

(c) As to clauses of this type, see *post*, p. 569.

(d) It is submitted that if *GODDARD, J.*'s decision on a similar point is applied (see *post*, p. 609) it would not apply to towing or trailing. (e) See *post*, p. 606.

(f) See, e.g., *Bright v. Ashfold*, [1932] 2 K. B. 153. There does not appear to be any other reported case in which this type of clause has been brought under consideration. In the case cited the policy did not cover a motor-cycle when a pillion passenger was carried thereon.

(g) See *Bright v. Ashfold* (*supra*), see, e.g., *Donney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39.

(h) Cf. *ante*, p. 204: *Wyatt v. Guildhall Insurance Co., Ltd.*, [1937] 1 K. B. 633; [1937] 1 All E. R. 792, *Bonham v. Zurich General Accident and Liability Insurance Co.*,

(2) Any clause which refers indirectly or incidentally to the number of persons which the vehicle carries for the primary purpose of identifying and describing the vehicle insured—thus, for example, if A insures a 20-seater motor coach and the vehicle is so described in the policy the clause would not be ineffective for the purpose of showing that a 60-seater coach was not the vehicle insured by the policy (i).

(3) A false representation or a non-disclosure of a material fact concerning the number of persons that the vehicle carries (k).

(C) *It is doubtful whether it affects :*

A clause referring to the means by or position in which passengers are carried (l).

(d) **"The weight or physical characteristics of the goods that the vehicle carries."**

(A) *This covers :*

(1) Any clause providing that the risk shall not attach, or that an indemnity shall not be payable, if the vehicle is carrying goods of a particular description or of a particular weight (m).

(2) Inaccurate but immaterial statements in the proposal form referring to the above matters (n), save in so far as such statements identify the vehicle (o).

(B) *The words do not cover :*

(1) A clause providing that no goods at all of any description shall be carried in the vehicle, or providing that, if they are, the risk shall not attach (p), or a clause identifying the vehicle (q).

(2) A false statement or non-disclosure of a material fact concerning the weight or physical characteristics of the goods to be carried (r).

(C) *It is doubtful whether they cover :*

(1) A clause providing that no goods above a certain quantity or number shall be carried in the vehicle at one time—for example, that a milk lorry shall not carry more than the number of churns which it is constructed to hold (r).

[1945] K. B. 292; [1945] 1 All E. R. 427; *McCarthy v. British Oak Insurance Co.*, [1938] 3 All E. R. 1; *Izzard v. Universal Insurance Co., Ltd.*, [1937] A. C. 773; [1937] 3 All E. R. 79; *Green v. Dynes* (1938), 159 L. T. 168; in the case of vehicles in which passengers are carried for hire or reward, this, of course, would be prohibited by proviso (ii) to sub-s. (1) (b) of s. 36 of the principal Act.

(i) See further, *post*, chapter VII.

(k) See *ante*, p. 303; *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240.

(l) E.g. an exclusion of carrying passengers on a motor-cycle pillion or otherwise than in a side-car. See *Bright v. Ashfold* (*supra*); *Herbert v. Railway Passengers Assurance Co.*, [1938] 1 All E. R. 650.

(m) See, e.g., *Piddington v. Co-operative Insurance Society*, [1934] 2 K. B. 236.

(n) Cf. *Provincial Insurance Co. v. Morgan* [1933] A. C. 240; *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590; *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 669.

(o) In this particular case an inaccurate statement would rarely affect the identity of the vehicle, unless it concerned a material matter.

(p) *Piddington v. Co-operative Insurance Society*, [1934] 2 K. B. 236; see also *Payne v. Allcock*, [1932] 2 K. B. 413; *Jones v. Welsh Insurance Corporation*, [1937] 4 All E. R. 149; *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590.

(q) Thus if a milk lorry is insured, a petrol-carrier is "not the vehicle covered."

(r) Cf. the clause in the policy in question in *Piddington v. Co-operative Insurance Society* (*supra*), which prohibited the carrying of a load in excess of that for which the vehicle was constructed.

(2) A clause prohibiting the carrying on the vehicle of goods other than of a certain class, or providing that if such are carried the vehicle shall not be "on risk." For example, some policies prohibit the carrying on the vehicle of any goods "other than personal luggage." Could this be described as a restriction of the insurance by reference to "the weight or physical characteristics" of the goods? It is submitted not, since it is neither their weight nor their physical characteristics which determines whether goods are personal luggage, but the relation between them and the assured, or even the mental attitude of the assured towards them (s).

(e) "The times at which or the areas within which the vehicle is used."

(A) *This applies to :*

(1) A clause providing that the vehicle shall not be used within certain hours (t), upon certain days, or outside certain places or areas (u), or one providing that if the vehicle is so used the risk shall not attach or the indemnity shall not be payable (b).

(2) Inaccurate but immaterial statements in the proposal form (c).

(B) *It does not apply to :*

(1) Any clause restricting the insurance to use within the United Kingdom (excluding Northern Ireland) (d).

(2) False statements or non-disclosure of material facts concerning the times at which or the areas within which the vehicle will be used (e). The area within which a vehicle is to be used is one of extreme materiality (f).

(C) *It is doubtful whether it applies to :*

Any clause referring to the place at which the vehicle is garaged or kept (g).

(f) "The horse power (h) or value of the vehicle."—This paragraph is the only one in the subsection which makes it doubtful whether the subsection was not intended to aim at non-disclosure or false representations. This seems to be so because the principal reference in a motor policy to the horse power or value of the vehicle is that contained in a statement in the proposal form. In addition, however, the horse power and value of the vehicle are usually set out in the schedule (i) to the policy which describes the insured vehicle. This schedule, is not, strictly speaking, a part of the policy which restricts the insurance—it defines and identifies the subject-matter (or part of the subject-matter), of the insurance, which for the purposes of the section is

(s) In *Piddington v. Co-operative Insurance Society* (*supra*), LAWRENCE, J., held that the distinction between personal luggage and other goods was that other goods were merchandise; cf. *Payne v. Allcock*, 1932, 2 K. B. 413. *Stone v. Licensees and General Insurance Co.* (1942), 71 Ll. L. R. 250.

(t) See, e.g., *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 660.

(u) *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 30. *Palmer v. Cornhill Insurance Co.* (1935), 52 Ll. L. R. 292.

(b) Cf. *per* SCRUTTON, L. J., in *Re Morgan and Provincial Insurance Co.*, [1932] 2 K. B. 70, at p. 82.

(c) See chapter VII.

(d) Since the Act only applies to the United Kingdom (excluding Northern Ireland). See *ante*, p. 276.

(e) See as to the materiality of such statements or concealments, chapter VII, *post*.

(f) As recent increases in premiums show.

(g) Cf. *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 419.

(h) By Finance (No. 2) Act, 1945, s. 5 (2) (c), after the word "horse-power" in this section the words "or cylinder capacity" are to be added.

(i) As to this, see further, *post*, chapter VII.

"the driving of a particular vehicle by a particular person." There seems no reason, therefore (unless certain motor traders' policies are aimed at) (*k*), for prohibiting terms referring to the horse power or value of the vehicle, unless it is intended to make every motor policy of universal application—that is, applicable to any vehicle driven by any person whether with the assured's consent or not—and to effect this intention it would have been primarily necessary to prohibit any term of the policy restricting the insurance by reference to any particular person or classes of persons.

This has not been done, and it can be concluded that it was not the intention of the legislature to provide that a policy issued to cover one vehicle should be effective to cover any motor vehicle in England. If the assured has misdescribed the vehicle it is not the vehicle insured or "covered by" the policy (*l*).

(A) *It is doubtful whether the paragraph applies to :*

(1) An inaccurate but immaterial statement in the proposal form concerning the horse power or value of the vehicle (*m*).

(2) Any term which purports to entitle the insurers to avoid the policy or to evade payment thereunder if the horse power of the insured vehicle is altered in any degree (*n*).

(3) Clauses in a policy which describe and identify the vehicle or limit the risk by reference to the value of the vehicle (*o*).

(4) Clauses relating to the age of the vehicle (*p*).

(B) *But it does not apply to :*

(1) False statements or non-disclosure of material facts concerning the horse power or value of the vehicle (*q*).

(2) Clauses in a policy which describe and identify the vehicle insured by reference to the horse power of the vehicle (*r*).

(3) Clauses in a policy which provide that it applies only to the driving of the insured vehicle and that if that vehicle be so substantially altered as to become a different vehicle the policy shall not apply (*s*).

(g) **"The carrying on the vehicle of any particular apparatus."**—

This, again, must, it is apprehended, be taken subject to the qualifications suggested in regard to the last paragraph—namely, that the legislature did not intend, and has not by this section provided that a policy issued in respect of one vehicle shall apply to and cover the driving of another vehicle. Thus it is submitted that, in a policy issued to cover a motor coach, a clause

(*k*) Such as contained an exclusion of cover for cars of more than a certain horse-power.

(*l*) See *Newcastle Fire Insurance Co v. Macmorran & Co* (1815), 3 Dow. 255.

(*m*) See, e.g., *Allen v. Universal Automobile Insurance Co.* (1933), 45 Ll. L. R. 55; *Paxman v. Motor Union Assurance Society, Ltd.* (1923), 15 Ll. L. R. 206; *Santer v. Poland* (1924), 19 Ll. L. R. 29; *Barnett v. Blackmore* (1926), 23 Ll. L. R. 137. And see further, *post*, chapter VII.

(*n*) Except in so far as such alteration would substantially alter the character of the vehicle insured. See *Seaton v. London General Insurance Co.* (1932), 48 T. L. R. 574.

(*o*) But not, it is submitted, by reference to the horse-power. Thus if a 25 h.p. car is insured, a clause specifying the car insured (e.g. the schedule mentioned above) would not be invalid or ineffective for this purpose, and a 50 h.p. car would not be covered by the policy. This does not restrict the insurance, but defines it.

(*p*) See *post*, p. 423.

(*q*) See *post*, chapter VII, and see *Santer v. Poland* (1924), 19 Ll. L. R. 29; *Allen v. Universal Automobile Insurance Co.* (1933), 45 Ll. L. R. 55; *Barnett v. Blackmore* (1926), 23 Ll. L. R. 137; *Paxman v. Motor Union Assurance Society, Ltd.* (1923), 15 Ll. L. R. 206; *Brentnall v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 166.

(*r*) See note (*o*), *supra*.

(*s*) See *Seaton v. London General Insurance Co.* (1932), 48 T. L. R. 574.

which prohibits the motor coach being turned into a petrol tanker or a breakdown van would not be void under this section. It is suggested that the paragraph—

(A) *Applies to :*

(1) Any clause which prohibits or insists upon the carrying on the vehicle of any incidental or auxiliary apparatus. Of this kind of apparatus fire extinguishers, superchargers, driving mirrors, lamps, hand brakes, horns, etc., would be typical examples.

(2) *Inaccurate but immaterial statements in the proposal form concerning the apparatus which the vehicle carries, unless these identify the vehicle (u).*

(B) *But does not apply to :*

(1) A clause which provides that no apparatus which substantially changes the character (v) of the vehicle insured shall be attached to or incorporated with it. Of this kind of apparatus, it is suggested that a side-car added to a "solo" machine (w), floats for the purpose of making the vehicle amphibious, or an air screw for the purpose of making it fly would be good examples.

(2) False statements or non-disclosure in the proposal form of material facts concerning any apparatus which the vehicle carries (x).

(h) "The carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under the Roads Act, 1920.—To ascertain to what this paragraph is intended to apply it is first necessary to make clear to what it expressly does not apply.

The Roads Act, 1920 (y), by section 6, subsection (1) provides as follows :

"On the first issue by a county council of a licence under section thirteen of the Finance Act, 1920, as amended by this Act, for a vehicle it shall be the duty of the council to register the vehicle in the prescribed manner without any further application in that behalf by the person taking out the licence, and subject to the provisions of this section, every such council shall assign a separate number to every vehicle registered with them, and a mark indicating the registered number of the vehicle and the council with which the vehicle is registered shall be fixed on the vehicle or on any other vehicle drawn by that vehicle or on both in the prescribed manner :

"Provided that any number which has been assigned to a motor car under section two of the Motor Car Act, 1903, and which is the registered number of that car on the first day of January, nineteen hundred and twenty-one, shall be treated as having been assigned to the car under the provisions of this section and no new number shall be assigned to such a car."

And the same Act (a) by section 12, subsection (1) (c), provides that the Minister of Transport may make regulations for prescribing the size, shape, and character of the identification marks or the signs to be fixed on any particular vehicle and the manner in which those marks or signs are to be

(u) See example in text above, under "B." *Newcastle Fire Insurance Co. v. Macmorran & Co. (supra)*.

(v) Since this does not restrict the insurance, but defines it.

(w) Cf. *Bright v. Ashfold*, [1932] 2 K. B. 153. A motor-cycle to which a side-car was attached would not be the vehicle insured by a policy issued to cover a solo machine, and liability incurred by its use would not be "liability covered by the terms of the policy." *Newcastle Fire Insurance Co. v. Macmorran & Co. (supra)*.

(x) See *post*, chapter VII.

(y) 19 Halsbury's Statutes 85.

(y) 19 Halsbury's Statutes 85.

displayed and rendered easily distinguishable, whether by night or by day. Under this subsection a number of regulations have been made for the purpose indicated.

It is apprehended that this paragraph is aimed at and hits the only known type of identification which any motor policy so far in common use has required to be carried—namely, the identification ticket which is required to be carried by the driver of each car on risk under a certain type of motor trader's policy. The effect of this paragraph has been to render this type of policy practically obsolete.

The type of policy referred to is one which insures the driving at the same time of only a specified number of cars (*b*).

In order to prevent abuse the policy stipulates that no car shall be "on risk" under it, or no sum shall be payable unless at the time the loss or accident occurs the driver of that car is carrying one of a limited number of identification tickets issued to the assured for the purpose of enabling him to prove that the particular vehicle was on risk under the terms of the policy.

The policy generally provides also that the driver must produce the ticket to a police constable or some other person as soon as possible after and at the scene of the accident and obtain that person's signature to the ticket for the purpose of proving that it was, in fact, being carried by the driver at the time. Without this system of tickets it is impossible for the insurers to know whether any particular vehicle was or was not "on risk" under the terms of the policy at the time an accident occurred.

Whilst neither this paragraph nor any other part of this section prohibits the form of policy described, it rendered ineffective the use, so far as third party claims are concerned (*c*), of the only means which had before 1935, been devised for the protection of insurers and for the purpose of proving that a particular vehicle was on risk under this form of policy (*d*). The paragraph, it should be noted, does not prohibit a clause which says that the insurers shall not be liable unless the driver produces his "ticket" to some person for the purpose of being vouched as soon as possible after the accident. But such a clause has already been rendered ineffective for the purposes of this Act by section 38 (*e*) of the principal Act (*f*).

There is, however, another type of policy under which it might reasonably be required that the driver should carry a means of identification. This is the private car policy which insures two or more cars, provided not more than one is being driven at the same time, or the ordinary private car policy under which the assured is covered whilst driving some other car, provided his car is not being used at the same time (*g*). In both cases the car is not on risk, and the assured is not "covered by the terms of the policy" if more than one car is being used at the same time (*h*).

It might well have been considered a reasonable precaution to provide that the insured should not, under such policies, be covered whilst driving

(*b*) For this and other special types of motor-traders' policies, see further, *post*, chapter IX.

(*c*) It should always be remembered that this section, like the rest of this and the principal Act, only applies to the insurance made compulsory by sub-s. (1) (*b*) of s. 36 of the principal Act.

(*d*) For the system devised after the 1934 Act see *Laycock v. Road Transport and General Insurance Co.* (1940), 67 Ll. L. R. 250, in which details of cars being used on the road had first to be entered in a register.

(*e*) See *ante*, p. 219.

(*f*) The Road Traffic Act, 1930 (23 Halsbury's Statutes 607), *ante*, chapter IV, pp. 219 *et seq.*

(*g*) Cf. *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 669.

(*h*) See further, *post*, chapter VIII.

one of two cars belonging to him, or whilst driving somebody else's car as the case might be unless he carried with him his insurance certificate. However this may be, such a clause would now be of no effect for the purposes of this subsection. It may be noted that the paragraph refers to "the carrying on the vehicle." It is submitted that this would be held to include "the carrying on the driver" of any particular means of identifying *the vehicle* but would not be held to apply to a clause requiring the driver of the insured vehicle to carry some means of identifying him (which might be desirable in cases of a motor trader's policy insuring vehicles only when driven by one of a large number of named drivers) (*i*). It is possible that the system of ticket policies as described above may be superseded by those under which only a certain number of drivers are covered by the policy whilst driving at any one time (*k*).

It follows, therefore, that the paragraph

(A) *Applies to :*

Any clause of the kind described requiring the carrying on the vehicle or on the driver thereof any particular means of identifying the vehicle (other than that specified in the paragraph) (*l*).

(B) *Does not apply to :*

(1) Any clause in the policy providing that the vehicle shall not be on risk, or that an indemnity shall not be payable thereunder, if the vehicle is being driven with number plates other than of the size, shape and character prescribed under the Roads Act, 1920 (*m*).

(2) Any clause in the policy providing that it does not cover the driving of more than a certain number of vehicles at the same time (*n*).

(3) Any clause in the policy providing that it shall not cover more than a specified number of a larger number of named drivers driving at the same time (*o*).

(C) *But it is doubtful whether it would be held to apply to :*

A clause providing that the risk should not attach, or that the policy should not cover any liability incurred when the insured vehicle was being driven by any driver who did not carry on him a particular means of identification (*p*).

13. Clauses in a motor policy to which section 12 does not apply.

There still remain many terms or clauses of various kinds commonly found in motor policies which are hit neither by this section nor by section 38 (*q*) of the principal Act.

The most important type of clause for which section 10 seems to have omitted to provide is that which limits the purpose for which the insured vehicle is to be used (*r*), and restricts the insurance to such limited purpose. Practically every motor policy defines the purpose for which the vehicle is to be used and restricts its insurance in this way (*s*). It is unnecessary to give more than a few examples of restrictions of this kind which are unaffected

(i) For this type of policy see further, *post*, chapter IX.

(k) As to this type of policy see further, *post*, chapter IX.

(l) *I.e.* other than the statutory index marks, etc.

(m) 19 Halsbury's Statutes 85 *et seq.*

(n) *Cf. Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 409.

(o) *Cf. ante*, p. 322.

(p) See *post*, chapter IX.

(q) As to s. 38, see *ante*, p. 219.

(r) See, e.g., *Gray v. Blackmore*, [1934] 1 K. B. 95; *Piddington v. Co-operative Insurance Society*, [1934] 2 K. B. 236.

(s) See further, *post*, chapter VIII.

by the provisions of this section. These few may be put shortly as clauses which provide that the vehicle is not covered :

- (1) Whilst towing any other vehicle (*t*) ; or
- (2) Whilst (or is *only* covered when) (*u*) being used for the purposes of business (*v*) ; or
- (3) Whilst being used for the purposes of the motor trade (*t*) ; or
- (4) Whilst being used for racing (*w*) ; or
- (5) Whilst being used for an illegal purpose or whilst being deliberately driven in an illegal manner (*x*) ; or
- (6) Whilst being driven by an unlicensed driver (*y*) ; or
- (7) Whilst being driven by a member of a particular race, religion, or profession (*z*).

" *Shall, as respects such liabilities as are required to be covered by a policy under paragraph (b) of subsection (1) of section 36 of the principal Act, be of no effect.*"—Clauses or terms of a motor policy of the kind specified in the section are rendered ineffective only in so far as they apply to the particular class of risk against which insurance is compulsory under section 36 of the principal Act—that is, the risk of incurring a limited class of liability arising out of the death of or bodily injury to a certain class of third party. It must be observed that whilst clauses of the kind referred to are only made *pro tanto* ineffective, they are not in any sense made void, as the proviso to the section shows. These clauses may, it is apprehended, still be inserted in a policy, and this Act only provides that their effect in law is limited. Except for this limitation these clauses are still perfectly valid and, to the limited extent, effective.

" *Provided that nothing in this section shall require an insurer to pay any sum . . . otherwise than in or towards the discharge of that liability. . . .*"—This seems clearly to refer to policies under which the assured has the right to demand payment to him of the indemnity thereby provided (*a*). Whilst most policies do not contain any clause expressly preventing the assured from exercising this right—which seems inherent in the nature of an indemnity—there has never been anything to prevent the insertion of such (*b*). This part of the proviso, therefore, seems to have been designed rather as a piece of friendly advice to insurers as to how they had better frame their policies, than as a necessary saving from any provision of the enacting part of the section.

" *Any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this section shall*

(*l*) See, e.g., *Gray v. Blackmore* (*supra*).

(*u*) See, e.g., *Jenkins v. Deane* (1933), 103 L. J. K. B. 250 ; *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590.

(*v*) *Gray v. Blackmore* (*supra*) ; *Passmore v. Vulcan Boiler and General Insurance Co.* (1936), 154 L. T. 258 ; *Levinger v. Licenses and General Insurance Co.* (1936), 54 Ll. L. R. 68 ; *Jones v. Welsh Insurance Corporation, Ltd.*, [1937] 4 All E. R. 149.

(*w*) As to this see further, *post*, chapter VIII, and see, as to what constitutes racing, *Alliance Aeroplane Co. v. Union Insurance Society of Canton* (1920), 5 Ll. L. R. 341, 406.

(*x*) Cf. *Tinline v. White Cross Insurance*, [1921] 3 K. B. 327 ; *James v. British General Insurance Co.*, [1927] 2 K. B. 311. " In this country, whatever may be the case in other countries, no person is allowed to insure himself against the commission of a crime " *Per GREER, L.J.*, in *Haseldine v. Hoshen*, [1933] 1 K. B. 822, at p. 837 (in which the legality of motor insurance covering criminal driving was doubted) ; see further, *ante*, p. 109, and *post*, chapter IX.

(*y*) *Ellis (John T.), Ltd. v. Hinds*, [1947] K. B. 475 ; [1947] 1 All E. R. 337. See chapter VIII, *post*.

(*z*) As in *Richards v. Port of Manchester Insurance Co.* (1934), 50 Ll. L. R. 88. See *post*, chapter IX.

(*a*) As to this see further, *ante*, chapter II, p. 74 ; and *post*, chapter IX.

be recoverable by the insurer from that person."—This part of the proviso provides that the clauses hit by the enacting part of the section and thereby rendered of no effect shall nevertheless be effective in so far as the assured is concerned.

It provides that if insurers have satisfied a judgment obtained by a third party against the assured in respect of a liability required to be covered by section 36 (1) (b) of the principal Act (c), or have otherwise discharged that liability by the payment of money, they can in cases where the operation of clauses rendered ineffective by this section would otherwise have freed them from or prevented the existence of any obligation to pay any person any sum in respect thereof, recover the sum so paid from the assured (d).

It is important to compare or relate this proviso with or to :

- (1) The proviso to section 38 of the principal Act (e) ;
- (2) Subsection (4) of section 10 (f) of this Act (g) ;
- (3) The Third Parties Act, 1930 (h).

Two points of contrast emerge.

(1) *The proviso to section 38 (i).*—(A) The proviso to section 38 does not preserve the effect as against the assured of the conditions which the enacting part of the section renders of no effect, but merely gives the right to insurers to insert a clause in the policy entitling them to recover from the assured sums paid by them under the policy and applied in satisfaction of the claims of third parties. Apart from such a clause in the policy, insurers have no right to recover sums which would not have been paid or payable by them but for the enacting part of section 38.

(B) There is nothing in the proviso to section 38 which entitles insurers to refuse to pay any sum under a policy in respect of third party liability otherwise than in discharge of such liability.

(2) *Subsection (4) of section 10 of this Act.*—Section 10 of this Act contains no saving clause or proviso preserving the rights of insurers to recover from the assured any sums paid by them by virtue only of the provisions of that section. But, as has been pointed out, it is possible that subsection (4) of that section was intended to and does have that effect (k).

(3) *The Third Parties Act, 1930.*—The possible concatenation in certain cases of the Third Parties Act, 1930 (l), and the operation of the proviso to section 38 has been previously noted (m). As there stated it is not thought that any such right to claim payment of a sum of money from the assured as is provided by the provisos to section 38 and section 10 could be enforced by way of defence or counterclaim against a third party claiming under that Act, since such right to claim payment only arises when the sum in respect

(b) Most motor policies give to the insurers the absolute conduct and control of claims and proceedings made or brought against the assured and the unqualified right to settle such, or contain conditions (which are affected by s. 38 of the principal Act, as to which see *ante*, p. 219), prohibiting the assured from making admissions to any claimant. Such conditions and other terms would in most cases materially affect the right of the assured to claim payment of the indemnity direct to him. See further, *post*, chapter IX.

(c) The Road Traffic Act, 1930 (23 Halsbury Statutes 607), *ante*, chapter IV.

(d) Cf. *ante*, p. 313, and the effect of sub-s (4) of s. 10 of this Act. See chapter VI for a description of the means whereby insurers may recover these sums from the assured or from persons indemnified under the policy.

(e) *Ante*, p. 219.

(f) See further, *ante*, p. 221, and *ante*, p. 295.

(g) *Ante*, p. 313.

(h) 23 Halsbury's Statutes 12 ; *ante*, chapter III ; see further, *ante*, p. 139.

(i) *Ante*, p. 219, chapter IV.

(k) See further, *ante*, p. 313.

(l) 23 Halsbury's Statutes 12 ; *ante*, chapter III, pp. 120 *et seq.*

(m) *Ante*, p. 221.

of which it arises has been paid to the third party. In this respect the provisos to sections 38 (n) and 12 (o) are similar.

II.—DUTY TO GIVE INFORMATION

1. Section 13 (1).

Duty of persons against whom claims are made to give information as to insurance.

"Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section thirty-six of the principal Act shall, on demand by or on behalf of the person making the claim, state whether or not he was insured in respect of that liability by any policy having effect for the purposes of Part II of the principal Act, or would have been so insured if the insurer had not avoided or cancelled the policy, and, if he was or would have been so insured, give such particulars with respect to that policy as were specified in the certificate of insurance delivered in respect thereof under subsection (5) of section thirty-six of the principal Act.

The rights conferred upon third parties by the operation of section 10 of the Act are, to a large degree, dependent upon the third party in question being able at an early stage to inform the insurers of proceedings which he is bringing or proposing to bring against a person insured by them (p). In order, therefore, to make the rights so conferred effective and to enable the injured third party in every case to ascertain whether or not he can attempt to reap the benefit of the Act, machinery has been provided for the purpose of compelling the person against whom the third party's claim is made to provide that third party on demand with the information necessary to enable him to take such steps as will make his rights effective. This machinery is provided in the first subsection of section 13, while the subsection which follows imposes a penalty for breach of the duty which a person against whom a claim is made is in certain conditions bound to fulfil. In interpreting this section it must be constantly borne in mind that the whole purpose of its enactment was to render effective the larger rights which are conceded to third parties by section 10. With these preliminary observations in mind, and remembering the different rights to information given by the Third Parties Act, 1930 (q), it is possible to pass to an examination of the provisions of the subsection in detail.

(1) "*Any person against whom a claim is made.*"—"Person" in this context is subject to the same construction as has been accorded to it in section 35 of the principal Act; it includes the plural and comprises fictitious persons, such as corporations, as well as real persons (r).

Before the obligations imposed in this section become incumbent upon any person it is necessary that a claim shall be made against them. No one against whom no claim has been made is required to furnish the information specified. But no particular formalities are, it is submitted, required for the purposes of a claim to bring the section into operation other than the simple fact of its having been made against the persons from whom the information is sought. While it is necessary that the claim should be brought to the knowledge of the person upon whom it is made, any means of so doing will suffice. The claim may therefore be made orally or in writing.

(n) Of the Principal Act.

(o) Of this Act.

(p) See notes on s. 10, *ante*, p. 297.

(q) *I.e.* upon insolvency—rights against both assured and his trustee or liquidator and against insurers. See fully *ante*, pp. 142 *et seq.*

(r) See *ante*, p. 171.

The claim must be made by or on behalf of the person alleging that he is entitled to rights against the person upon whom it is made, but there is no limit of time within which such claim must be laid (save in the one instance of claims by practitioners or hospitals for emergency treatment under section 16 (s)). It is submitted that whenever and however a claim against him is made a person becomes obliged, under the conditions of the subsection, to furnish the requisite information. The terms of the subsection indicate that it is not necessary that the request provided for shall be preceded by the making of a claim: it is therefore anticipated that the claim and the request for information may be made simultaneously (l).

(2) "*In respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 36 of the principal Act.*"—This phrase is *ipsissimis verbis* a repetition of words appearing in section 10 (1), and is subject to exactly the same interpretation as has been earlier accorded to that section (u). It will suffice briefly to summarise the most important conclusions as to the meaning of the phrase:

(a) *Liabilities required to be covered.*—These are to be found in section 36 (1) (b) of the 1930 Act (v) as amended by section 16 (4) of the present Act (w). As such they include liabilities to third parties in respect of death or personal injury caused by or arising out of the use of a motor vehicle on a road and liabilities to practitioners or hospitals in respect of fees for emergency medical treatment.

(b) *Securities.*—Despite the general provisions of section 15 of the present Act (x), which *mutatis mutandis* applies the sections under discussion to securities as to policies, the same difficulty arises in this connection as arose under section 10—namely, that section 36 (1) (b) of the 1930 Act does not apply of its own operation to securities (a). The general submission which is earlier made upon this deficiency must therefore be reiterated in this connection (b).

(c) *Claims.*—These must be with respect to the liabilities considered above and must be made of persons who are alleged to be responsible in law for the use of the motor vehicle concerned arising out of which the third parties' claim is made (c).

(d) *Liability . . . covered by a policy.*—It should be noted as the later wording of the section makes clear that these words *also* mean liability which would be covered by the terms of the policy but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy (d).

(3) "*Shall on demand by or on behalf of the person making the claim.*"—Neither the time nor the manner in which the demand necessary to impose the obligation to furnish information should be made are provided for in the section. It is therefore submitted that the demand may be made at any reasonable time and in any manner (e), either after or at the same time as the claim previously alluded to is made. The demand must, however, indicate that it is made by the person making the claim or on his behalf, that is, by some person authorised by him to make it (g).

(s) See *post*, p. 341.

(t) The words are "against whom a claim is [not *has been*] made."

(u) *Ante*, p. 278.

(v) 23 Halsbury's Statutes 607.

(w) *Post*, p. 348.

(x) *Post*, p. 340.

(a) The necessary link is s. 37 (1), which is not referred to in the present Act.

(b) *Ante*, p. 278.

(c) *Ante*, p. 48.

(d) *Cf.* s. 10 (5), *ante*, p. 314.

(e) *Powell v. Main Colliery Co.*, [1900] A. C. 366; *Lowe v. Myers (M.) & Sons*, [1906] 2 K. B. 265; *Thompson v. Gould & Co.*, [1910] A. C. 409.

(g) See cases cited in note (r), *supra*.

(4) "*State whether or not he was insured in respect of that liability.*"—The meaning of the word "insured" here must be interpreted, in view of the wide requirements for information imposed by this section, in the light both of section 10 of this Act and of section 36 (4) of the Road Traffic Act, 1930. That is to say, not only does it refer to a person who is the assured under the policy in the sense that he has paid the premium or other consideration, but also to a person who is covered by the terms of any policy, that is to say, authorised drivers and other persons whom the policy by its terms indemnifies.

The person against whom the claim is made and to whom the request is submitted must forthwith (h) inform the claimant whether or not he was "insured," as above defined, with respect to the liability, being one within the terms of section 36 (1) (b) of the 1930 Act as amended (i), which is the subject-matter of the claimant's demand and request. Apart from the criminal sanctions provided by a later subsection, this section prescribes no procedure for the enforcement of the right to information against a recalcitrant assured. It is submitted that the methods suggested in regard to the enforcement of the similar right under the Third Parties Act might be adopted (k). Before the affirmative answer may be made to the claimant it must be ascertained that the liability in respect of which the claim is made is one covered by the terms of the policy. If the use of the motor vehicle from which the claim arose was one not covered by the terms of the policy, then a negative answer must be furnished to the claimant (l).

(5) "*By any policy having effect for the purposes of Part II of the principal Act.*"—A policy having effect for the specified purposes is one granted by an authorised insurer and made effective by the delivery of a certificate of insurance, which insures such person, persons or classes of persons specified therein against liabilities to certain third parties for death or injury, and in respect of fees for emergency treatment caused by or arising out of the use of the motor vehicle on a road (m). As has been previously submitted, a policy is not "effective" for the specified purposes unless it covers the particular user of the particular person at the particular time in question in such a way that that person could enforce the policy (n).

(6) "*Or would have been so insured if the insurer had not avoided or cancelled the policy.*"—These words, again, are introduced in order to produce consistency of effect with section 10 (1). Subject to the provisions of that section, third parties who obtain judgments against insured persons are, as has been shown, entitled to enforce such judgments against the insurers of the judgment debtor, provided that the liability in respect of which the judgment was obtained was covered by the terms of the policy, notwithstanding that the insurers may have avoided or cancelled the policy. The meaning of avoidance or cancellation within the language of section 10 (1)

(h) The section says "on demand."

(i) *Ante*, p. 180.

(k) But with the important difference that the right under this section could be enforced summarily by the ordinary processes of discovery in any action (by the third party against the assured) for damages for death or personal injuries.

(l) S. 10 (1) expressly qualifies "liability" as one covered by the terms of the policy, etc., and it is submitted that liability in this context must be similarly interpreted. The parenthesis in question is merely explanatory and adds little if anything to the meaning of the word "liability." *Ante*, p. 188.

(m) 23 Halsbury's Statutes 623, 637. S. 36 (1) and s. 16 (4) of the present Act. See chapter IV, *ante*, p. 188, and see *post*, p. 347.

(n) Chapter IV, *ante*, p. 189. Apart, of course, from s. 38 of the principal Act and s. 12 of this Act.

has been fully discussed (o), and it has been shown that the implications of that phrase are different from those arising under section 10 (2) (c), which latter envisage circumstances totally different from those included in the scope of "avoidance or cancellation" (p). The consequence of this distinction is, it is submitted, of importance in the interpretation of the duties imposed by the present section. For where the insurers have cancelled or were entitled to cancel or avoid in circumstances similar to those comprised in the meaning of the term in connection with section 10 (1), viz. where there has been misrepresentation or non-disclosure (q), the person of whom a claim and request are made must nevertheless give the required information, and where the policy was cancelled by mutual consent or by virtue of a provision contained in it, as under section 10 (2) (c) (r), he is under the same obligation.

(7) "*And, if he was or would have been so insured, give such particulars with respect to that policy as were specified in the certificate of insurance delivered in respect thereof under subsection 5 of section 36 of the principal Act.*"—"So insured" means insured, as above defined, by a policy having effect to cover the person concerned for the purposes of section 36 (1) of the 1930 Act as amended, with respect to that particular liability in respect of which the claim and request arising therefrom are made (s). Further, a policy has effect for the purposes of the subsection, although it has been avoided or cancelled by the insurers upon the grounds of fraud, non-disclosure or breach of essential condition. Where the policy was effective, as above defined, the person against whom a claim covered by its terms has been made is obliged not only to state that he is insured but also to furnish the prescribed particulars. Where the person against whom a claim is made is not covered by an effective policy in respect thereof, his obligation under the section concludes with a negative reply to the demand of the claimant for the information contained in the section (t).

It remains, in concluding the discussion of subsection (1) of section 13, to indicate what particulars must be supplied to a claimant on demand by the person who is insured by an effective policy against his claim. This necessitates reference to the terms of the certificate of insurance (u) delivered with respect to the effective policy concerned by the authorised insurers to the person by whom the policy was effected (v). Section 36 (5) of the 1930 Act provided that such certificates of insurance, without the delivery of which a policy was not effective for the purposes of Part II of the 1930 Act, should be in the prescribed form and should contain such particulars as may be prescribed.

In accordance with the power given to the Minister of Transport, regulations (x) have been issued prescribing both forms for certificates of insurance or security, and the certain matters, e.g. index marks and identification of the vehicle concerned, dates of commencement and of expiry of insurance, limitations as to use, particulars of which must be stated on the certificate. The obligation of the person of whom the demand is made must, therefore, supply such claimant not only with all the particulars which appear upon the certificate of insurance which has been delivered under the policy concerned. He must also give particulars of the conditions subject to which the policy is issued.

(o) *Ante*, p. 280.

(p) *Ante*, p. 300.

(q) *Ante*, p. 281, and see chapter VII, *post*.

(r) *Ante*, p. 300.

(s) *Ante*, p. 329.

(t) See wording "if he was or would have been insured."

(u) Including certificate of security.

(v) S. 36 (5).

(w) S. R. & O. 1941, No. 926. See chapter IV, p. 216, *ante*.

2. Section 13 (2).

" If, without reasonable excuse, any person fails to comply with the provisions of this section or wilfully makes any false statement in reply to any such demand as aforesaid, he shall be guilty of an offence."

This subsection merely provides the penalty for non-compliance with the duties last considered. It prescribes neither a method of trial nor a penalty for the offence in question, which accordingly becomes subject to the general provisions of section 113 of the principal Act (x), prescribing that such offence shall be summarily triable and shall be visited with a maximum penalty of £20 for a first offence and of £50 or three months' imprisonment for a subsequent offence. There is no right of trial by jury. Proceedings must be commenced within six months of the offence complained of, and there is no such alternative period such as is provided by section 35 of the principal Act and by section 33 of the present Act, amending section 112 of the principal Act (x).

The substantive part of the offence in question consists in failure to comply with the provisions of the section or making a statement wilfully false in reply to a demand under the section. The alternative is, strictly speaking, redundant, inasmuch as a person who makes an untrue statement in reply to a demand is failing to comply with the requirements of the section which oblige him, *inter alia*, to state whether or not he was or would have been *in fact* insured with respect to the claim made upon him. The duty imposed upon him is, as the word " shall " indicates, an absolute one, and if he gives an untrue answer in reply to a demand whether he knows of its untruth or not he is, it is submitted, failing in fact to comply with the provisions of the section (a). While, in view of the above submission, lengthy examination of the alternative " wilfully making a false statement " seems unnecessary, it seems apposite to remark that " wilfully " means deliberately and intentionally, as opposed to inadvertence or accident (b). When the substantive elements in offences under the section are being considered it is important clearly to bear in mind with which provisions of the section a person is obliged to comply. As has been shown, these will vary according to whether he was or was not insured by an effective insurance against the claim made of him. If he was not, then all he is obliged to do under the section is to say he was not ; while if he was so insured then he must go further and furnish the particulars of the certificate of insurance relating to the policy under which he alleges he was insured with respect to the particular claim.

Against a charge under this subsection the defendant has one defence in addition to any defences of fact upon which he may seek to rely. He may allege and prove, the burden of proof in this respect being upon him (c), that he had a " reasonable excuse " for failing to comply with the provisions of the section. It is extremely difficult to lay down any conclusive test as to what excuses are and what are not " reasonable." Upon the circumstances of each particular case, it is a question of fact as to whether the person concerned had an excuse for offending against the section which was, having regard thereto as well as to the general object and purpose of the principal Act, reasonable, *i.e.* commendable to good reasoning. More than this it is impossible to say, except that " reasonable excuse " is an expression wider in meaning than " lawful excuse " to the extent that there

(x) Chapter IV, *ante*, p. 264.

(a) Though he may in such case have a " reasonable excuse " for his false statement.

(b) *R. v. Senior*, [1899] 1 Q. B. 283.

(c) *Dichins v. Gill*, [1896] 2 Q. B. 310, and cases therein cited.

are circumstances in which a man, although acting unlawfully, is not acting in a manner inconsistent with reason (d).

3. Section 14.

Duty to surrender certificate on cancellation of policy.

"Where a certificate of insurance has been delivered under subsection (5) of section thirty-six of the principal Act to the person by whom a policy has been effected and the policy is cancelled by mutual consent or by virtue of any provision in the policy, the person to whom the certificate was delivered shall, within seven days from the taking effect of the cancellation, surrender the certificate to the insurer or, if it has been lost or destroyed, make a statutory declaration to that effect, and if he fails so to do he shall be guilty of an offence, and the statutory declaration shall be delivered to the insurer in like manner as though it were a certificate (e)."

The preceding section was, as has been indicated, provided in order to render effective the main rights of third parties under section 10 (1) of the 1934 Act. The present section serves a similar purpose in relation to section 10 (2) of the Act which provides that in certain circumstances the insurers shall be freed from the onerous liabilities to third parties which would otherwise be the operation of section 10 (1) become incumbent upon them.

The present section, therefore, must be considered in conjunction with subsection (2) (c) of section 10, the full meaning and effect of which has already been discussed, and be regarded as machinery whereby the exemption of insurers is made operative in the circumstances specified in that subsection.

(1) "*Where a certificate of insurance has been delivered under subsection (5) of section 36 of the principal Act to the person by whom a policy has been effected.*"—This phrase is the same, with the exception of the first word, as the commencing phrase of section 10 (1) in connection with which its meaning has been fully considered (f). It should be noted that while this section deals with the obligations of the person to whom a certificate of insurance has been delivered and by whom a policy has been effected, the preceding section (g) deals with the obligations of persons "insured" by a policy having "effect" for the purpose therein specified. The points which turn on this difference in language have already been sufficiently indicated.

The certificate of insurance was intended by the legislature to be, as it were, the "life certificate" of policies of insurance against third party risks under the principal Act (h). Without the certificate of insurance no policy is effective for the purposes of Part II of that Act, and so long as a certificate is in existence, as appears from other provisions of the Act, the other obligations imposed upon the users of motor vehicles are deemed to have been complied with (i). The present section makes provision for the extinction of the "evidence" of a policy when that policy has come to an end and, in conjunction with section 10 (2), provides for the exemption of insurers from liabilities to third parties to which they would become subject by virtue of the continued existence of a policy of insurance, where that policy has in fact, for certain reasons, been extinguished.

(2) "*And the policy is cancelled by mutual consent or by virtue of any provision in the policy.*"—These words are a repetition of the formula used in section 10 (2) (c) of the Act, in the discussion of which the meaning of the words employed is fully elucidated. It should be noted that the section

(d) See *Dickins v. Gill*, [1896] 2 Q. B. 310.

(e) By Reg. 16, S. R. & O. 1941, No. 926.

(f) *Ante*, p. 278.

(g) S. 13, *ante*, p. 329.

(h) Chapter IV, *ante*, p. 214. See notes to s. 36 (5).

(i) *E.g.*, s. 40 of the principal Act, *ante*, pp. 249 et seq.

under discussion becomes operative only when the policy has been subjected to a valid cancellation before the happening of the event giving rise to liability (k).

Both cancellation by mutual consent, such as may take place under a term of the policy or an extraneous agreement supported by consideration between the insurers and assured, and cancellation by reason of a breach of a condition of the policy have been fully discussed. It suffices, therefore, at this juncture to reiterate the submission that cancellation "by virtue of a provision in the policy" includes such cancellation as insurers may validly effect under the terms of the policy on the grounds of misrepresentation or non-disclosure (l). Upon the acceptance of this interpretation depends the effect, as far as the rights of third parties against insurers are concerned, of cancellation of policies before liability has been incurred to them by the assured. Unless this submission be correct, whenever cancellation takes place the insurers will in order to avoid liability to third parties, be driven to resort to proceedings for a declaration under section 10 (3) in which the provisions of the policy itself will be ineffective as a basis for avoidance or cancellation (m).

(3) "*The person to whom the certificate was delivered.*"—This person will be the person by whom the policy of insurance has been effected, to whom or to whose agent the certificate must be delivered in order that the policy concerned should become effective. If no certificate of insurance were initially delivered there would be no policy of insurance against third party risks effective for the purposes of Part II of the principal Act, and consequently no effective policy under which third parties could gain rights under sections 10 or 13 of the 1934 Act (n). The words now under consideration must, it is submitted, bear the same meaning as the words used earlier in the section, "the person by whom a policy has been effected."

(4) "*Shall within seven days from the taking effect of the cancellation.*"—As has been indicated, the section is only of importance in connection with the provisions of section 10 (2) (c) and cancellation, perforce, means cancellation in either of the modes indicated *before* the happening of an event giving rise to liability to a third party. Such cancellation, as consideration of section 10 (2) (c) has shown (o), is ineffective to enable the insurers to avoid the liabilities arising under section 10 (1) unless in addition to the cancellation one of three other events has occurred. These three events are either :

- (i) surrender or statutory declaration before the event giving rise to liability arose (p) ; or
- (ii) surrender or statutory declaration within fourteen days of the taking effect of the cancellation (q) ; or
- (iii) proceedings under Part II of the 1934 Act commenced by the insurers within fourteen days from cancellation in respect of the failure to surrender (r).

It may be noted that whereas section 14 provides that surrender, etc., shall take place within seven days of cancellation the earlier section provides,

(k) See *ante*, p. 300, notes to s. 10 (2) (c).

(l) Notes to s. 10 (1) (2) (3), *ante*, pp. 278 *at seq.*

(m) See *ante*, p. 300. Also chapter VII, *post*.

(n) See *ante*, pp. 214, 329. *Starkey v. Hall*, [1936] 2 All E. R. 18.

(o) *Ante*, p. 299.

(p) S. 10 (2) (c) (i), *ante*, p. 297.

(q) S. 10 (2) (c) (ii), *ante*, p. 297.

(r) S. 10 (2) (c) (iii), *ante*, p. 297. In this and the last-mentioned case the fourteen days may expire after the event.

as (ii) above shows, a period of fourteen days from cancellation for such surrender or statutory declaration.

(5) "*Surrender the certificate to the insurer.*"—"Certificate" in this context, as later in the section where the question of loss or destruction is dealt with, includes such copies and duplicates of certificates of insurance as have been issued under policies (s).

The obligation is an absolute one; the insured under the cancelled policy must deliver up his certificate unless it has been lost or destroyed (i), and if he fails to do so he is guilty of the offence specified in the section. The certificate must be surrendered to the insurer by whom it was originally delivered in pursuance of the provisions of the principal Act (u).

(6) "*Or, if it has been lost or destroyed, make a statutory declaration to that effect.*"—The terms "loss" or "destruction" need no comment. In a case when duplicates or copies have been issued to an assured the question may arise as to the correct procedure upon cancellation in the event of some such certificates being lost or destroyed. Although insurers are entitled to issue copies of certificates upon their assured satisfying them that the certificate delivered to him has been lost or destroyed (v), it is submitted that even in such a case there would be no qualification of the requirements of this section and that the assured upon cancellation of his policy must account for every certificate which has been issued to him, by surrendering such of them as he has and making a statutory declaration to cover such of them as may have been lost or destroyed. It will be in the obvious interest of insurers to see that this course is taken and, as will be shortly shown, insurers enjoy a right sufficient to enable them to make such obligation effective (w).

The statutory declaration which must be made in the event of the loss or destruction of a certificate will be (x) governed by the provisions of the Statutory Declarations Act, 1835 (y), which requires that such declarations should be made in the form set out in the Schedule to that Act (a). Any person who knowingly and wilfully makes a statement false in a material particular in a statutory declaration is guilty of an indictable misdemeanour for which he can be sent to prison for a maximum term of two years, with or without hard labour, or fined, or both imprisoned and fined (b).

(7) "*And if he fails so to do he shall be guilty of an offence.*"—Failure to surrender a certificate (including a copy or duplicate) which has not been lost or destroyed, or failure to make a statutory declaration with respect to such a certificate which has been lost or destroyed, is a criminal offence. The offence is summarily triable and no right to trial by jury exists (c). The maximum penalty for failure to comply with the provisions of section 14 is a fine of £20 for a first offence, with a fine of £50 or imprisonment for not longer than three months for a subsequent offence (d). It is important

(i) See S. R. & O. 1941, No. 926, chapter IV, *ante*, p. 214. Also s. 10 (3) of the 1934 Act, *ante*, p. 314.

(j) *N.B.*, the word "shall"

(u) S. 36 (5) (23 Halsbury's Statutes 638).

(v) S. R. & O. 1941, No. 926, Reg. 15, *ante*, p. 217.

(w) *Post*, p. 337.

(x) Interpretation Act, 1889, s. 21 (18 Halsbury's Statutes 1001).

(y) 8 Halsbury's Statutes 194.

(a) The following form of declaration is prescribed: "I, A.B., do solemnly and sincerely declare that . . . and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of an Act made and passed in the . . . year of the reign of his present Majesty intituled . . . 1 y. a. 18 of the same Act such declaration must be made and signed in the presence of a justice of the peace, notary public, commissioner for oaths, or other person authorised to administer an oath, who must add his signature thereto.

(b) Perjury Act, 1911, s. 5 (4 Halsbury's Statutes 775).

(c) Road Traffic Act, 1930, s. 113 (1); chapter IV, *ante*, p. 264.

(d) *Ibid.*, s. 113 (2), *ante*, p. 264.

carefully to distinguish the offence created by section 14 from the more serious offence, mentioned above, of making a statutory declaration false in a material particular under the Perjury Act, 1911 (e).

(8) "*Delivery of the Declaration.*"—This provision made by the Minister of Transport (f) gives completeness to the Section.

III.—PROCEEDINGS BY INSURERS FOR RETURN OF CERTIFICATE

In concluding the discussion of section 14 there remains one further matter to be considered. It has already been remarked that an earlier section (e) makes reference to proceedings by an insurer under the Act in respect of the failure to surrender a certificate. As the Act nowhere makes any express provision conferring upon insurers the right to bring such proceedings it is necessary to consider whether any such rights can devolve upon the insurers by implication under the provisions of this or some other section. Before entering upon the major question it is apposite to make short allusion to the obligations imposed by the Minister of Transport's Regulations made under the Road Traffic Act, 1930, dealing with the issue of policies of insurance under the provisions of Part II of that Act. These regulations oblige authorised insurers to keep a full record of particulars relating to certificates of insurance issued by them (g), to notify the Minister of Transport in the event of cancellation or avoidance of the policy under which the certificate was issued (h), and generally to control the issue, transfer, and delivery up of certificates (i). A penalty of £5 is imposed for failure to comply with these regulations (k).

The relevance of these points to the present inquiry is the extent to which they bear upon the right of insurers to obtain delivery up of certificates issued in respect of policies which have been cancelled under the conditions indicated in section 10 (2) (c) and section 13. From a perusal of the 1930 Act and the regulations issued under it, it is apparent that "authorised insurers" are a special class of persons subject to special obligations and entitled to special privileges (l). The Road Traffic Act, 1934, even more stamps "authorised insurers" with the hall-marks of a class. The exceptional and novel obligations which are imposed upon them by the operation of section 10 have already been discussed. It is further extremely important to note that section 10 (2) (c) provides machinery whereby such insurers may, in certain circumstances, obtain exception from the burdens of section 10 (1). This machinery is made effective by the provisions of section 14 now under consideration. Thus by the joint operation of section 10 (2) (c) and section 14 insurers are in certain circumstances relieved from liabilities which otherwise would be imposed upon them (m). The initial factor in obtaining exception from section 10 (1) is that the certificate of insurance issued under a cancelled policy should have been surrendered to the insurers, or a statutory declaration made in the event of its being lost or destroyed. Section 14 penalises failure to surrender such certificate or make such declaration. To obtain the surrender of the certificate or the making of such declaration is of vital importance to the insurers. But failure to do so will not preclude an insurer from avoiding liability to third

(e) S. 10 (2), *ante*, pp. 294 *et seq.*

(f) By Reg. 16, S. R. & O. 1941, No. 926.

(g) S. R. & O. 1941, No. 926, Reg. 12, *ante*, p. 217.

(h) *Ibid.*, Reg. 13, *ante*, p. 217.

(i) *Ibid.*, Regs. 14, 15, *ante*, p. 217.

(k) *Ibid.*, Reg. 37, *ante*, p. 267. The last-mentioned provisions of S. R. & O. No. 926 of 1941 apply also to companies issuing securities under s. 37 of the 1930 Act.

(l) Ss. 36 (3), 42 (23) Halsbury's Statutes 638, 641; chapter IV, *ante*, p. 214.

(m) As to these circumstances see *ante*, p. 297.

parties under the cancelled policy if within fourteen days of cancellation he commenced proceedings "in respect of the failure to surrender the certificate" (n).

1. **Civil proceedings.**—Neither the 1930 Act, nor the 1934 Act, nor the Regulations of the Minister of Transport (o) makes any provision for proceedings whereby the surrender of certificates issued under cancelled policies may be enforced by insurers. The sole provision made for proceedings "in respect of the failure to surrender the certificate" is contained in section 14, which, as has been shown, provides a penalty for failure to surrender (or make a statutory declaration of loss or destruction) within seven days of cancellation.

The question therefore arises as to what is intended by the expression "proceedings under this Part of this Act in respect of the failure to surrender the certificate," employed in section 10 (2) (c). This phrase admits of alternative interpretations. The one contemplates criminal proceedings under section 14; the other, civil proceedings based on breach of the ex-assured's statutory duty under section 14.

With respect to the latter interpretation it must, at the outset, be stated that apart from the provisions in the sections under consideration there is nothing, unless such a term were inserted in a policy, requiring that an assured should surrender his certificate of insurance to the insurer upon the expiration or determination of his policy. If such a term were therein inserted then the insurers could maintain proceedings for performance of the duty thereby imposed or for damages for its breach under the terms of the policy itself. If, however, no such term were included, the insurers could only proceed by way of action (or counterclaim in an action by the assured to enforce the policy against them) for "cancellation and delivery up" (p). Such action would have to be commenced in the Chancery Division of the High Court (although the counterclaim could, it appears, be made in proceedings in the King's Bench Division) (q). In either case an arbitration clause would present difficulties (r). As far as the terms of section 10 (2) (c) of the Act are concerned it is, however, submitted that proceedings for "cancellation and delivery up" do not come within the purview of the proceedings there indicated on the following three grounds:

(i) That they would not be proceedings "under Part II of this Act" as are prescribed by the Act;

(ii) That whereas the cancellation contemplated by section 10 (2) (c) may be cancellation "by mutual consent," the equitable relief of the type above indicated appears to be available only where the contract in question has been obtained through fraud or non-disclosure or is otherwise void *ab initio* (s).

(iii) That it is doubtful whether such equitable proceedings are entertainable to enforce the surrender of a document which is neither a contract nor a conveyance (t). The provisions under discussion deal

(n) S. 10 (2) (c) (iii), *ante*, p. 297. (o) S. R. & O. 1941, No. 926, *ante*, p. 215.

(p) 13 Halsbury's Laws, 2nd Edn. 64-5.

(q) Supreme Court of Judicature Act, 1925, s. 56 (1) (b) (13 Halsbury's Statutes 219).

(r) Though not insuperable. It is submitted that an order for the return of the certificate could be obtained in arbitration proceedings.

(s) *Brooking v. Maudslay, Son and Field* (1888), 38 Ch. D. 636. "If a policy is liable to be completely avoided, as on the ground of fraud or misrepresentation, a Court of Equity has jurisdiction to direct its delivery up and cancellation, but it has no jurisdiction to direct the cancellation of a policy to any claim on which there is a good legal defence or to declare that there is no liability upon it."

(t) See 13 Halsbury's Laws, 2nd Edn. 64-5, and cases there cited. Also *Brooking v. Maudslay, Son and Field*, *supra*.

solely with the surrender of "certificates of insurance," documents which are not contractual and which, it is submitted, have no legal significance apart from section 10 (2) (c), unless the policy of insurance under which they were delivered is valid and subsisting (*u*). While the authorities governing actions for "cancellation and delivery up" deal solely with such documents as are contractual in their effect, it might nevertheless be argued that such proceedings could be taken with respect to a certificate of insurance. The contrary view is, however, preferred for the three reasons which are here summarised (*v*).

This being the case, any cause of action by the insurers would have to be based solely upon the failure of the insured to surrender his certificate of insurance or to make a statutory declaration concerning it in accordance with his obligations under section 14 of the 1934 Act. But the express terms of that section already penalise him for such failure. Further, insurers have no absolute right to the surrender of the certificate, as such certificate may have been lost or destroyed, and failure to procure its surrender or the making of a statutory declaration does not expose the insurer to liability under the cancelled policy if he commences the requisite proceedings "*in respect of the failure to surrender*," not, be it noted, "*for the surrender of the certificate*."

2. Criminal proceedings.—The former interpretation of the expression contemplates criminal proceedings under section 14. Such proceedings may be commenced, by information or complaint, when the ex-assured is seven days in default. By section 10 (2) (c) the insurers are given fourteen days to commence their proceedings. The apparent conflict between the two periods is susceptible of easy explanation if this interpretation of the words under section 10 (2) (c) (iii) is adopted. The assured, in a given case, having failed to surrender his certificate within seven days of cancellation may immediately thereafter be prosecuted under section 14 in respect of such failure, and where, as may well be the case, such prosecution is commenced (*w*) within fourteen days of cancellation, the insurer will have by complying with section 10 (2) (c) relieved himself of the burden of section 10 (1). The question of the onus of proof in such proceedings is considered in a later place (*x*).

It is submitted that the interpretation last discussed of the phrase employed in section 10 (2) (c) is the preferable, since it enables an easy construction to be placed upon the duties of insurers thereunder, complies implicitly with the qualification "under this part of this Act," and avoids the difficult considerations which would have to be weighed in determining whether or not civil proceedings for breach of statutory duty were in this context admissible (*a*). By concluding that proceedings under section 14 are contemplated in the wording of section 10 (2) (c), it becomes unnecessary to deal with the complexities of the exact form of the possible civil proceedings for breach of statutory duty or what relief could be sought in such

(*u*) See, e.g., notes on s. 40 of the 1930 Act, chapter IV, *ante*, p. 249. The insurer is not prejudiced by the failure of the assured to deliver up his certificate, etc., unless he fails to commence proceedings under s. 14 now under discussion.

(*v*) Should proceedings have been commenced by the insurers, the fact that the assured still holds his certificate does not prejudice the insurers, *vis à vis* third parties; the assured himself is in no better position than he would be without a policy as far as prosecution under the principal Act and failure to comply with its provisions are concerned.

(*w*) As to when a prosecution is commenced, see chapter IV, *ante*, p. 249.

(*x*) Chapter IX, *post*.

(*a*) For a study of these considerations in another relation, see chapter IV, *ante*, p. 163.

action (b). The question of the rival interpretations is no easy matter, however, and whilst one is preferred by the author for the reasons indicated, the difficulty can be met in practice by the insertion of a term in the policy requiring the insured to surrender his certificate within fourteen days after cancellation by mutual consent or under a proviso.

IV.—APPLICATION TO SECURITIES

Section 15.

Application of this Part to securities given under Part II of the principal Act.

"The foregoing provisions of this Part of this Act shall apply in relation to securities having effect for the purposes of Part II of the principal Act as they apply in relation to policies of insurance, and in relation to any such security as aforesaid, references in the said provisions to being insured, to a certificate of insurance, to an insurer, and to persons insured, shall be construed respectively as references to the having in force of the security, to the certificate of security, to the giver of the security, and to the persons whose liability is covered by the security."

(1) "*Having effect for the purposes of Part II of the principal Act.*"—It is submitted that these words show that the obligations undertaken by the giver of a security under section 37 (c) of the principal Act (d), and the general scope and effect of a security are not enlarged by the provisions of this Act. The most important point in this connection is that which has previously been referred to (f), namely, the question whether under section 10 of this Act the giver of a security can be made to pay to a third party any sum in excess of that to which he may have limited his liability under the security in pursuance of the express provisions of section 37 entitling him so to do.

It has been submitted that section 10 of this Act, which must be construed strictly, cannot be said to have repealed the provisions of section 37 of the principal Act without express words to that effect. It is true that the imperative words of subsection (1) of section 10 of this Act are peremptory and without qualification: nevertheless, they only require payment to respect of a liability covered by the terms of the security—and, it is submitted, a liability for £10,000 is not one covered by a security limited in £5,000 in so far as it exceeds the latter sum (g). Moreover, as has previously

(b) The claim could hardly be for a declaration that the policy is avoided under s. 10 (3) in view of the different circumstances to which s. 10 (2) (c) applies and of the express terms of s. 10 (3). Nor could the claim be for surrender of the certificate, which is not always the appropriate or necessary course. It is hardly possible that a claim would be made, or upheld, that another person should make a statutory declaration.

(c) *Ante*, p. 222.

(d) The Road Traffic Act, 1930 (23 Halsbury's Statutes 607).

(f) *Ante*, p. 297.

(g) If this submission be accurate, there is in fact no repugnancy between the two sections concerned. But even if the two sections are repugnant, which if the submission made in the text is inaccurate needs must be the case, then it is apprehended that s. 10 of the later Act cannot be considered to remove by implication the benefit of the limitation of liability expressly conceded by the earlier Act. Despite the principle that a later enactment is deemed, in such case, to repeal by implication so much of a previous enactment as is inconsistent with it, the rule that later general enactments do not derogate from earlier special enactments would seem applicable. See Maxwell, 7th Edn., pp. 153 *et seq.*; 31 Halsbury's Laws, 2nd Edn. 525-8, and cases there cited; *De Winton v. Brecon Corporation* (1859), 26 Beav. 533; *Pretty v. Solly* (1859), 26 Beav. 606; see *per* Lord Houshouse, *Barker v. Edger*, [1898] A. C. 748, at p. 754; *Ross v. Gibson*, [1891] 1 Q. B. 632.

been pointed out, there seems no difference in principle between limiting the liability covered by a security by excluding liability arising out of certain classes of risk (as, for example, the use of the insured vehicle for purposes of the motor trade) and limiting such liability by excluding liability in excess of a certain amount. However this may be, the submission made above is maintained.

(2) "*References to . . .*"—The necessary transposition which this section requires when considering the various provisions of the preceding sections in relation to securities have been noted in each instance by way of footnote. It is unnecessary here to do more than point out the following difficulties which this method of compendious alteration involves.

i. "*To a certificate of insurance.*"—The inapplicability of transposing the words "certificate of security" in subsection (1) of section 10 in the reference therein to the delivery of a certificate of insurance under subsection (5) of section 36 of the principal Act has already been indicated (*h*). This might, it is thought, be treated as a *casus omissus*, and the necessary change of wording be implied (*i*).

ii. "*The having in force of the security*" is not a phrase which aptly takes the place of "insured." For example, subsection (1) of section 10 refers to a judgment obtained against any person insured by the policy: this thus becomes "judgment obtained against any person having in force a security," which at once begs the question as to how a security can be "in force" if the giver of it is entitled to avoid it on any ground. It seems unfortunate that the word "secured" could not have been specified as the substitute of "insured."

(3) "Policy" is not expressly stated in this section to be interchangeable with "security." This, however, is in effect provided by the enacting words of the section, and the transposition must be implied where appropriate unless most of the provisions of section 10 are to become inapplicable to a security.

(4) "Insurance" is given no equivalent word to be applied in relation to securities. This, perhaps, is a slightly more serious omission having regard to the fundamental difference in character between a policy of insurance and a security. The appropriate equivalent word is, of course, "undertaking," and the phrase "restricts the insurance of persons insured thereby" in section 12 (*k*) should, when applied to securities, be read as "restricts the undertaking given to the persons having in force a security."

V.—EMERGENCY TREATMENT

1. Section 16 (1).

Payments and insurance in respect of emergency treatment of injuries arising from the use of motor vehicles on roads.

"Where medical or surgical treatment or examination is immediately required as a result of bodily injury (including fatal injury) to any person caused by, or arising out of, the use of a motor vehicle on a road, and the treatment or examination so required (in this section referred to as 'emergency treatment') is effected by a registered medical practitioner, the person who was using the vehicle at the time of the event out of which the bodily injury arose shall, on a claim being made in accordance with the provisions of the next succeeding section, pay to the practitioner, or,

(*h*) *Ante*, p. 278.

(*i*) See *ante*, p. 279, and the cases there cited.

(*k*) *Ante*, p. 316.

"where emergency treatment is effected by more than one practitioner, to the practitioner by whom it is first effected—

- "(i) a fee of twelve shillings and sixpence in respect of each person in whose case the emergency treatment is effected by him; and
- "(ii) a sum, in respect of any distance in excess of two miles which he must cover in order to proceed from the place whence he is summoned to the place where the emergency treatment is carried out by him and to return to the first-mentioned place, equal to sixpence for every complete mile and additional part of a mile of that distance."

In the preceding chapter it was shown that the Road Traffic Act, 1930, as amended (*l*), conferred certain limited rights upon hospitals to claim and receive payment in respect of their reasonably incurred charges for medical treatment to injured third parties. The liability to pay such charges was, however, conditional upon payment having been made in satisfaction of that injured third party's liability by the insurers, or other persons therein specified (*m*). The provisions of the Road Traffic Act, 1934, confer rights additional to and quite independent of those mentioned above, and, more remarkably, impose liabilities upon the users of motor vehicles independent of negligence or other wrongful act, but merely because they happen to be using a motor vehicle which at some time, in some manner is involved in an accident in which personal injury is sustained by any person. The object of these provisions runs thus strikingly counter to the well-established view of the Courts that the use of a motor car is a perfectly lawful use of the highway (*n*), that a motor car is not a dangerous thing (*o*), and that so long as a motor car is used with care no civil liability can arise from its presence or user on the highway (*p*). The imposition of liabilities upon the users of motor vehicles merely because they are using such modes of conveyance is a novelty, which can hardly be justified by reference to the small quantum of the obligations thus imposed.

(1) "*Where medical or surgical treatment or examination.*"—As its definition indicates, "medical" treatment is properly treatment by the administration of healing liquids or substances, while "surgical" treatment involves manual or instrumental interference with the patient (*q*). The subsection contemplates two types of circumstances, cases in which something must be done to aid the injured third party, *i.e.* treatment, on the one hand, and cases when physical examination is needed in order to ascertain whether or not the patient requires treatment, on the other. Even though no

(*l*) 23 Halsbury's Statutes 637, amended by the Road and Rail Traffic Act, 1933, s. 33 (26 Halsbury's Statutes 898)

(*m*) Chapter IV, *ante*, p. 268. See also on that page a discussion on the effect of the National Health Service Act, 1946, on that section of the 1930 Act. It was there stated that it may well be that practitioners and hospital authorities who dispense medical treatment to injured third parties without charge to the patient under the terms of the National Health Service will not make any claim against the insurers of the motorist who injured the third party. Further, the effect of s. 3 (4) of the Law Reform (Personal Injuries) Act, 1948, on s. 36 (2) of the Road Traffic Act, 1930, was considered. Both these new Acts will affect this s. 16 (1) of the Road Traffic Act, 1934, in the same way.

(*n*) *Wing v. London General Omnibus Co.*, 1900, 2 K. B. 652, chapter I, *ante*, p. 32.

(*o*) *Ruoff v. Long & Co.*, [1916] 1 K. B. 148. See *ante*, chapter I, p. 32.

(*p*) *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539; on appeal, [1923] 2 K. B. 832

(*q*) From the legal aspect, however, the additional "or surgical" is probably redundant. From the earliest times the status of surgeons and physicians in England has been regulated by statutes which, up to the present day, involve little if any distinction between "medicine" and surgery and concerning which it may be said that medicine includes surgery. See, for a history of these statutes and generally, *Royal College of Physicians v. General Medical Council* (1893), 62 L. J. Q. B. 329.

treatment is, in fact, necessary or even indicated, an examination, with the same consequences as regards liability, may take place. The patient may be unreasonably insistent, hypochondriacal or merely deceitful; the position of the party liable is unchanged.

(2) "*Is immediately required.*"—These words are so vague, for it is nowhere indicated by what test "required" is to be judged or who, if anyone, is to make the request, that it is doubtful whether they prevent the section from applying to every case in which a third party sustains bodily injury. The word "required" is capable of two interpretations, one transitive, meaning necessary; the other intransitive, meaning where a person requests something. It is submitted that in the present context "required" must be interpreted in the former sense, as meaning necessary. To adopt the alternative interpretation would, in certain circumstances, lead to impossible conclusions, and there is no doubt that the section is intended to apply to cases when no person is in a position actively to "require" treatment although such treatment is necessary.

The adverb "immediately" qualifies "required" in its relation to treatment or examination. Cases in which treatment, etc., is not at once necessary (e.g. where the injured party appears to be uninjured and unaffected after the accident, although, in fact, harmed) are thus excluded from the purview of the section. It is therefore possible to refer, as does the section, to such "immediately required medical treatment or examination" as "emergency treatment."

(3) "*As a result of bodily injury (including fatal injury) to any person.*"—The term "bodily injury" is found in the Road Traffic Act, 1930 (r), in connection with which its meaning has already been discussed. Although it is not consistently used in that statute, the words "personal injury" competing with it (a), it is submitted that the two expressions are synonymous and that bodily injury would include injury by shock and mental injury (b). "Bodily injury" is used in distinction to "death" both in the Road Traffic Act, 1930, and in the Road and Railway Traffic Act, 1933 (d). Its use in the present section as including fatal injury is novel to this branch of law, but does not appear to present any difficulty.

"Any person" must, in this context, refer to a real person as opposed to a legal person, which by its nature is incapable of sustaining bodily injury. "Any person" is sufficiently wide to include the user of the vehicle himself (e).

(4) "*Caused by, or arising out of, the use of a motor vehicle on a road.*"—The terms in the above phrase are all employed in the Road Traffic Act, 1930 (f), in relation to which their meaning has already been considered. Pursuant to the general rule for the construction of the 1934 Act with the earlier enactment (g), the discussion of these points in the preceding chapter must be summarised in their present application (h) as follows:

"*caused by, or arising out of.*"—*I.e.* when the use of the vehicle is a *causa causans* of the injury (i). "Cause" in this sense is independent

(r) S. 36 (1) (b); see p. 188, *ante*.

(a) *Ibid.*, s. 40 (2), *ante*, p. 252.

(b) *Hambrook v. Stokes Brothers*, [1925] 1 K. B. 141. Cf. chapter IV, *ante*, p. 197.

(d) S. 33 (26 Halsbury's Statutes 898).

(e) Cf. *ante*, p. 197.

(f) 23 Halsbury's Statutes 607; chapter IV, *ante*, p. 196.

(g) S. 42 (1) (27 Halsbury's Statutes 505), *ante*, p. 227.

(h) Here the words have a different meaning from that which they bear in s. 36 (1) (b), the difference being created (i) by the presence of the comma between "by" and "or," (ii) the absence of any reference to liability for the cause of the injury, etc. See further, *ante*, chapter IV, pp. 196, 197.

(i) See Chapter IV, *ante*, p. 197.

of considerations of legal liability. The word "event," which is used to refer to the incident or accident in question, throughout this and the following section, together with section 16 (3), is a sufficient indication that "caused by or arising out of" has reference to circumstances, not to liabilities. The presence here of a comma and its absence in section 36 (1) (b) show that the phrase bears a wider meaning (*h*).

"*the use*."—This implies that the motor vehicle must be being used, and not merely present, stationary and unattended, on the highway (*i*). That liability is imposed upon the person using the vehicle indicates that only cases when the vehicle is in use, whether or not it is being driven, are contemplated by the section.

"*of a motor vehicle*."—The exclusion of tramcars, trolley vehicles and invalid carriages (*m*) from the definition of motor vehicle in Part II of the 1930 Act must be followed in Part II of the present Act (*n*). The term therefore bears the same meaning as has been previously discussed.

"*on a road*" means any highway or road to which the public has access and includes bridges (*o*) and the adjacent footway (*p*).

(5) "*And the treatment or examination so required . . . is effected by a registered medical practitioner*."—As has been indicated, such treatment or examination which is immediately required is known as "emergency treatment," and the necessity of immediate treatment does not give rise to liability unless such treatment is carried out. It is submitted, and sub-clause (b) bears this out, that only treatment carried out immediately following the accident can furnish a ground for liability under the section; that it is, in fact, the effecting of immediate treatment, etc., which gives rise to the liability to pay for such "emergency treatment."

Registered medical practitioners are such medical practitioners of the necessary qualifications as are entitled to be registered under the Medical Acts, 1858 and 1886 (*q*). They are subject to the control of the General Medical Council and are entitled to certain monopolies and privileges. Dentists, chemists, veterinary surgeons, nurses and pharmacuticists are not registered medical practitioners within the meaning of the Medical Acts, nor, it is submitted, within the subsection. Registered medical practitioners, other than fellows of the Royal College of Physicians (*r*), are now by statute entitled to sue for charges, expenses and fees (*s*), and thus, as a rule, would be entitled to charge for emergency treatment apart from the right conferred by the present section upon a contractual basis, express or implied. The statute, therefore, confers upon them an additional right, the nature, extent and incidence whereof will be examined as they arise for comment hereafter. One curious result of the section is that where the user of the motor vehicle involved in the accident happens to be a registered medical practitioner he will be unable to recover in respect of emergency treatment, even though some other person is at fault, since the right to recover is only conferred against the user of the vehicle (*t*).

(6) "*The person who was using the vehicle at the time of the event out of which the bodily injury arose*."—Person in the context means any person,

(*h*) See note (*h*) on last page.

(*m*) Chapter IV, *ante*, p. 176.

(*n*) S. 42 (1) (27 Halsbury's Statutes 565); *ante*, p. 277.

(*o*) Chapter IV, *ante*, p. 176.

(*p*) *Bryant v. Mars* (1932), 147 L. T. 499.

(*q*) *See 15 et seq.* (11 Halsbury's Statutes 671), s. 27 (11 Halsbury's Statutes 725).

(*r*) Under the charter of that body. But this disability does not extend to members; *Gibson v. Budd* (1863), 2 H. & C. 92.

(*s*) Medical Act, 1886, s. 6 (11 Halsbury's Statutes 717).

(*t*) *I.e.* the statute would only give him a right to recover against himself.

(*i*) Chapter IV, *ante*, p. 177.

whether an individual or a fictitious person, such as a corporation. The implications of "use" as described in this section have already been discussed (u). The "event" is the brief substantive description for the occurrence caused by or arising out of the use of a motor vehicle on the road from which bodily injury results. As has been said, the section is concerned purely with "events," which in themselves can and frequently do occur without question of fault or liability. Bodily injury includes fatal injury, as the section itself indicates. "Person using" means "person principally using" (u).

The section provides a measure for the liability of the "user" of the vehicle, and he is expressly enabled to claim indemnity against such liability when he is not the party in fault (v). The procedure whereby his liability can be enforced is outlined in the succeeding section (w).

(7) "*Shall, on a claim being made in accordance with the provisions of the next succeeding section, pay to the practitioner.*"—The statutory rights of the registered medical practitioner to recover his fees and expenses by legal action have already been referred to (x). This section confers additional rights independent of any contract, or indeed of any duty or responsibility. The methods whereby registered practitioners' claims may be enforced are fully discussed in the notes upon section 17. Suffice it, at this point, to say that no liability arises until a claim for payment is made, but that when such claim is made, liability arises immediately and the sum properly claimed must be paid to the claimant forthwith (y).

(8) "*Or, where emergency treatment is effected by more than one practitioner, to the practitioner by whom it is first effected.*"—This part of the subsection deals, though not too clearly, with cases in which more than one registered medical practitioner are concerned in rendering "emergency treatment." It is clear that when an accident involves bodily injuries to more than one third party the person using the motor car concerned may be liable to pay for emergency treatment rendered in respect of each injured person. If the parties injured are treated by separate medical practitioners, no difficulty in determining the liability of the person using the motor vehicle arises. But where one or more third parties are rendered "emergency treatment" by more than one doctor complications ensue. These complications the section endeavours to escape by providing that the first practitioner who effected the treatment can claim payment, but not the others. "Emergency treatment" is treatment which is "immediately required." Cases may arise in which delicate points of fact, and perhaps of professional etiquette, may be involved in the question by whom the "emergency treatment" immediately required was first effected. For analogy, reference may be made to the common case of several house agents claiming commission upon one sale of a house. The Act makes no provision for the settlement of conflicting claims by medical practitioners, let alone what is the position when two medical practitioners jointly render emergency treatment (z).

(9) "*A fee of twelve shillings and sixpence in respect of each person in whose case the emergency treatment is effected by him.*"—This clearly indicates a *per capita* fee of 12s. 6d. As has been stated, the position where one practitioner treats more than one third party, or where several practitioners

(u) It is submitted that "the person . . . using" means the person chiefly using: thus in the case of a bus or taxi the owners and not the passengers would be the "persons using" the vehicle for the purposes of the section.

(v) S. 16 (3) (27 Halsbury's Statutes 548); *post*, p. 347.

(w) *Ibid.*, s. 17, *post*, p. 349.

(x) *Ante*, p. 344.

(y) See fully notes to s. 17, *post*, p. 349.

(z) See further, *post*, p. 353.

treat separately an equal number of third parties, is clear. Difficulties will arise in rare cases where one third party is treated by several practitioners, or where several practitioners treat a smaller or greater number of third parties, in which cases the test, who gave the first treatment, is little calculated to form clear-cut issues. Apart from priority in point of time it would, however, be difficult to devise a test which, in practice, will as a general rule operate without too great a difficulty.

(10) "*And a sum, in respect of any distance in excess of two miles which he must cover in order to proceed from the place whence he is summoned to the place where the emergency treatment is carried out by him and to return to the first-mentioned place, equal to sixpence for every complete mile and additional part of a mile of that distance.*"—To the specified *per capita* fee of 12s. 6d. the medical practitioner who first effects emergency treatment is entitled to add a distance fee of 6d. per mile for the distance in excess of two miles which he covers for the purpose to and from the place where the treatment was rendered to the place from which he was summoned to give such treatment.

2. Section 16 (2).

"Where emergency treatment is first effected in a hospital (that is to say, an institution, not being an institution carried on for profit, which provides medical or surgical treatment for in-patients) the provisions of the foregoing subsection with respect to the payment of a fee shall, so far as applicable, have effect with the substitution of references to the hospital for references to a registered medical practitioner."

The object of this subsection is to assimilate as far as possible the position of hospitals rendering emergency treatment to that of medical practitioners. Hospitals thus receive further rights in addition to those enjoyed under section 36 of the Road Traffic Act, 1930 (a). The provisions of the present enactment as far as they specifically affect those of the preceding law are dealt with subsequently in more detail (b).

That part of the subsection which defines a hospital needs no comment. The rights and legal position of hospitals in respect of their reasonably incurred expenses have already been discussed elsewhere (c). The commencing words of the phrase, however, require some comment, concerning the difficult expression "first effected." While the subsection does not give rights in respect of treatment by a hospital (d), it nevertheless appears that the right of a hospital to receive payment is alternative to and not cumulative upon the right of a medical practitioner to receive such payment. On the whole it may be said that cases are somewhat rare in which injured third parties find themselves in hospital where they have been brought on the diagnosis of a medical practitioner. The exclusion of institutions carried on for profit is designed to prevent nursing homes and such-like institutions from enjoying the rights which this section grants.

In the event of emergency treatment being first effected in a hospital such hospital becomes entitled to claim the *per capita* fee of 12s. 6d. from the user of the motor vehicle involved in the accident. The fee is not claimable where emergency treatment has been effected by a medical practitioner elsewhere, but where the treatment is effected in a hospital the medical practitioner who effects the treatment is not entitled to claim the

(a) As amended by the Road and Rail Traffic Act, 1933, s. 33 (26 Halsbury's Statutes 898), chapter IV, *ante*, p. 267. A like amendment to s. 16, *supra*, is effected by the National Health Service Act, 1946, 10th Schedule, as is set out in note (e), p. 267, *ante*.

(b) S. 17 (6) and (7) see *post*, pp. 354, 356.

(c) *Ante*, p. 267.

(d) *N.B.* the wording "in a hospital."

fee. Further, in such case the "distance fee" to which a registered medical practitioner can lay claim is not, it is submitted, applicable to a hospital. The wording of the subsection under discussion precludes any suggestion that where a hospital is summoned to render treatment elsewhere it is entitled to claim the distance fee. Hospitals can only recover when and to the extent that treatment is first effected "*in a hospital*," and no substitution of hospital for registered medical practitioner can affect the words "*in a hospital*" which govern the circumstances in which the substitution is effective.

3. Section 16 (3).

"Liability incurred under this section by the person using a vehicle" shall, where the event out of which it arose was caused by the wrongful act of another person, be treated for the purposes of any claim to recover damage by reason of that wrongful act as damage sustained by the person using the vehicle."

This subsection shows conclusively that the liability of a person using a motor vehicle to pay for emergency treatment to an injured third party is independent of fault or negligence of any degree, by giving him a right, in certain circumstances, to claim to be indemnified by some other person from whose wrongful act the event involving injury to the third party occurred.

(1) "*Liability incurred under this section by the person using a vehicle.*"—No liability to pay for emergency treatment arises unless such treatment has been effected and, in addition, a claim for payment in respect thereof has been made by the practitioner or hospital entitled. Where these conditions are present, liability to pay the relevant amount is imposed upon the person using the vehicle from the use of which the accident arose, independently of negligence.

(2) "*Shall, where the event out of which it arose was caused by the wrongful act of another person.*"—This subsection involves two points necessitating comment. First, the right to claim indemnity only arises where the accident is due to the wrongful act of another person. Where the user of the vehicle and all other persons concerned in the event are blameless or equally blameworthy, then the liability to pay for emergency treatment remains where it is originally imposed—upon the person using the vehicle (e). Secondly, the question arises as to the position when two or more vehicles are concerned in one accident. It seems that in such case the practitioner or hospital seeking to recover the proper fee for emergency treatment is not concerned with questions of fault, but may select one, but not more than one, of the several users and claim from him. The question of ultimate liability is then in the hands of the user upon whom the claim has been made, and he may follow the procedure indicated in the subsection for the purpose of recovering his loss from the party who is properly liable to bear it.

(3) "*Be treated for the purposes of any claim to recover damage by reason of that wrongful act as damage sustained by the person using the vehicle.*"—Where the user of a vehicle has become liable to pay the statutory fee for emergency treatment he may rely upon that liability as damages, in themselves, or in addition to such other damage as he has sustained sufficient to ground a claim based upon the wrongful act against any person, including the injured third party himself, to whose wrongful act the accident was attributable.

(e) It therefore seems that the patient is entitled to free treatment at the expense of an unfortunate motorist, whilst another motorist involved in the same accident may escape liability though equally blameworthy.

4. Section 16 (4).

"In paragraph (b) of subsection (1) of section thirty-six of the principal Act, the reference to liability in respect of death or bodily injury shall be deemed to include a reference to liability to make a payment under this section in respect of emergency treatment required as a result of bodily injury, and the proviso to that paragraph shall not have effect as respects liability to make a payment under this section."

The most striking effect of this subsection is that not only does it extend the scope of the so-called "compulsory insurance," but it also makes a degree of compulsory insurance necessary in cases where apart from it risks to third parties do not require to be insured against. Both these consequences are affected by means of an interpretation of the relevant section of the Road Traffic Act, 1930 (f), the discussion of which must be borne in mind when interpreting the present provision. Inasmuch as the latter is interpretative, its consequences in the two indicated directions can be best studied by treatment under two separate heads.

(1) "*In paragraph (b) of subsection (1) of section thirty-six of the principal Act, the reference to liability in respect of death or bodily injury shall be deemed to include a reference to liability to make a payment under this section in respect of emergency treatment required as a result of bodily injury.*"—The form in which this provision is drafted requires consideration. It does not amend or alter the existing statutory provision, but it interprets the language of the old section referred to by stating that liability in respect of death or injury to third parties shall "be deemed to include" liability to pay for emergency treatment under section 16. "Third party risks" within the meaning of the 1930 Act thus, by reason of the joint operation of that statute and the 1934 Act which is read with it (g), include liability towards medical practitioners, etc., who render emergency treatment to third parties injured as a result of accidents arising out of the use of motor vehicles on the road. The expression "third parties" thus takes on a wider meaning. Used in the 1930 Act and in the existing law concerning motor cars to designate persons injured through the use of vehicles, it now includes, subject to certain conditions (h), medical practitioners and hospitals who render emergency treatment to the victims of the use of the road by themselves or by others. Whereas liability to "third parties" actually injured through the use of a motor vehicle is in every case dependent upon the negligence or other wrongful act of the user of the vehicle, the statutory liability to pay for emergency treatment to the injured third party, when after claim it arises, is independent of fault or negligence (i). Every policy of insurance made under the effect of the 1930 Act must, by this subsection, cover the insured against his liability to pay for emergency treatment. It is submitted that it is not essential that the policy should contain express terms extending the indemnity to such case, although in practice such terms will probably be henceforth found (h). It will suffice that an insurance is against such third party risks as the Road Traffic Act, 1930, requires, for by the operation of law "third party risks" include the risk of liability to pay for emergency treatment to any other person in respect of injuries arising out of the use of the vehicle on the road.

(f) S. 36 (1) (b) (23 Halsbury's Statutes 637); chapter IV, *ante*, p. 188.

(g) 27 Halsbury's Statutes 534.

(h) *Ante*, p. 267.

(i) Cf. *ante*, p. 37, as to other cases of liability arising from the use of a vehicle without negligence.

(h) As interpreted in this respect by the 1934 Act.

(2) "And the proviso to that paragraph shall not have effect as respects liability to make a payment under this section."—This part of the subsection makes an important consequential change in the existing law. The freedom from the necessity of insuring against liabilities incurred to third parties in so far as they may be workmen in the course of their employment, voluntary passengers or persons carried under a contract (otherwise than by a public service vehicle) has already been fully considered (*m*). A policy of insurance against third party liability is not required in these limited classes of cases in order to satisfy the requirements of the Road Traffic Act, 1930. But by the effect of the new subsection third party risks which may arise in relation to the three excepted classes must, so far as such risks include liability to pay for emergency treatment (*n*), be covered by a valid and subsisting policy of insurance in order that sections 35 and 36 of the principal Act be complied with. A person who uses or causes or permits a motor vehicle to be used on a road without the risk of liability to pay for emergency treatment to workmen in the course of their employment, voluntary passengers and passengers under contract, being covered by insurance will be guilty of the main offence under Part II of the 1930 Act (*o*).

Although no corresponding interpretation is included in the 1934 Act with respect to liabilities under securities in lieu of insurance, it is submitted that the provision under discussion is impliedly incorporated into the section of the 1930 Act (*p*) which requires a security to be given with respect to "such liability as is required to be covered by a policy of insurance under the last preceding section. . . ."

VI. CLAIMS FOR EMERGENCY TREATMENT.—SECTION 17

1. Section 17 (1).

Provisions as to claims for, and supplementary provisions as to, payments for emergency treatment.

"A chief officer of police shall, if so requested by a person who alleges that he is entitled to claim a payment under the last foregoing section, furnish to that person any information at the disposal of the chief officer as to the identification marks of any motor vehicle which that person alleges to be a vehicle out of the use of which the bodily injury arose, and as to the identity and address of the person who was using the vehicle at the time of the event out of which it arose."

While section 16 of the 1934 Act imposes the liability in the events and upon the conditions there specified upon persons using motor vehicles to pay for emergency treatment afforded to injured or killed third parties, section 17 provides machinery whereby the persons entitled to the benefits of this provision shall be able to determine, claim and effectuate their rights. At the outset it may be briefly reiterated that no liability arises unless and until:

- (i) emergency treatment as defined above has been effected, and
- (ii) a claim has been made by a registered medical practitioner or a hospital in respect of such treatment.

When once a claim has been so made liability to pay arises immediately, and the user who is liable can be forthwith sued for payment of the statutory fee.

Certain points in the first subsection require comment.

(*m*) Chapter IV, *ante*, pp. 198 *et seq.*

(*n*) And they are "deemed to include" such liability.

(*o*) S. 35 (1), as to which, see fully chapter IV, p. 163, *ante*.

(*p*) S. 37 (1) (*b*) (23 Halsbury's Statutes 639); *ante*, p. 222.

(1) "A chief officer of police shall, if so requested by a person who alleges that he is entitled to claim a payment under the last foregoing section."—The expression "chief officer of police" bears the same meaning as in the 1930 Act, in relation to which it has already been considered (q). "Person" in this context must be intended to refer to registered medical practitioners or hospitals, the only persons who can qualify to claim payments under section 16. But since the section does not make it necessary that a person alleging to be entitled to rights should satisfy the chief officer of police that he has a *prima facie* right to do so, and since the wording of this subsection eschews the expression "practitioner," it is submitted that any person who, rightly or wrongly, alleges that he is entitled to claim payment for emergency treatment is entitled to be furnished with the information specified in the section. His motive in requiring the information is quite irrelevant, as is the genuineness or validity of his claim. The chief officer of police cannot inquire into these points, but as soon as a request is made of him by any person alleging rights under section 16 must furnish the specified information.

The request for information may be made at any time. Although a written claim must be made within seven days from the time of the occurrence concerned and no claim can be made when this limit is exceeded (r), yet when a claim has been made at the time of the occurrence no such limit arises. Thus it appears that it is not necessary for the request to be made within any defined time, although it might at first sight be thought that a seven-day limit would apply. Further, the request may be oral or in writing; the fact that the request must be made of the chief officer of police indicates that such requests will as a rule be made in writing.

(2) "Shall . . . furnish to that person any information at the disposal of the chief officer as to the identification marks of any motor vehicle which that person alleges to be a vehicle out of the use of which the bodily injury arose."—In order to exercise his rights under the subsection to obtain information the person making the request must allege that a motor vehicle is involved in the occurrence in respect of which his claim is made. It is not necessary for him to do more than allege that one or more motor vehicles are concerned in order to insist upon his right to obtain information. Upon receipt of the request the chief officer is bound forthwith, as time is of the essence of the matter, to provide the person alleging his right to claim with information upon two matters:

- (i) the identification marks of any motor vehicle out of the use of which the bodily injury arose; and
- (ii) as to the identity and address of the person using the vehicle at the relevant time.

The second of these is discussed in more detail below. Before proceeding to some general observations upon the duty of the chief officer of police on request to provide information, it will not be out of place to treat specifically the first matter upon which information must be furnished.

The only matter as to which the requisitions must be definite is the bodily (including fatal (s)) injury in respect of which his claim is made. As a rule, though not essentially, the name of the victim will be furnished with other particulars of the accident, including a reference to the fact that one or more vehicles were involved. Where more than one motor vehicle is involved the specified information must be furnished in relation to them all (t).

(q) Chapter IV, *ante*, p. 256.

(r) See *post*, p. 352.

(s) S. 16 (1) (27 Halsbury's Statutes 547).

(t) "The identification marks of any motor vehicle which . . ."

Under the first head the index letter and registration number of the vehicle must be supplied (u).

Concerning both identification marks and the identity and address of the user, the chief officer of police is only bound to furnish such information as may be at his disposal. It is submitted, however, that inasmuch as a chief officer of police is an authority in control of a force, information which is in the possession or custody of any of the members of his force is, in law, "at his disposal." If this is, as is submitted, the case, then the chief officer is bound to make inquiry of his subordinates in order to supply the information which is required of him. The duty imposed by this subsection is an absolute one, in that the officer concerned is bound to furnish the specified types of information at his disposal, in the described sense, when a request is made of him by a person alleging a claim under section 16. It is submitted that no charge may be asked for such information furnished in compliance with an absolute statutory obligation by a public official.

(3) "*And as to the identity and address of the person who was using the vehicle at the time of the event out of which it (i.e. the bodily injury) arose.*"—Identity may be made known by other means than the furnishing of a name and/or address. An address is not necessarily the place where a man lives, works or sleeps—it may be any place where he is ordinarily to be found (v). The expressions "identity" and "address" must, it is submitted, be construed in relation to the purpose and general content of the sections now under consideration. Any information which serves to identify or locate the user at the relevant time of the vehicle concerned should be given, as far as possible, to secure that such person may be traced and pursued by the claimant of the statutory fee.

The words "the vehicle" might at first sight seem to complicate the position arising when more than one vehicle is involved in an accident resulting in personal injury. This is not, however, the case. The true interpretation of the words must be in connection with the expression "any vehicle" which precedes it, and "the vehicle" must therefore mean any vehicle respecting which information is required and given. It may be remarked that no particulars of the identity, etc., of the owner of the motor vehicle may be asked or must be given. Ownership of the vehicle involved is irrelevant as far as sections 16 and 17 of the 1934 Act are concerned, which impose liability upon persons using vehicles and upon them *only*. The right to require and the obligation to furnish information are thus quite different from the obligations imposed under the Road Traffic Act, 1930, which have been alluded to previously (w).

2. Section 17 (2).

"A claim for payment under the last foregoing section may be made
"at the time when the emergency treatment is effected, by oral request to
"the person who was using the vehicle, and if not so made must be made
"by request in writing served on him within seven days from the day on
"which the emergency treatment was effected."

No liability to pay for emergency treatment by a registered medical practitioner or in a hospital arises unless a claim for payment is made with respect thereto. This claim may be made either at the time when the

(u) See S. R. & O., 1941, No. 1149, made by the Minister of Transport pursuant to his powers under the Roads Act, 1920, ss. 6, 12 (19 Halsbury's Statutes 90, 95).

(v) Cf. notes to s. 40 of the Road Traffic Act, 1930 (23 Halsbury's Statutes 640), chapter IV, *ante*, p. 249.

(w) Ss. 22, 40, 112 (23 Halsbury's Statutes 627, 640, 683). See chapter IV, *ante*, pp. 249 *et seq.*

emergency treatment concerned is being effected or, alternatively, by a claim in writing (signed by the claimant) (x) or, in the case of a hospital, by an executive official for and on behalf of the hospital (y). Whereas a claim contemporaneous with the treatment concerned may be made orally of the user of the vehicle involved, a claim made subsequently must be in a signed writing, served on the person using the vehicle within seven days from the day on which the emergency treatment was effected. The requirements of the request and of the modes for communicating it are later dealt with (z). The result of the time provision is to give the claimant up to the end of seven days after the emergency treatment is effected within which he may serve a written claim if he has not already at the time of rendering the treatment made his claim orally.

3. Section 17 (3).

"A request in writing must be signed by the claimant or, in the case of
 "a hospital, by an executive officer thereof, must state the name and
 "address of the claimant, the circumstances in which the emergency treat-
 "ment was effected, and that it was first effected by the claimant, or, in
 "the case of a hospital, in the hospital."

This subsection sets out briefly and simply with what requirements a written claim for payment of the fee must comply. The name and address of the claimant, but not, it is noted, his qualifications or occupation, the circumstances in which treatment was effected and the fact that emergency treatment was first effected by the applicant or in the hospital where a hospital is claiming, are all to be stated, and the whole is to bear the signature of the claimant, or of an executive officer where the claimant is a hospital. These requirements apply only to a written and not to an oral claim for payment. Of these requirements some require specific mention. The Act contains no clue as to whether any special meaning is to be attached to the words "circumstances in which the treatment was effected." It is submitted, however, that they mean such external events and factors as suffice to identify the occasion in respect of which the claim is made. It may be possible that the nature of the injury is regarded as such a circumstance as is relevant. There seems, however, no valid reason why this should be the case. The nature of the third party's injuries is immaterial except in so far as it bears upon what, if any, treatment or examination is "immediately required" by the third party so as to furnish the necessary ground to base a claim for emergency treatment. The last requirement of the subsection as to the contents of the written request is important. Section 16 (1) (a) clearly provides that liability shall only arise in favour of a medical practitioner or hospital which *first effects* treatment; even if this fundamental condition is present, however, no liability arises in fact until a claim is made in one of the ways specified in the subsection under immediate consideration.

4. Section 17 (4).

"A request in writing may be served by delivering it to the person who
 "was using the vehicle, or by sending it in a pre-paid registered letter
 "addressed to him at his usual or last-known address."

This subsection merely provides for the manner of service of the written request last dealt with, where the claim is made in that manner. The alternative methods of serving the request are either delivery to the user of the vehicle in person, or postal service in the manner specified. Delivery

(x) S. 17 (3) (27 Halsbury's Statutes 548).

(z) See above.

(y) *Ibid.*

(a) *Ante*, p. 341.

sufficient to constitute service of the claim may be made in any way in which a writ or process may be served personally upon a party to legal proceedings (b). The rules applicable to postal service of the claim are similar to those which apply to the service of legal process where personal service cannot be effected or an order for substituted service is made (c).

5. Section 17 (5).

"A sum payable under the last foregoing section shall be recoverable as if it were a simple contract debt due from the person who was using the vehicle to the practitioner or the hospital."

The consequence of the assimilation between the statutory fee for emergency treatment and a simple contract debt is that the former, when it has become payable by reason of a claim having been made in the proper time and manner, may be sued for and recovered just as money owing under ordinary transactions (d). The registered medical practitioner or hospital concerned may thus after making a claim proceed to sue the person using the motor vehicle upon whom their claim was made should he decline to pay. The plaintiff in such a suit is not concerned with questions of fault or liability; the conditions precedent to the validity of his claim are satisfied when he proves that the defendant is a person who was using a motor vehicle involved in the accident from which the injury resulted, that he, the plaintiff, is a person entitled to recover the statutory fee by reason of the two facts that he is a registered medical practitioner or hospital, and that he has made an oral or written claim for payment on the defendant. To such a claim the defence can only go to one of the conditions of the claim, that the plaintiff is not qualified within section 16 to recover, that he did not first effect the emergency treatment concerned, or that he has not made a claim in the manner and time limited by section 17 for that purpose.

The other consequences which flow from indebtedness on a simple contract apply to the statutory fee for emergency treatment. Such a claim is barred by the lapse of six years from the time when it is made. No demand for payment, after the first claim, is necessary before action.

References have been made above to the possibility of a number of practitioners or hospitals making conflicting claims to payment of fees for emergency treatment under section 16. Although, save in unusual cases where two practitioners may jointly effect treatment, there can be no question of liability co-existing to two persons in respect of the same emergency treatment, because only the first of them is entitled to payment, this hardly assists the user of the vehicle who is confronted by conflicting claims. He will not in many cases know towards which of several claimants he is under legal liability and often will have no means of ascertaining, for the section does not give to him the right to get information from the police on this, or any other, score. It is suggested that he could interplead under Order 57 of the Rules of the Supreme Court, or the corresponding rule in the County Court as being

"a person . . . under liability for any debt, money, etc., for or in respect of which he is, or expects to be, sued by two or more parties making adverse claims thereto."

It is well settled that the remedy by way of interpleader is not applicable to cases where the adverse claims, although accruing out of the same trans-

(b) R.S.C., Order IX., *passim*. See current Annual Practice.

(c) R.S.C., Order X., *ibid*.

(d) When judgment is obtained it can be enforced against the insurers under s. 10 (1) of the 1934 Act, *ante*, pp. 278 *et seq*.

action, are really different (e). But these cases present no analogy to the cases now under consideration in which there is and can, as a rule, be only *one* liability, the liability to pay the person (hospital or practitioner) in or by which emergency treatment was *first* effected. Each claimant in such cases is laying claim to the one payment which the person using the motor vehicle is liable to pay, and the determination of the proper recipient is one which depends upon a simple question of fact with which the person under the liability is little concerned. For these reasons it is submitted that the user of the vehicle is entitled to interplead and, on bringing the money into court, to stand aside and let the adverse claimants themselves fight out the issue (f). If the interpleader is not practicable, then the person liable is under the heavy burden of finding who in fact is properly entitled to receive payment, an inquiry which the Act provides him with no facilities to undertake.

6. Section 17 (6).

"A payment made under the last foregoing section to a practitioner or hospital shall operate as a discharge, to the extent of the amount paid, of any liability of the person who was using the vehicle, or of any other person, to pay any sum in respect of the expenses or remuneration of the practitioner or hospital of or for effecting the emergency treatment."

This is perhaps the most difficult provision of section 17 to be construed. The rights of hospitals to claim their reasonably incurred expenses have been dealt with in the preceding chapter (g). It will nevertheless be convenient to summarise the position of both hospitals and medical practitioners to claim payment of their fees and expenses.

Rights of hospitals.—Apart from the statutory rights conferred upon the hospitals of local authorities (h) and rights arising under the Road Traffic Act, 1930 (i), which in its relation to the present provisions will be separately discussed, the rights of a hospital to recover sums in respect of treatment, etc., must be based upon contractual relationships with the party undergoing treatment or some other person.

Position of patients.—Liability of a patient is contractual (apart from the statutory exceptions) and depends upon the existence of an express or implied agreement to pay for such treatment. An implied agreement to pay will exist where the patient voluntarily submits to and accepts treatment. No such agreement to pay will, however, be implied where treatment is rendered under such conditions that the hospital, or other person, acts in such a way as to induce the patient to believe that he is being gratuitously treated, and he *bona fide* accepts treatment under such belief.

Position of third party (k).—His liability may in rare cases be contractual, where he gives the instructions for treatment. It may arise out of status, as where his wife is treated, it being known that she is his wife and he being looked to for payment. In other cases the third party's liability

(e) *Greatorex v Shackle*, [1895] 2 Q B 249, and see current Annual Practice, notes to Order LVII.

(f) Interpleader is, for example, admissible where conflicting claims are made to insurance monies. *Prudential Assurance Co v Thomas* (1907), 3 Ch App. 74. *Re Haycock's Policy* (1876), 1 Ch D 611.

(g) Chapter IV, *ante*, pp. 267 *et seq.* This right is subject, also, to the following subsection. The National Health Service Act, 1946, is discussed, *ante*, p. 268, for the amendment effected by it to s. 17. *supra*, see p. 267, note (e), *ante*.

(h) Chapter V, *ante*, pp. 267 *et seq.*

(i) S. 30 (2) (23 Halsbury's Statutes 637), as amended by the Road and Rail Traffic Act 1933, s. 33 (26 Halsbury's Statutes 608).

(k) The expression is used here in the signification of persons other than the hospital or practitioner, and the patient.

(save under statutory provisions) is based upon the commission of a wrongful act causing injury to the patient. In such cases the liability in respect of medical expenses is, as has been said, to the person who has been injured and who has borne or become liable to bear such expenses as part of the loss consequent upon his injury (l).

With these considerations in mind it is possible to consider the effect of the subsection :

(1) "*A payment made under the last foregoing section to a practitioner or hospital.*"—These words present no difficulty of interpretation. It should, however, be noted that the subsection does not come into operation until a payment has been made to the registered medical practitioner by whom or the hospital in which emergency treatment was first effected. The complications which may arise when rival claims are made have already been alluded to (m) ; it will therefore suffice at this juncture to indicate that the present subsection does not offer any solution of these difficulties.

(2) "*Shall operate as a discharge, to the extent of the amount paid, of any liability of the person who was using the vehicle.*"—The circumstances in which a person using a vehicle can become liable by contract or statute to pay money in respect of hospital treatment received by others have been indicated. The words now under consideration indicate, thus, that the contractual or statutory liability is *pro tanto* satisfied by a payment made for emergency treatment (n). In respect of what liabilities satisfaction operates is indicated in the discussion which follows.

(3) "*Or of any other person.*"—Primarily payment of the statutory emergency fee satisfies *pro tanto* only the liabilities of the person making the payment. But the words now under consideration indicate that satisfaction *pro tanto* has effect in relation to the liabilities of all other persons. Apart from the rare cases under statutory provisions, the only other persons who could be under liability to pay money to practitioners or hospitals would be injured third parties. Payment by the user of one motor vehicle involved in an accident enures to the benefit of any other person under liability to the practitioner or hospital whether he be the injured party himself or some other person under a common law liability or liable, as the person using another motor car involved in the accident, by virtue of section 16. The subsection indicates that the provision of the new statutory right is not to enable a hospital or practitioner to be twice paid in respect of the same liabilities, however such additional claim is grounded in law. Where payment is claimed from and made by a person using a vehicle involved in an accident through the fault of another, the payment, while operating *pro tanto* to discharge the person at fault from liability to pay a practitioner or hospital does not prevent the person who has paid from claiming an indemnity against such payment from the person really in fault. This right is expressly sanctioned by section 16 (4) (o).

(4) "*To pay any sum in respect of the expenses or remuneration of the practitioner or hospital of or for effecting the emergency treatment.*"—These words provide to what cases *pro tanto* satisfaction applies. It is submitted that the expression "any sum" means in relation to what follows, any sum, however chargeable, which any person is under liability, statutory (p) or otherwise, to pay in respect of the same subject-matter, i.e. treatment or examination immediately required by a person injured in a motor accident.

(l) Chapter IV, *ante*, p. 267.

(m) *Ante*, p. 353.

(n) Subject to s. 17 (7) ; see *post*, p. 356.

(o) *Ante*, p. 348. But if the other motorist is merely equally innocent or blame-worthy, there is apparently no right of contribution.

(p) But see s. 17 (7), *post*, p. 356.

If satisfaction were only to relate to liability to pay for emergency treatment under section 16, much of the section would be redundant and some of it unintelligible. The fact that the words "practitioner or hospital" are prefaced with the definitive article is important as indicating that *pro tanto* satisfaction takes effect only in relation to liabilities towards that medical practitioner or hospital to whom a payment under section 16 has been made. The section does not, therefore, operate so as to enable the user of a vehicle who had paid one claimant to escape liability to pay other claimants. Although, except in extraordinary cases, there can be in fact only one proper claimant, nevertheless cases involving a multiplicity of claims may be expected to arise (g). Where this is the case, payment to one of the claimants can, of itself, be no reply to a conflicting claim, only in the event of such payment having been made to the proper person can a second claim be thus resisted.

7. Section 17 (7).

"A payment under the last foregoing section shall not be deemed to be a payment by an authorised insurer or owner for the purposes of sub-section (2) of section (36) of the principal Act."

The liability which is imposed upon insurers or the owners of vehicles covered by deposit or security to pay the reasonably incurred expenses of hospitals in affording treatment to the knowledge of such insurers or owners to injured third parties has been fully discussed in the preceding chapter (r). It is enough to reiterate that such liability only arises where payment has been made to such third party with or without an admission of liability. It is obvious that the fee for emergency treatment payable under sections 16 and 17 in its nature and incidence is a liability totally different from the liability to pay hospital charges under section 36 (2) of the principal Act, and the subsection now under consideration makes it clear that the two liabilities are quite distinct and separate, so that where emergency treatment is rendered in a hospital the amount of the emergency fee to which that hospital is entitled under section 16 of the 1934 Act is not to be computed *pro tanto* as a payment of hospital charges under the principal Act (s). But where such a payment has been made to the hospital it must apparently be deducted as being money actually received by the hospital from the total expenses reasonably incurred by the hospital in respect of the balance of which insurers and owners may be made liable under the principal Act (t).

The position of owners under the joint operation of section 17 and section 36 (2) of the principal Act is that they may become automatically liable to pay a fee for emergency treatment as well as a fee in respect of hospital charges. Insurers, however, although they cannot become directly liable to pay a fee for emergency treatment under section 16 of this Act, by the joint operation of that section and section 10 do become directly liable to pay such fee if judgment is obtained by the person entitled to claim it against the person using the vehicle who is liable to pay it (u).

(g) There can be only one person who has "first effected" emergency treatment, but there is no means by which the user of the vehicle can find out who the first person was.

(r) See chapter IV, *ante*, p. 268.

(s) But for other purposes it is computed as a *pro tanto* satisfaction. See *ante*, pp. 354 *et seq.*, notes to s. 17 (6).

(t) Because the manifest object of s. 36 (2) as amended is to prevent a hospital from receiving payment twice in respect of the same expenses.

(u) *Ante*, pp. 353 *et seq.*

CHAPTER VI

THE MOTOR INSURERS' BUREAU

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PART 1.—INTRODUCTION

1. General.

In this chapter the last and finally successful effort to secure compensation (a) for the victims (b) of uninsured motorists comes to be considered. In turn the Third Parties (Rights against Insurers) Act, 1930 (c), the Road Traffic Act, 1930 (d), and the Road Traffic Act, 1934 (e), have been examined in detail, and it has been shown that while gradually the idea of compulsory insurance against the third party risks incurred in the driving of motor vehicles on the highway crystallised during the years 1930 to 1936, the three statutes mentioned failed to secure completely the principal object of that system of compulsory insurance, that an injured third party, whose injuries were caused by a motorist, should in all circumstances obtain the sum of money which represented the compensation awarded to him at Common Law for those injuries (f).

(a) In the sense of making certain that a judgment at Common Law in respect of personal injuries is satisfied in full. For the heads of damage and the quantum of damages obtainable in a running down action, see chapter I, pp. 60 and 63 respectively.

(b) "Victims" is here used synonymously with "third parties" as defined by Part II of the Road Traffic Act, 1930, *ante*, p. 188.

(c) 23 Halsbury's Statutes 12; *ante*, chapter III, p. 113.

(d) 23 Halsbury's Statutes 607; *ante*, chapter IV, p. 159.

(e) 27 Halsbury's Statutes 534; *ante*, chapter V, p. 276.

(f) For the quantum of damages awarded in running down actions, and the heads of damage under which claims may be made, see chapter I, pp. 60 *et seq.*, *ante*.

The root cause of the failure of these statutes to achieve this object once and for all was inherent in the system of motor insurance business conducted by the insurers of this country, a system based on private contracts of insurance between insurer and assured, with the form of which the Road Traffic Acts of 1930 (*ff*) and 1934 (*g*) only interfered by imposing limitations, without disturbing the cardinal principle of freedom of contract which underlay them.

2. The Contract of Insurance.

In order that the risk undertaken in consideration of a carefully selected premium should not only be accurately defined at the inception of the period of insurance, but should also remain the same throughout that period, and also in order that insurers should be given every reasonable opportunity to reduce to a minimum the liability of an assured to a third party arising out of an accident, the terms and conditions of many standard policies were numerous and varied, being divided into three classes (*gg*). First, those that defined the risk (*h*). Secondly, those terms which restricted the assured in the use of the car and the driving thereof (*i*). Thirdly, those conditions which required proper notice to be given to insurers of any accident, and the affording of proper facilities to insurers to investigate and defend any claim made by or against any person insured by the policy (*k*). Each and every term, from a strictly legal point of view, was reasonable.

But the assured persons were not usually lawyers, and even if they read the terms of the policy carefully, they could not in all probability understand their full significance, drawn as they were to conform with recorded decisions in insurance law, in a language which to them was by no means common parlance. It was inevitable that some careless persons should, wittingly or unwittingly, offend against the terms of the policy, and that many persons should use a car on the road without full appreciation of the fact that they were uninsured, either wholly or in respect of that particular journey (*l*).

The Road Traffic Acts, by the intricacy of the language of their clauses (*m*), did little to ease this situation, as has been shown. It is only now in 1947, when the body of insurers in the United Kingdom have voluntarily taken upon themselves the burden of relieving the third party victims of road accidents, for those injuries for which the person responsible cannot pay in full, that a simplification of the wording of the more complicated policies can be expected.

Nothing, as will be shown (*n*), in the Motor Insurers' Bureau Agreements relieves the assured from observing carefully the terms of his policy. Indeed, in addition to the heavy penalties that can be inflicted upon uninsured drivers of motor vehicles, assured persons will still find themselves liable to pay back to their insurers, and uninsured persons to the Motor Insurers' Bureau, as best they can, any sums which have been paid to extinguish the

(*ff*) See note *id.*, p. 357, *ante*.

(*g*) See note *id.*, p. 357, *ante*.

(*gg*) The terms and conditions of the standard policies are set out and discussed in chapter VIII, *post*. The definition of the risk in the proposal form is examined in chapter VII, *post*.

(*h*) Distinguish between terms that define the risk, and those that limit the risk when defined; see *ante*, chapter V, p. 317, and chapter VII, pp. 493 and 530, *post*.

(*i*) See chapter VII, *post*, pp. 443 *et seq*.

(*k*) See chapter VIII, *post*, pp. 590, 596.

(*l*) Cf. *Passmore v. Vulcan Boiler and General Insurance Co* (1935), 154 L. T. 258; *Levinger v. Licenses and General Insurance Co* (1936), 54 Ll. L. R. 68; *Jones v. Welsh Insurance Corporation, Ltd.* [1937] 4 All E. R. 149.

(*m*) See *ante*, chapter IV, p. 160.

(*n*) *Post*, clause 4 of the M.I.B. Agreement, p. 366.

liability to third parties. It may be hoped that insurers will endeavour so to draft their policies that insured persons will in all cases clearly appreciate, from the simplicity of the language used, their rights and duties in relation to insurance which is still primarily for their benefit.

3. Treatment of the M.I.B. Agreement.

Later in this chapter the clauses of the M.I.B. Agreement entered into by the Minister of Transport and the Motor Insurers' Bureau are set out and examined *seriatim*. It will be seen that the core of this "charter" of injured third parties is contained in clause 1 of the M.I.B. Agreement (o), which states in effect that where a third party, against whose injury insurance is required by section 36 (1) (b) of the Road Traffic Act, 1930 (p), has obtained a judgment against any person in respect of personal injuries or death arising out of a motor accident, and that judgment is not satisfied by the defendant from whatever cause, within seven days from the date on which the judgment becomes enforceable (q), then the M.I.B. will cause that judgment and the taxed costs thereof to be satisfied, by payment either of the whole of the damages and costs awarded, or of any part remaining unpaid at that time to the judgment creditor. In the treatment of this Agreement in this chapter, no mention will be made of the vast proportion of judgments obtained by injured third parties in running down actions where the defendant is entitled to the benefit of a valid contract of insurance, whereby he may obtain indemnity in regard to that liability to the third party from an insurance company (r). This chapter is only concerned with the comparatively rare occasions on which the defendant in the running down action has either not taken out a contract of insurance at all to cover the driving of the motor vehicle concerned, or else has entered into a contract of insurance which does not in fact cover him in respect of that motor accident (s) or at all, with the result that an insurer is not in law liable to indemnify him in respect of his liability to the third party in the running down action.

It was on such occasions as these that the injured third parties, before the M.I.B. came into existence, sometimes found themselves unable to obtain the fruits of the judgments obtained against impecunious motorists, and it was to remedy this injustice that the M.I.B. was instituted. In the great majority of running down actions there is no question as to the right of the defendant to obtain an indemnity from an insurer in respect of any damages for which he may be found liable, and the Agreement does not alter the position in regard to these cases.

4. General Effect of the M.I.B. Agreement.

It must always be borne in mind that the Agreement entered into by the M.I.B. is not intended to and does not in fact repeal any of the provisions of the Road Traffic Acts of 1930 and 1934. Being in effect a private Agreement to which the Minister of Transport and the M.I.B. alone are signatories, it could not, of course, have that result. Nevertheless, this Agreement has the remarkable, though indirect, effect of rendering of little worth large

(o) *Post*, p. 365.

(p) *Ante*, chapter IV, p. 188.

(q) As to the date on which such a judgment becomes enforceable, see *post*, p. 371.

(r) The normal procedure by which insurers undertake the defence of a proposed defendant in a running down action, the proposed defendant being entitled to seek a valid indemnity from those insurers under a policy of insurance, is considered in chapter VII, *post*, p. 506, and chapter X, *passim*.

(s) The liability of the "assured" arising from the motor accident not being a liability covered by the terms of the policy within the meaning of those words used in section 10 (1) of the Road Traffic Act, 1934, *ante*, chapter V, pp. 278 *et seq.*

portions of a well-established and important body of statute law, for by its terms the Agreement renders almost wholly unnecessary section 38 of the Road Traffic Act, 1930 (*f*), and sections 30 (*u*) and 12 (*v*) of the Road Traffic Act, 1934.

The whole of the Third Parties (Rights against Insurers) Act, 1930 (*w*), will also fall into desuetude in so far as that Act affects Road Traffic Act claims (*w*). There is no sanction for a breach of the Agreement, though indeed a breach is inconceivable in the present state of affairs (*x*). That the insurers of the United Kingdom should voluntarily have accepted this burden, and that the undertaking of the insurers which is contained in this Agreement should be accepted by the Government is a remarkable example of common-sense co-operation between State and Industry.

PART 2.—THE OPERATION OF THE ROAD TRAFFIC ACTS

It is not proposed to examine here in detail the operation of the three statutes passed to assist third parties to obtain the fruits of judgments recovered in respect of personal injuries.

The three Acts (*y*) have been considered exhaustively in the preceding chapters (*y*). As a matter of the history of Motor Insurance Law, however, it is necessary to restate their effect briefly to show how far these Acts fell short of the final result achieved by the Agreements entered into by the Motor Insurers' Bureau, as a prelude to showing how that body came to be formed. In addition, in so far as these three statutes are still in full force and effect, their objects must be borne in mind now, when many of their provisions have been superseded but not repealed by the later Agreement mentioned.

The Third Parties (Rights against Insurers) Act, 1930 (*a*), was passed to avoid the particular difficulty arising from the operation of the laws of bankruptcy (*b*). By these laws a third party who claimed against an assured person who became bankrupt, whether as a result of the claim or from other causes, found that his claim ranked equally with others against the estate of the bankrupt. In the result, insurers who were under a contractual duty to pay to the assured the amount of the third party's claim, had to pay that sum to the assured's trustee in bankruptcy, whereupon the money was swallowed up in the general estate and became available to pay the claims of creditors other than the third party in question. In order to preserve that sum intact for the third party, the Act ensured that the rights against the insurers arising out of the policy covering the assured at the time of the accident became vested forthwith in the third party in the event of the assured's bankruptcy (*c*). The Act, however, did not achieve anything

(*f*) See chapter IV, *ante*, p. 219.

(*w*) See chapter V, *ante*, pp. 278-314.

(*u*) See chapter V, *ante*, p. 316.

(*w*) 23 Halsbury's Statutes 12; *ante*, chapter III, pp. 114-115.

(*x*) The only possible sanction should the present scheme fail, which has come into operation as a result of the M.I.B. Agreement, is that Third Party Risks Motor Insurance business should be taken over by the State. The Minister of Transport has stated (on November 12, 1945, H. of C. Official Report, column 1872) that such legislation would be complicated, and that he was satisfied that the voluntary scheme contained in the M.I.B. Agreement would achieve the same purpose.

(*y*) The Third Parties (Rights against Insurers) Act, 1930 (23 Halsbury's Statutes 12), *ante*, chapter III; Part II of the Road Traffic Act, 1930 (23 Halsbury's Statutes 636), *ante*, chapter IV; and Part II of the Road Traffic Act, 1934 (27 Halsbury's Statutes 544), *ante*, chapter V.

(*a*) 23 Halsbury's Statutes 12; *ante*, chapter III.

(*b*) In *Re Harrington Motor Co., Ex parte Chaplin*, [1928] Ch. 105, and *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793; *ante*, p. 117.

(*c*) Third Parties Act, 1930, section 1 (*i*) *et seq.*

more than this limited objective, and, as has been shown (d), any valid defence which was available to insurers against the assured in respect of their liability for that accident was equally available against the third party after he had stepped into the shoes of the assured. In a number of cases, therefore, the third party's claim against insurers was bound to be defeated (e).

Part II of the Road Traffic Act, 1930 (f), passed a few months after the Third Parties Act, 1930, also had a limited objective which was, however, in itself a considerable advance. The object (g) of Part II of the Road Traffic Act, 1930, though stated to be provision for the protection of third parties against risks arising out of the use of motor vehicles, was achieved by indirect methods, that is, by compelling the insurance by users of motor vehicles against certain specified risks, being liabilities incurred in respect of the death of or bodily injury to third parties (h), without, except by the minor limitation effected by section 38 (i), giving to those third parties any direct advantages against the insurers (k). The result, as has been shown, in so far as the terms of the policies effected between insurers and insured were in the main left untouched, was to leave the mischief arising from the system of private insurance unaffected, in that insurers were still able to avoid liability to their insured in cases where the insured vehicle was used outside the terms of the cover provided by the policy, or where the assured was in breach of one of the many terms contained in the policy, and thus deprive the third party's claim against an impecunious assured of the fruits of success.

The Road Traffic Act, 1934, Part II (l), attempted to remedy this position, again to a limited extent, by giving two advantages to third parties, the one direct, the other indirect. By the provisions of section 10 (1) third parties were enabled to sue insurers direct for an indemnity in respect of a liability, arising from a motor accident, which had been properly proved against the assured, providing that a policy had been issued to the assured which purported to cover him in respect of that accident (m).

Insurers could only avoid liability under this provision if they could show, within a stated time and after proper notice had been given to them of the third party's claim, either that the policy which appeared to cover the user of the motor vehicle was in fact no policy at all, that is to say that it had never come into effect because of the misrepresentation or non-disclosure of the assured in bargaining for the policy (n), or that the policy defined a user of the vehicle concerned which was different from the user of that vehicle at the time of the accident (o). By the provisions of section 12 (p), the third party was indirectly benefited by the requirement that certain restrictions of the cover provided by any policy of insurance issued under the terms of the Road Traffic Act, 1930, were to be of no effect as against the

(d) *Ante*, chapter III, p. 133; section 1 (4), Third Parties Act, 1930.

(e) *Hassell v. Legal and General Insurance Co.* (1938), 60 Ll. L. R. 278; *Dennahy v. Ballamy*, [1938] 2 All E. R. 262; *Smith v. Pearl Assurance Co.*, [1939] 1 All E. R. 95.

(f) 23 Halsbury's Statutes 607; *ante*, chapter IV.

(g) As stated in the Preamble, *ante*, chapter IV, p. 161.

(h) As set out in section 36 (1) (b) of that Act, *ante*, chapter IV, p. 188.

(i) *Ante*, p. 219.

(k) In the sense of giving to them any right to sue insurers direct for an indemnity under a policy purporting to cover the tortfeasor at the time of the accident. This advantage was provided by section 10 (1) of the Road Traffic Act, 1934.

(l) 27 Halsbury's Statutes 534; *ante*, chapter V, p. 270.

(m) *Ante*, chapter V, p. 278.

(n) *Ibid.*, section 10 (2) and (3).

(o) *Ibid.*, section 10 (1), *ante*, p. 278. This effect was produced by the limiting words therein "being a liability covered by the terms of the policy."

(p) *Ante*, chapter V, p. 316.

third party himself, although they remained in full force against the assured (q). This second advantage proved in fact of no great value as a protection for third parties, as it did not in any way detract from the right of insurers to evade liability on the grounds of misrepresentation or non-disclosure by the assured or on the ground that the liability arising from the accident was not a liability covered by the terms of the policy.

Thus, although terms in the policy were made invalid against third parties which purported to restrict the insurance by reference to the age of persons driving the insured vehicle, yet where the assured had falsely described his age or the age of any person who he knew would drive, and that false description was material in altering the risk in the eyes of insurers, then the insurers could evade liability (r).

Again, while a term restricting the number of persons carried in the vehicle was made invalid against third parties, yet the insurers could evade liability to third parties by showing that at the time of the accident passengers were being carried for hire or reward in a private car, whereas the assured had expressly stipulated that he would not carry such passengers, and thereby such a user of the vehicle was expressly excluded by the terms of the policy (s). The assured was therefore either guilty of misrepresentation in the proposal form or else the liability arising from the accident could be shown not to be covered by the terms of the policy. In either case the rights of the third party (t) given by the earlier provision to sue insurers direct were defeated.

It is impossible to avoid a feeling that the framers of the Act never intended to permit these gaping holes in the system of compulsory insurance. Nevertheless, the language in the Act permitted them, and it was inevitable that insurers should take advantage of them. Private insurance companies are not charitable institutions, and in any case it would be found hard to relieve, as a matter of charity, an assured who not only drove badly but broke his contract as well.

PART 3—THE FORMATION OF THE MOTOR INSURERS' BUREAU

In the years following the passing of the Road Traffic Act, 1934 (a), these defects in the legislative scheme for providing compensation to injured third parties became readily apparent. In addition, owing to the award of very large sums by juries to these injured persons, and also in cases of death (b), certain insurance companies found themselves unable to meet their commitments. A Departmental Committee, which included representatives both of the insurance companies and of Lloyds, was therefore appointed by the Board of Trade in February, 1936, under the chairmanship of Sir Felix Cassel, K.C., to consider changes in existing law relating to the carrying

(q) Distinguish here between terms of the policy which define and those which restrict the insurance of the persons insured by the policy. See *ante*, chapter IV, p. 281.

(r) *Mechanics and Manufacturers Insurance Co., Ltd v Hunt and Thorne*, [1940] 4 All E. R. 205, affirmed, [1941] 1 K. B. 295, [1941] 1 All E. R. 123, *Broad v. Walsand* (1942), 73 Ll. L. R. 263.

(s) *Wyatt v. Guildhall Insurance Co.*, [1937] 1 K. B. 653, [1937] 1 All E. R. 792; *Bonham v. Zurich General Accident and Liability Insurance Co.*, [1945] K. B. 292; [1945] 1 All E. R. 427. *Laycock v. Road Transport and General Insurance Co.* (1940), 67 Ll. L. R. 250.

(t) As defined by section 36 (1) (b) of the Road Traffic Act, 1930.

(a) 27 Halsbury's Statutes 534 *ante*, chapter V.

(b) Cf the effect of the decision in *Ross v. Ford*, [1937] A. C. 826; [1937] 3 All E. R. 359, in which £1,000 was awarded to the representatives of a young girl of 23, killed in a motor accident.

on of the business of compulsory insurance against third party risks. This Committee made a unanimous report in July, 1937 (*c*), in which three major alterations in the law and in insurance practice were recommended. These were, first, that the standard of solvency of insurers who transacted this form of compulsory insurance business should be kept at a very high level (*d*); secondly, that a Central Fund should be instituted, to which all authorised insurers in the motor insurance business should contribute, and from which payments should be made to injured third parties who were unable to obtain satisfaction of a judgment obtained against a motorist, and, thirdly, that legislation should be passed to the effect that no conditions in a motor insurance policy should be effective against an injured third party save a very few relating to the limitations as to user of the insured vehicle and to the persons entitled to drive it (*e*).

The Committee also took note of two further problems, but made no recommendations in respect of them, as they fell outside the terms of reference. The two problems were, first, whether classes of road users other than motorists should be compelled to insure against "third party risks" (*f*), and, secondly, whether liabilities arising from road accidents other than liabilities in respect of personal injuries should be the subject of compulsory insurance. It is quite frequent that costly damage is done to expensive motor cars by road users who are quite unable to pay therefor. Nevertheless, no change in the law in relation to these two problems has yet (June, 1948) been made.

In the war years between 1939 and 1945 the recommendations of the Cassel Committee could not be put into effect. In November, 1945, the Minister of War Transport announced that insurers had voluntarily made proposals which would effect those recommendations, and that in so far as legislation to achieve the same results would be somewhat complicated, those proposals had been accepted (*g*). An agreement was made on December 31, 1945, between the Minister and insurers transacting compulsory motor insurance business in Great Britain, whereby the insurers undertook within six months to form a company, later called the Motor Insurers' Bureau, to become members of that company and to enter into agreements with it to keep it supplied with all funds necessary to enable it to discharge its obligations. A future agreement was to be made between the Minister and the new company which was to contain certain provisions set out in this, the Principal Agreement. In so far as the provisions of the Principal

(*c*) Cmd 5528.

(*d*) This recommendation was given effect by the Assurance Companies Act, 1946 (39 Halsbury's Statutes 37); chapter II, *ante*, p. 104, and chapter IV, *ante*, p. 231.

(*e*) Note the change of emphasis. The Road Traffic Act, 1930, section 38, and the Road Traffic Act, 1934, section 12, made a few less important terms in a policy of motor insurance ineffective against the injured third party; by this recommendation *all* terms and conditions were to be made ineffective, save for the small number referred to generally above and set out in the Third Appendix to the Report (Cmd. 5528). Yet the M.I.B. Agreement in effect goes still further in preventing all terms, without exception, working to the disadvantage of the injured third party, while preserving their operation against the assured. See p. 368, *post*. For the normal conditions and terms inserted in a standard motor policy, see chapter VIII, *post*.

(*f*) Reports from County Courts not infrequently show that pedestrians have been found liable to pay damages for injury caused by their careless behaviour (*cf.* 97 Law Journal 278 (May 30, 1947)), and a Committee on Road Safety recommended in October, 1947, that pedal cyclists should come within the ambit of sections 12 and 22 of the Road Traffic Act, 1930.

(*g*) By question and answer in the House of Commons on August 12, 1945; see Official Report, column 1872, and the text of the Principal Agreement, published by the Stationery Office under the title "Motor Vehicle Insurance Fund," dated December 31, 1945.

Agreement were exactly the same as those contained in the M.I.B. Agreement of June 17, 1946, they will be considered in the succeeding section (h).

The new company, named the Motor Insurers' Bureau, was duly formed on June 5, 1946. The Bureau forthwith entered into two Agreements, the first with the Minister of Transport (*the M.I.B. Agreement*), the second with the individual insurance companies and members of underwriting syndicates at Lloyds transacting compulsory motor vehicle insurance in Great Britain (*the Domestic Agreement*). Both these Agreements came into effect on July 1, 1946: claims arising out of accidents occurring before that date are not affected by their terms, but a claim based on an accident occurring after July 1, 1946, is subject to them.

It should be noticed that the terms of the M.I.B. Agreement go much further than the recommendations of the Cassel Committee in imposing liability on insurers for all third party claims under the Road Traffic Acts. Indeed, unless, before the date of the accident out of which the third party claim arose, a policy covering a particular motor vehicle has either been brought to an end automatically, or has been cancelled or avoided by agreement between the two parties thereto, or unless the assured's interest in the vehicle insured has been transferred, the insurer who issued that policy has undertaken to discharge M.I.B.'s liability to satisfy the amount of the third party's judgment against any person responsible for the use of the vehicle which the policy purports to cover, if that person fails to satisfy the judgment himself (i). In addition, even where the identity of the offending motorist, to use a general term, is not known, the Motor Insurers' Bureau is prepared to consider an *ex gratia* payment to a third party injured by a motor vehicle.

PART 4.—THE M.I.B. AGREEMENT MOTOR INSURERS' BUREAU

(COMPENSATION OF VICTIMS OF UNINSURED DRIVERS)

Text of an Agreement dated the 17th June, 1946, between the Minister of Transport and the Motor Insurers' Bureau together with some notes on its scope and purpose.

" IN accordance with the agreement made on 31st December 1945 between
" the Minister of War Transport and insurers transacting compulsory motor
" vehicle insurance business in Great Britain (published by the Stationery
" Office under the title ' Motor Vehicle Insurance Fund ') a corporation
" called the ' Motor Insurers' Bureau ' has been incorporated and has on the
" 17th June 1946 entered into an agreement with the Minister of Transport
" to give effect from 1st July 1946 to the principle recommended in July 1937

(A) The text of the Principal Agreement was printed, as stated above, by the Stationery Office under the title " Motor Vehicle Insurance Fund." As it is in effect a " contract to make a contract," detailed examination of its provisions is unnecessary. The provisions which the insurers engaged themselves to insert in the Agreement to be entered into between the newly formed Motor Insurers' Bureau and the Minister of Transport are all contained without alteration in the M.I.B. Agreement.

(i) This is the general effect of the Domestic Agreement. It must be stressed that the liability of M.I.B. to satisfy third party judgments under the terms of the M.I.B. Agreement is the only obligation with which the third party is concerned. That for administrative reasons the individual insurers have agreed to take over M.I.B.'s liability in certain cases in which the policy which purports to cover the assured is voidable *ab initio* at the instance of the insurer against the assured or under which owing to breach of condition no indemnity is payable to the assured, is mentioned for the sake of completeness only. The legal relations of the insurer and the assured are wholly unaffected by the Domestic Agreement, which, indeed, so far as the outside world is concerned, might not exist.

" by the Departmental Committee under Sir Felix Cassel, (Cmd. 5528), to secure compensation to third party victims of road accidents in cases where, notwithstanding the provisions of the Road Traffic Acts relating to compulsory insurance, the victim is deprived of compensation by the absence of insurance, or of effective insurance.

" Following is the text of the agreement :

" MEMORANDUM OF AGREEMENT made the Seventeenth day of June One thousand nine hundred and forty-six BETWEEN THE MINISTER OF TRANSPORT (hereinafter referred to as ' the Minister ') to whom, by virtue of the Ministry of War Transport (Dissolution) Order 1946, the functions of the Minister of War Transport have been transferred of the one part and MOTOR INSURERS' BUREAU whose Registered Office is at 60 Watling Street in the City of London of the other part SUPPLEMENTAL to an Agreement (hereinafter called ' the Principal Agreement ') made the Thirty first day of December One thousand nine hundred and forty-five between the Minister of War Transport of the one part and Those Insurers Transacting Compulsory Motor Vehicle Insurance Business in Great Britain by or on behalf of whom the said Agreement was signed (thereinafter and hereinafter referred to as ' the Insurers ') of the other part.

" WHEREAS in pursuance of the undertaking given by the Insurers in Paragraph 1 of the Principal Agreement a Company has been incorporated under the Companies Act 1929 (1) with the name of ' Motor Insurers' Bureau ' (being a party to these presents and hereinafter referred to as ' M.I.B. ')

" NOW THEREFORE IT IS HEREBY AGREED between the parties hereto as follows :

" SATISFACTION OF CLAIMS BY M.I.B.

" 1. IF judgment in respect of any liability which is required to be covered by a policy of insurance or a security (hereinafter called ' a contract of insurance ') under Part II of the Road Traffic Act 1930 is obtained against any person or persons in any Court in Great Britain whether or not such person or persons be in fact covered by a contract of insurance or if judgment in respect of any liability which is not so required to be covered by reason only of the provisions of Sub-section (4) of Section 35 of the said Act is in fact covered by a contract of insurance and any such judgment is not satisfied in full within seven days from the date upon which the person or persons in whose favour the judgment was given became or would apart from the provisions of the Courts (Emergency Powers) Act, 1939 or similar legislation have become entitled to enforce it then M.I.B. will subject to the provisions of Clauses 5 and 6 of these presents pay or satisfy or cause to be paid or satisfied to or to the satisfaction of the person or persons in whose favour the judgment was given any sum payable or remaining payable thereunder in respect of the aforesaid liability including taxed costs (or such proportion thereof as is attributable to the aforesaid liability) whatever may be the cause of the failure of the judgment debtor to satisfy the judgment.

" FOREIGN VISITORS.

" 2. M.I.B. shall take all such measures as the Minister without prejudice to the foregoing provisions of Clause 1 or the provisions of Clause 5 hereof may from time to time require to secure that persons having claims in respect of the death or injury of any person caused by or arising out of the use of motor vehicles by persons making a temporary stay in Great Britain or by persons for whom they may be responsible shall be in no worse position than persons having such claims in respect of death or injury of any person caused by or arising out of the use of motor vehicles by persons permanently resident in Great Britain."

" PERIOD OF AGREEMENT.

" 3. THIS Agreement shall be determinable by the Minister at any time or by M.I.B. on two years' notice without prejudice to the continued operation of the Agreement in respect of accidents occurring before the date of termination.

" RECOVERIES.

" 4. NOTHING in this Agreement shall prevent authorised Insurers or givers of security from providing by conditions in their contracts of insurance or by collateral agreements that all sums paid by them or by M.I.B. by virtue of the Principal Agreement or of these presents in or towards the discharge of the liability of their assured shall be recoverable by them or by M.I.B. from the assured or from any other person.

" CONDITIONS PRECEDENT TO M.I.B.'S LIABILITY.

" 5. (1) THE following shall be conditions precedent to M.I.B.'s liability, videlicet—

" (A) That notice of the bringing of or intention to bring proceedings against any uninsured person be given to M.I.B. before or within twenty-one days after the commencement of such proceedings

" JUDGMENT AGAINST ALL TORT-FEASORS

" (B) That if so required by M.I.B. and subject to full indemnity from M.I.B. as to costs the person bringing the proceedings shall have taken all reasonable steps to obtain judgment against all the tort-feasors responsible for the injury or death of the third party and in the event of a tort-feasor being a servant or agent against his principal.

" ASSIGNMENT OF JUDGMENT.

" (C) That the judgment or judgments (including such judgment as may be obtained under Paragraph (B) of this Clause) be assigned to M.I.B. or its nominee

" (2) IN the event of any dispute as to the reasonableness of a requirement by M.I.B. that any particular step should be taken to obtain judgment against other tort-feasors it shall be referred to the Minister whose decision shall be final

" EXEMPTIONS

" 6. CLAIMS arising out of the use of vehicles owned by or in the possession of the Crown in respect of any liability which is required to be covered by a contract of insurance under Part II of the Road Traffic Act 1930 shall be outside the scope of these presents except where any other person has undertaken responsibility for the existence of a contract of insurance under the said Part II (whether or not the person or persons liable be in fact covered by a contract of insurance) or where the liability is in fact covered by a contract of insurance. For the purposes of this Clause a vehicle which has been unlawfully removed from the possession of the Crown shall be taken to continue in that possession whilst it is kept so removed

" DOMESTIC AGREEMENT.

" 7. FOR the purpose of the efficient expeditious and economical carrying out of certain of the obligations accepted by M.I.B. by these presents an Agreement of even date (hereinafter referred to as 'the Domestic Agreement') has been entered into by M.I.B. of the one part and the Insurers of the other part whereby the carrying out of certain of the said obligations is delegated to and accepted by individual Insurers, but it is hereby agreed and declared that nothing in the Domestic Agreement discharges M.I.B. from its obligations to the Minister under these presents.

" OPERATION.

" 8. THIS Agreement shall not come into operation until the First day of July One thousand nine hundred and forty-six and nothing herein shall

"affect any claims in respect of any liability which may be incurred by any person, persons or classes of person in respect of the death or bodily injury of any person caused by or arising out of the use of a vehicle on a road on a date prior to the First day of July One thousand nine hundred and forty-six.

"IN WITNESS whereof the Minister of Transport has caused his Official Seal to be hereto affixed and the Motor Insurers' Bureau has caused its Common Seal to be hereto affixed the day and year first above written."

1. Clause 1. Satisfaction of claims by M.I.B.

The implications and effect of this clause are far-reaching. In general, it is seen that the Motor Insurers' Bureau has taken upon itself the responsibility of seeing that satisfaction is provided of every judgment obtained against any person in respect of a liability arising out of or caused by the use of a motor vehicle, if that liability is one against which insurance is required by section 36 (1) (b) of the Road Traffic Act, 1930 (*k*).

The scheme applies to all third party judgments in respect of Road Traffic Act liability obtained in Great Britain (*l*).

It will be seen that only in rare cases will the funds of the Motor Insurers' Bureau be called upon to provide this satisfaction.

In the great majority of cases, of course, the defendant in the running down action will have provided himself with a valid contract of insurance against the liability in question. As is the normal practice, his insurers in these cases will undertake his defence in the running down action, and will satisfy the judgment and the taxed costs thereof directly with the successful plaintiff in the action for damages. If the defendant in the running down action had provided himself with a contract of insurance which purported to cover him against the liability in question at the date of the accident, but which, owing to one cause or another (*m*) was not in law effective so as to require the insurers to provide an indemnity for the liability, he himself must pay the damages and costs awarded against him, if he can. If he cannot pay that sum, or does not do so (*n*), the M.I.B. is made liable by this clause to satisfy the judgment within the time stated, but, as will be seen (*o*), the insurer who issued the invalid policy will in practically all instances satisfy the judgment debt on behalf of M.I.B. Thirdly, if the defendant in the running down action was not insured at all at the time of the accident, the M.I.B. will satisfy the judgment in default of immediate payment thereof by the defendant. The matter may be summarised as follows:

If personal injuries are suffered in an accident which occurs after July 1, 1946, by a third party as is described in section 36 (1) (b) of the Road Traffic Act, 1930, the injured person, or, in cases of death, his personal representative, need only concern himself with giving notice of his claim to the insurers or to the M.I.B. and with obtaining judgment against the person responsible for those injuries in a running down action. If at the date of the accident the defendant in that action is insured, the M.I.B. will pay any part of the

(*k*) See chapter IV, p. 188, *ante*.

(*l*) This has been amended to include not only England, Scotland and Wales, but also Northern Ireland and the Isle of Man.

(*m*) *Cf.* because the contract of insurance is voidable *ab initio* at the suit of the insurers, or because from some breach of condition of an existing policy insurers are not liable to their assured in respect of that particular liability.

(*n*) It appears that the tortfeasor may refuse to satisfy the judgment given against him, even though he has the means to do so. In such a case, M.I.B.'s obligation to satisfy the judgment forthwith becomes operative, and steps have to be taken by M.I.B. thereafter to recover the judgment debt from the tortfeasor.

(*o*) From the terms of the Domestic Agreement; see *post*, p. 377.

judgment debt which remains unsatisfied by the defendant through the insurer concerned—and the word "insured" here has a very wide meaning. If the defendant is uninsured, and fails to pay—and the word "uninsured" here has a very narrow meaning—the M.I.B. itself will pay the unsatisfied debt from the Central Fund. If the defendant is exempted from compulsory insurance against third party risks by the terms of section 35 (4) of the Road Traffic Act, 1930 (p), but is in fact covered by a contract of insurance, the M.I.B. will hold itself responsible for the satisfaction of the judgment debt through the insurer concerned. With regard to vehicles owned by the Crown which are excluded from the scope of this clause of the Agreement, the Minister of Transport has given an undertaking that the same benefit in respect of compensation will be afforded by the Crown to the victims of a road accident in which Crown vehicles are involved as they would receive were the accident caused by a private vehicle (q).

Two points in particular must be borne in mind. First, only Road Traffic Act liability is the subject of this Agreement. That is to say, damage to property and personal injury to persons against whose injury no insurance is required by section 36 (1) (b) of the Road Traffic Act, 1930 (r), are not covered by the terms of this Agreement and must be considered, so far as the obtaining of an indemnity is concerned, under the strict terms of any policy which covered the defendant in the running down action in respect of that type of risk. The M.I.B. Agreement and indeed the Road Traffic Acts themselves are wholly irrelevant to this type of injury.

Secondly, although by this clause satisfaction is granted of third parties' judgments at the expense of the general body of insurers, nevertheless that defendant is in no way relieved of his basic responsibility to satisfy the judgment awarded against him if he can. The only difference made by this Agreement in such cases is that the defendant may later be required to pay what part he can of that judgment, if he has defaulted originally so as to bring this Agreement into effect, not to the original plaintiff but to the M.I.B. or to the nominee of the Bureau (s).

If judgment in respect of any liability which is required to be covered by . . . a contract of insurance under Part II of the Road Traffic Act, 1930.

Nothing in this clause or in the whole Agreement affects the position at law of the parties to an action for damages arising out of the use of a motor vehicle on the road. The Bureau's liability under the Agreement can only arise after the plaintiff has successfully established his case against the defendant in a running down action, and judgment has been given in his favour (t).

There is, of course, nothing to exclude the acceptance of compensation by the plaintiff under a settlement negotiated between the plaintiff and the

(p) See *ante*, chapter IV, p. 185. The exemptions extend by virtue of section 35 (4) to vehicles owned by a local authority, a police authority, or on behalf of the Metropolitan Police, or by a person who has deposited £15,000 with the Accountant-General.

(q) By answer in the House of Commons on November 12, 1945; see Official Report, column 1872, and also the text of the Principal Agreement, dated December 31, 1945, printed by the Stationery Office under the title "Motor Vehicle Insurance Fund," in which this answer is included.

(r) *Ante*, chapter IV, p. 188.

(s) The procedure by which M.I.B. may obtain repayment to them of any sums paid to third parties by virtue only of these two agreements is considered later.

(t) As to the conditions under which such judgment may be obtained in a running down action, see chapter I, pp. 16 *et seq.* Where no judgment can be obtained against any person because, for instance, the tortfeasor avoided identification by hurriedly leaving the scene of the accident, M.I.B. is not liable to compensate the injured plaintiff, except as a matter of grace. See p. 377, *post*.

defendant or the M.I.B., acting through its agents on behalf of the defendant. Apart from the several conditions precedent to the Bureau's liability under the Agreement, which are considered hereafter (*u*), the injured third party is therefore concerned only to establish liability at law against the particular person who was responsible for his injuries in the accident.

The classes of liabilities against which insurance cover is required by Part II of the Road Traffic Act, 1930, have already been discussed (*v*).

By a policy of insurance or a security (hereinafter called a contract of insurance).

No difference is made in this Agreement between the effect of a policy of insurance and a security. It will be remembered that in the Road Traffic Acts of 1930 and 1934 the positions of an insurer and the giver of a security are for most purposes assimilated. The only practical difference between them, and it is the only one which concerns this Agreement, is that still by section 37 (1) (b) of the Road Traffic Act, 1930, the liability of the giver of the security may be limited in the case of public service vehicles to £25,000 and in any other case to £5,000 (*w*). The Cassel Committee (*a*) recommended that givers of security should not be allowed to transact business except under licence from the Board of Trade, that the same tests of solvency should be applied to them as to insurers, and that the limitation of their liability should be abolished. These recommendations have not been incorporated into either of the two M.I.B. Agreements, for these Agreements are concerned only with authorised insurers. On the other hand, givers of securities who are also authorised insurers (*b*) have bound themselves to satisfy judgments obtained by third parties in the same manner as the issuers of policies of insurance (*c*), and in so far as the M.I.B. will make good any default made owing to insolvency by an authorised insurer, in practice third parties will not be affected adversely by this limitation of liability. In this different manner the object of the recommendations of the Cassel Committee is achieved.

Obtained against any person.

This M.I.B. Agreement, which concerns the liability of M.I.B. as opposed to that of any individual insurers, emphasises by these words the liability of M.I.B. to third parties who obtain a judgment against a *person*, the defendant in the running down action. The individual insurer, as has been stated, relieves M.I.B. of the duty of satisfying the third party's judgment when the contract of insurance issued by him covers the *vehicle* concerned in the accident.

There is no qualification of the classes of persons who may thus be found liable to pay compensation to an injured third party for his injuries, save that the judgment must arise from one of the liabilities required to be covered by section 36 (1) (b) of the Road Traffic Act, 1930. This means that "any person" may be one of the following classes—a driver of a motor vehicle, the employer of that driver, or his principal, or the hirer, or the owner of the car who has retained the right to control the driving of it (*e*).

(*u*) Clause 5 (1) of the M.I.B. Agreement, *post*, p. 375.

(*v*) Chapter IV, *ante*, pp. 188 *et seq*

(*w*) See section 15, Road Traffic Act, 1934, *ante*, chapter V, p. 340

(*a*) Cmd. 5528, paras 172-173.

(*b*) And up to the date of the publication of this book no giver of a security is other than an authorised insurer.

(*c*) *I.e.*, authorised insurers; see *ante*, chapter IV, p. 227.

(*e*) See *ante*, chapter I, pp. 48-52.

The question arises whether the liability of an owner who is in breach of the duty imposed by section 35 (1) (f) is a liability which is required to be covered by a contract of insurance under Part II of the Road Traffic Act, 1930. Strictly speaking, it cannot. The liability to a third party of an owner of a motor vehicle who causes or permits the use of his vehicle by an uninsured person, during which user an accident occurs, arises from a failure to see that the driver, who is himself unable to satisfy the third party's judgment in the running down action (g), is properly insured, and not from the misuse of the vehicle on the road. Nothing in section 36 (1) (b) requires that a policy of insurance must obtain a provision that persons driving with the owner's consent or permission must, as such, be covered by insurance while driving. The matter is academic, however, for the individual insurers by the terms of the Domestic Agreement have agreed to regard this liability for breach of statutory duty as contained in the phrase "Road Traffic Act liability," so that in all cases now where an injured third party obtains a judgment against an owner of a vehicle for causing or permitting its uninsured user (h) that judgment will be satisfied, if the defendant and the owner default, by the insurer of the vehicle concerned at the time of the accident. And if that owner be wholly uninsured (i), the judgment will be satisfied by M.I.B. itself, from the funds of the Bureau.

Whether covered by a contract of insurance or not.

The duty to satisfy the judgment, if the defendant defaults, is absolute. Judgment obtained against a smash and grab thief, who steals a car and drives it at a furious speed away from the scene of the crime and while doing so kills half a dozen bystanders, must still be satisfied. Note that this Agreement is not even indirectly a contract to indemnify a criminal in respect of his criminal acts (j). The right to enforce the judgment against the criminal is specifically retained by M.I.B. by the requirement that the third party's judgment shall be assigned to M.I.B. under this Agreement (k). The penalties imposed by section 35 (2) of the Road Traffic Act, 1930, on a person who uses a motor vehicle whilst uninsured, or who causes or permits such use, are in no way derogated from by this Agreement, and nothing in this Agreement can be said to be an encouragement to persons to use motor vehicles whilst uninsured (l).

r if judgment in respect of any liability which is not so required to be covered by reason only of the provisions of subsection (4) of section 35 of the said Act is in fact covered by a contract of insurance.

Certain persons and persons driving certain vehicles specified in this subsection are exempted from the operation of section 35 (1) of the Road Traffic Act, 1930, that is, from the requirement that third party insurance shall be provided for vehicles used by them, or which they cause or

(f) *Ante*, chapter IV, p. 163; the breach of duty consists, for the purpose of this argument, in causing or permitting any other person to use a motor vehicle on a road unless there is in force in relation to the user of that vehicle by that other person a contract of insurance in respect of third party risks which complies with the requirements of Part II of the Road Traffic Act, 1930 (23 Halsbury's Statutes 607).

(g) *Daniels v. Vaux*, [1938] 2 K. B. 203; [1938] 2 All E. R. 271.

(h) As in *Monk v. Warbey*, [1935] 1 K. B. 75.

(i) In the sense that at the time of the accident there was not even a defective policy in existence covering the vehicle concerned.

(j) See chapter II, p. 107, *ante*.

(k) By clause 5 (1) of the M.I.B. Agreement, *post*, p. 375.

(l) Indeed, the Cassel Committee specifically recommended (Cmd. 5528, paras 158-161) that the penalties in question, provided by section 35 (2) (*ante*, p. 244) and section 112 (2) (*ante*, p. 261) of the Road Traffic Act, 1930, should be strictly enforced. This recommendation has been carried into effect by recent decisions; see p. 245, *ante*.

permit to be used on the road. These persons are local authorities, police authorities and persons who have deposited £15,000 with the Accountant-General in respect of vehicles owned by them (m).

A large number of vehicles owned by these authorities are in fact insured, despite this exemption, by one of the authorised insurers who are signatories to this Agreement, and being so, come under the operation of this Agreement and of the Domestic Agreement (n).

If any such judgment is not satisfied in full.

The Motor Insurers' Bureau's responsibility only arises if the judgment is not satisfied in full by the defendant in the running down action. Should he pay the judgment in full, but pay no part of the costs, it can be argued that, strictly speaking, M.I.B.'s liability to pay the taxed costs does not arise. This Agreement, however, is not a statute, and its terms are not to be construed strictly. Being a contract, the expressed intentions of the parties must be examined, and it is clear from the whole tenor of the Agreement that it is the intention of M.I.B. to see that the third party obtains every penny of his judgment together with the taxed costs referable to the Road Traffic Act liability. These words clearly mean "if any such judgment together with the taxed costs thereof is not satisfied in full."

Within seven days from the date upon which the person . . . in whose favour the judgment was given became or would apart from the Courts (Emergency Powers) Act, 1939, or similar legislation have become entitled to enforce it.

The date upon which a person in whose favour such a judgment is given becomes entitled to enforce it is set out in Order XLII of the Rules of the Supreme Court, rules 1 and 17. When there is a direct order to pay money (and in running down actions such as those envisaged in this Agreement a direct order to pay money will normally be made) it is well established practice in the High Court that a writ of *fieri facias* or *elegit* may issue immediately and as a matter of course (o). Service of the order or judgment upon the debtor is not necessary before suing out the writ (p). Where, however, the judgment or order is for payment within a certain period, no writ of *fieri facias* or *elegit* may be issued until after its expiration, and if the Court has made an order or given a judgment staying execution until such time as is thought fit, no writ may be issued until after that time, and then only after service of the order or judgment upon the debtor without demand (q). Sometimes a stay of execution is ordered pending the result of an appeal, in which case Order LVIII, rule 16 applies, that an appeal only effects a stay of execution on the terms ordered by the Court from which the appeal is made (r).

(m) See p. 185, *ante*.

(n) That is to say, even if the contract of insurance covering the exempted vehicle in question at the date of the accident is voidable at the instance of the insurer concerned or is otherwise ineffective, so that the insurer is not *in law* obliged to provide indemnity thereunder, yet the insurer will honour the policy, in accordance with the Domestic Agreement. If the insurance policy has lapsed at the time of accident, however, or has been terminated in such a way that the insurer is not obliged to honour it even under the terms of the Domestic Agreement, it is submitted that M.I.B. would not be under any obligation to satisfy the judgment, for the tortfeasor's principal in such a case is not an uninsured person within the meaning of the M.I.B. Agreement.

(o) R. S. C., Order XLII, r. 1. See the current Annual Practice.

(p) Under R. S. C., Order XLII, r. 17.

(q) R. S. C., Order XLII, rr. 1, 17.

(r) If the court of first instance refuses a stay of execution, application may be made by Original Motion to the Court of Appeal for a stay. See *Practice Note*, [1947] W. N. 133, *per* Lord GREENE, M.R.

In the County Court, by section 116 (1) of the County Courts Act, 1934 (s), any sum of money payable under a judgment or order of a County Court may be recovered, in case of default or failure of payment thereof, forthwith or at the time and in the manner directed in the judgment or order, by execution against the goods and chattels of the party against whom the judgment or order was obtained. That is to say, unless a period of time is fixed by the terms of the judgment or order within which the money must be paid, execution may be levied immediately on default of payment, by means of an application to the registrar to issue a warrant of execution. When a period of time is fixed within which the money must be paid, or when the judgment debtor is directed to pay the money by instalments, an application to the Registrar to issue a warrant of execution may only be made after the said period, or on default of payment of any one of the instalments.

The effect of the Courts (Emergency Powers) Act, 1943 (t), is expressly excluded in this assessment of the date on which the judgment can be enforced. These Acts protect debtors in respect of pre-war obligations, and to a modified extent in respect of wartime obligations, which they are unable to discharge owing to war obligations, in that a judgment creditor is not entitled except with the leave of the appropriate court to proceed to execution or otherwise to the enforcement of any judgment for the payment of a sum of money. In any case, the Acts would have had no effect on the great majority of the judgments considered in the M.I.B. Agreement, for by section 1 (1) (a) and (b) of the Courts (Emergency Powers) Act, 1943 (u), leave to proceed to execution is not necessary in the case of any judgment for the recovery of damages for a tort, or of any judgment under which no sum of money is recoverable otherwise than in respect of costs.

The M.I.B. will subject to the provisions of clauses 5 and 6 pay or satisfy or cause to be paid or satisfied to or to the satisfaction of the person in whose favour the judgment is given.

The conditions precedent to M.I.B.'s liability to satisfy the judgment and the costs of the third party are considered later (a). In a large number of cases an individual insurer by the terms of the Domestic Agreement will in fact pay the required sums. In clause 7 of this Agreement this duty undertaken by insurers is said to be by way of delegation of M.I.B.'s obligation. A lengthy examination of the exact nature of the contractual relationship between the individual insurers and M.I.B. in this matter would be idle. Suffice it to say that, as far as a third party is concerned, he may be sure that one or other will pay him his due if the judgment debtor does not.

The words "in whose favour" are used here instead of those used in section 10 (1) of the Road Traffic Act, 1934, "entitled to the benefit of the judgment." The distinction has some consequence (b).

(s) 27 Halsbury's Statutes 86.

(t) 36 Halsbury's Statutes 461.

(u) *Ibid.*

(a) Under clause 5 (1) of the Agreement. See p. 375, *post*.

(b) In so far as the judgment debt has to be satisfied within so short a time of the date on which it was awarded by the Court, it is sufficient for the M.I.B. to cause the required sum to be paid to the person to whom the Court awarded the judgment. In the great majority of cases this person will be the injured third party, or his personal representative in cases of fatal injury. On p. 289, chapter V, *ante*, it was suggested that the "person entitled to the benefit of the judgment" must include any person to whom the rights under the judgment have been assigned. It would appear from the wording of this clause that payment to an assignee of the judgment is not envisaged by this Agreement, though there is nothing, of course, to prevent such payment by arrangement between the M.I.B. and the original plaintiff in the running down action.

Any sum payable or remaining payable thereunder including taxed costs (or such proportion thereof as is attributable to the aforesaid liability).

The meaning of these words has been considered previously (c). It is to be noted that reference is omitted to payment of any interest awarded by the Court. Interest is, in practice, not awarded in running down actions where there has not been undue delay in the hearing of the action. If it were to be awarded in any case, it is thought that doubtless M.I.B. would pay any sum awarded in the judgment given in favour of the third party in respect of interest, if that sum remained unpaid by the defendant in the running down action (d). If by any chance M.I.B. should not satisfy the judgment within seven days of the execution date, interest on the judgment itself would become payable.

2. Clause 2. Foreign visitors.

Until the end of 1947, the law relating to vehicles brought into this country by foreign visitors was contained in section 41 (e) of the Road Traffic Act, 1930, and the regulations made thereunder (e), Part II of the Motor Vehicles (Third Party Risks) Regulations, 1941, paragraphs 17 to 28 (f). The Cassel Committee expressed anxiety that under the then existing regulations (g), which were identical with the later regulations made in 1941 (f), the declaration of a foreign visitor as to the existence of a policy was accepted, though the policy did not have to be produced and no enquiry appeared to be made as to the standing of the insurer or the terms of the policy. Such a policy might have limited the amount of the insurer's liability, and might have contained conditions which would not be effective as against third parties in the case of a British policy. Although the reported cases were few in which third parties injured by the vehicles of foreign visitors were not able to obtain damages to which they were entitled, the Committee felt that to leave third parties unprotected in such cases would be unjustified, and therefore recommended that the Minister of Transport should make regulations based on a scheme which was adopted from the law which was in force in Norway and Sweden at that time. The effect of this scheme is to ensure that in all cases where a foreign visitor brings a vehicle into this country, either he shall be insured temporarily by an authorised British insurer while he is in this country, or, if he has taken out a policy of insurance in his own country, he must insure with an approved insurer thereof. To become an approved foreign insurer, a guarantee must be provided for him by a British insurer, or the M.I.B., that he is a person who is able, from the legal and financial aspects, to remit to this country any sums which he may be found liable to pay to third parties injured on the roads in this country. The British guarantor accepts service on his behalf of any proceedings and pays any sums that are found to be payable immediately to third parties (h). As was stated in an earlier chapter (i), it is understood that new Regulations embodying the effect of this scheme, and superseding the regulations made in 1941 (f), are soon to be drafted and brought into force (j).

In a great many cases arrangements are made by authorised insurers of

(c) See pp. 290 *et seq.*, *ante*.

(d) The relevant statutory provisions relating to the powers of Courts to award interest on debts and damages are set out *ante*, chapter V, p. 293.

(e) See chapter IV, pp. 237-239, *ante*.

(f) S. R. & O., 1941, No. 926.

(g) S. R. & O., 1933, No. 311, paras 16-27.

(h) See Cmd. 5528, Appendix IV, for the scheme proposed by the Cassel Committee.

(i) *Ante*, chapter IV, p. 242.

(j) If these regulations have been issued by the time this book goes to press, they will be included in an Appendix.

Great Britain whereby insurance is provided by branch offices or agents of the British insurers in the foreign countries. In such cases the British insurer is responsible under the Domestic Agreement for the satisfaction of judgments obtained against their foreign assured (*k*).

3. Clause 3. Period of Agreement.

The right of the Minister of Transport to determine this Agreement at any time is presumably inserted in case the Agreement does not fulfil expectations, and legislation becomes necessary to provide compulsory insurance in the fullest sense. In view of the generous terms of the undertakings entered into by M.I.B. and the individual insurers, this situation is most unlikely to arise.

4. Clause 4. Recoveries.

The object of this clause is to emphasise that there is nothing in the scheme for ensuring compensation for third party victims of road accidents that affects any contractual obligations imposed upon a policy holder by his policy or on any other person covered by a policy (*l*). The "recovery clause," normally inserted in the standard motor insurance policy, setting out the insurers' right to recover from the assured sums paid by them to third parties by virtue only of section 38 of the Road Traffic Act, 1930, and of sections 10 and 12 of the Road Traffic Act, 1934, has already been considered (*m*). Strictly speaking, it is entirely unnecessary to include in the standard policies of the future any reference to a right to recover from the assured any sums paid by virtue of the M.I.B. Agreement to injured third parties. The satisfaction of the third party's judgment by M.I.B. or by M.I.B.'s nominee (who will normally be an individual insurer) is granted on condition that that judgment against the motorist is assigned to M.I.B. or to M.I.B.'s nominee. Should M.I.B. or its nominee see fit to do so, that judgment can thereafter be executed against the judgment debtor without further legal or arbitration proceedings. It is therefore most unlikely that any such recovery clause referring to payments made by virtue of the M.I.B. Agreement will be inserted in standard policies.

Where the judgment debtor at the time of the accident which gave rise to his liability to the third party enjoys the apparent or purported cover of a third party risks insurance policy, certain considerations arise, which are dealt with later (*n*).

Where the offending motorist is not covered at the time of the accident by any policy of motor insurance at all, either valid or invalid, M.I.B. through its nominee will normally conduct the negotiations with the third party in order to reduce the damages. If recovery is to be sought from the tortfeasor by M.I.B., three points should be noted. First, a judgment of the Court must be obtained against the tortfeasor: payment by M.I.B. of

(*k*) By the terms of the Domestic Agreement.

(*l*) Such as persons authorised to drive by the assured, who by the normal "extension" clause in a policy of motor insurance become insured by the policy. Such persons, by section 36 (4) of the Road Traffic Act, 1930, are given a statutory right to claim an indemnity from insurers for liabilities arising from accidents which occur while they are driving the insured vehicle. While doing so, they become *pro hac vice* the assured and they must observe, if the policy so requires it, all the terms of the policy in so far as they are able. See Lord WRIGHT's judgment in *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319; and *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250; [1945] 1 All E. R. 316. Persons driving under a hire-drive motor policy may also fall into the same category; see *Spraggon v. Dominion Insurance Co.* (1940), 67 Ll. L. R. 529.

(*m*) P. 328, *ante*.

(*n*) See Domestic Agreement, *post*, p. 377.

an agreed sum by way of damages would be a voluntary action, and would give no right to M.I.B. to reclaim that sum from the tortfeasor, unless perhaps some agreement is made between M.I.B. and the uninsured tortfeasor for an indemnity or for contribution. Secondly, M.I.B. is only liable for Road Traffic Act liabilities: payment in respect of, for instance, damage to the third party's car will not be made. Thirdly, before the negotiations are undertaken by M.I.B. with the third party, permission from the tortfeasor should first be obtained (*nn*).

5. Clause 5 (1). The conditions precedent to M.I.B.'s liability.

(A) *Notice*. No particular form of notice is required, and indeed if notice is given before the issue of the writ against the uninsured person, no more than the bare fact of the intention to bring proceedings can be given. Where there is a policy of insurance purporting to cover the proposed defendant, the third party will be well advised, in view of cases decided on this point (*o*), to give specific details to the insurer concerned not only of the allegations against the defendant but also of the issue and service of the writ. But where, within twenty-one days of the issue of the writ the defendant has not given satisfactory evidence of the existence of a valid policy covering him at the date of the accident, or where within that time an insurer named by the defendant has repudiated liability to the assured defendant in respect of that motor accident without stating the grounds of the repudiation, a prudent third party would be well advised to notify M.I.B. of the commencement of proceedings, in case it should later prove that no policy was in existence at the time of the accident. It is understood, however, that in those cases where there exists a policy of insurance, whether valid or not, as will most usually be the case, notice to the insurers will be deemed to be notice to M.I.B. within the meaning of this condition precedent. In practice, however, it will be preferable to notify the Bureau in all cases where the name of the insurers is not speedily forthcoming (*oo*).

(B) *Judgment against all tortfeasors*.—This condition is presumed to have three objects. First, to ensure that all persons responsible shall be made liable for their respective proportions of the blame, in order that M.I.B. may be able to proceed against each and every one of such persons for recovery of any judgment sums paid in their default (*p*). Secondly, it may be that certain persons who are partly responsible for the damage are covered by a policy of insurance, and M.I.B. may require the concerned insurer to pay for his assured's share in the damage. Thirdly, for the protection of the individual insurer, judgment must be obtained against all those responsible, so that rights of indemnity or contribution may be properly determined (*q*).

(C) *Assignment of Judgment*.—Where the tortfeasor is wholly uninsured, the enforcement of the assigned judgment against him would be M.I.B.'s

(*nn*) See the effect of *Groom v. Crocker*, [1937] 3 All E. R. 844: on appeal, [1939] 1 K. B. 194; [1938] 2 All E. R. 394, *post*, p. 728; and *Beacon Insurance Co. v. Langdale*, [1939] 4 All E. R. 204, *post*, p. 731.

(*o*) *Cross v. British Oak Insurance Co., Ltd.*, [1938] 2 K. B. 167; [1938] 1 All E. R. 383; *Contingency Insurance Co. v. Lyons* (1940), 65 Ll. L. R. 53; *Windsor v. Chalcraft*, [1939] 1 K. B. 279; [1938] 2 All E. R. 751.

(*oo*) Communications should be addressed to the Motor Insurers' Bureau, 60, Watling Street, E.C. 4.

(*p*) See clause 4 (*supra*) of this Agreement, and the discussion thereon, *ante*, p. 374.

(*q*) The right of one insurer to claim indemnity or contribution from another insurer, whether by subrogation or not, is considered later; see chapter II, *ante*, p. 101, and chapter X, pp. 699, 719.

only method of securing repayment of sums paid by them by way of satisfaction of the judgment debt. Where there is a policy of insurance in existence, even though it be voidable or although liability may be repudiated for breach of its terms, by the terms of the Domestic Agreement the concerned insurer is obliged to pay the judgment debt in discharge of M.I.B.'s liability under this agreement. M.I.B.'s obligation to see that the third party's judgment is satisfied arises whether the tortfeasor is insured or not, and it is therefore presumed that M.I.B.'s nominee to whom the judgment may be assigned will, in cases where a policy is in existence, be the insurer concerned.

6. Clause 5 (2). Reasonableness of particular steps taken to obtain judgment against other tortfeasors.

The intervention of the Minister is unlikely to be invoked, in so far as by clause 5 (1) (B) M.I.B. undertakes to provide full indemnity as to the costs of taking these steps to bring all persons responsible for the damage to judgment.

7. Clause 6. Exemptions.

Claims arising out of the use of vehicles owned by or in possession of the Crown are expressly excluded from the operation of this agreement, except where authorised insurers have in fact undertaken responsibility for the existence of a contract of insurance covering such vehicles.

It will be remembered that the Crown is not affected by the sections of the Road Traffic Acts, 1930 and 1934, which relate to compulsory insurance against third party risks (r). By the Crown Proceedings Act, 1947 (s), the Crown is for the first time put into the position of an ordinary employer with regard to its vicarious responsibility for the tortious acts of its servants. Nevertheless, unless a contract of insurance is effected to cover third party risks in relation to a vehicle owned by the Crown by an authorised insurer who is a signatory to this annexed Agreement, the terms of this latter Agreement do not apply (t).

In an accident in which an uninsured vehicle owned by the Crown is involved as well as a vehicle which is required to be covered by a contract of insurance by Part II of the Road Traffic Act, 1930, M.I.B.'s liability will only arise in relation to the private vehicle's share in the responsibility for the damage. Thus, where the user of the Crown's vehicle is found to be 60 per cent. responsible for the damage, and the user of the private vehicle 40 per cent. responsible, M.I.B. will be liable to satisfy only 40 per cent. of the judgment sum awarded to the third party, and for such proportion of the costs as the Court awards against the private person.

8. Clause 7. The Domestic Agreement.

To a large extent individual insurers have by the Domestic Agreement undertaken to discharge M.I.B.'s obligation to satisfy the judgments obtained by injured third parties, which arises under this Agreement. Nothing, however, in the Domestic Agreement, as is pointed out, alters the position that it is primarily the responsibility of M.I.B. to make this satisfaction: when the individual insurer pays the judgment sum under the terms of the Domestic Agreement, he pays on behalf of M.I.B. The Domestic Agreement is therefore largely an agreement for administrative purposes entered into between

(r) *Anie*, chapter IV, p. 170.

(s) 10 & 11 Geo. 6, c. 44; chapter I, *anie*, p. 42.

(t) See also note (g) p. 363, *anie*.

M.I.B. and its members, the exact terms of which have little or no public interest.

Individual insurers bound themselves to discharge this obligation by the terms of the Domestic Agreement, and indeed payment in proper cases can be demanded of them by M.I.B.

In the final event, however, should the individual insurer refuse or be unable to satisfy a judgment which he is obliged to satisfy by the Domestic Agreement, then M.I.B. must satisfy it from the Central Fund, and thereafter take what steps are seen fit to recover from the insurer concerned.

9. The untraced driver.

The Cassel Committee did not find it possible to make any recommendation with regard to the case of the third party injured by a motorist who could not be identified. In such a case no claim can be established in law against anyone, and the committee considered that the grant of rights to third parties against M.I.B. in such cases would be calculated to lead to such abuses as to render such a course totally unsuitable. The Minister of Transport agreed with this view on behalf of the Government, and accordingly the annexed Agreement does not cover such cases. The Minister stated, however, in answer to a question asked in the House of Commons on November 12, 1945 (u), that the insurers (a) had informed him that they did not intend to exclude these cases entirely from their purview, and where there is reasonable certainty that a motor vehicle is responsible for injury to a third party, and that but for its unidentifiability (b) a claim might be made, they will give sympathetic consideration to the making of an *ex gratia* payment to the victim. Such cases will arise mainly when the offending motorist fails to stop after knocking down a third party. The third party must comply as far as possible with the terms of this Agreement, and he must carry out as far as he can the conditions precedent to M.I.B.'s liability set out in clause 5 (1) of the M.I.B. Agreement. It is submitted that he must be able to provide evidence which would satisfy a court of law that the injury was caused by the negligence of the absent motorist, and this evidence, it is surmised, should have substantial corroboration from independent eye-witnesses of the accident or from incontestable matters of fact. Notice should be given to M.I.B. as in the case where an uninsured motorist can be identified and reported to M.I.B., as soon as is reasonably practicable.

PART 5.—THE DOMESTIC AGREEMENT

It cannot be too often repeated that the Domestic Agreement, as its name implies, is, and is intended to be, a contract between M.I.B. and the authorised insurers of Great Britain (c), and that the Agreement merely sets out the terms and conditions on which the individual members of M.I.B. have agreed to discharge the general obligation resting on M.I.B. to satisfy the judgments obtained by "Road Traffic Act Third Parties" in running down actions, in default of satisfaction by the defendants in such actions. As far as the third party is concerned, it is immaterial whether the money comes from M.I.B. or the individual insurer. The exact limits and extent

(u) Official Report, column 1872.

(a) At this date, the M.I.B. had not yet been formed.

(b) Presumably where the offending motorist is known by name or by other circumstances, but has evaded being brought to judgment by leaving the jurisdiction, this charitable principle will not be brought into operation.

(c) Including those "operating" in Northern Ireland and the Isle of Man.

of this further obligation undertaken by the individual insurers by the Domestic Agreement are matters which only concern M.I.B. and insurers among themselves. Comment on the phrasing of the clauses of the Domestic Agreement has therefore been omitted.

Suffice it to say, as a general principle, that where, at the time of the accident (*d*) giving rise to the Road Traffic Act liability on which the third party's judgment is based, a policy of insurance, issued by a member of the M.I.B. and covering or purporting to cover the driving of the vehicle which was concerned in the accident and in respect of whose driving the defendant was found to be responsible, which policy had not been brought to an end before the date of the accident automatically (*e*) or by effluxion of time, or by cancellation, or by mutual agreement between the parties thereto, then the member of M.I.B. who issued that policy will discharge M.I.B.'s obligation under the M.I.B. Agreement. This obligation will also be undertaken where the policy is voidable at the instance of the insurer on the ground of material misrepresentation or non-disclosure, or void for fraud or mistake, and even though no indemnity was payable under the policy either in respect of that particular accident or at all (*f*). This obligation is undertaken by the insurer concerned whoever was driving the vehicle concerned in the accident.

It is assumed that if the insurer concerned discharges M.I.B.'s obligation to pay the third party's judgment under the M.I.B. Agreement, then that insurer will be the nominee of M.I.B. to whom assignment of the judgment in question will be made as a result of the third condition precedent to M.I.B.'s liability set out in the M.I.B. Agreement (*g*).

If he sees fit, the insurer concerned may then execute that judgment against the defendant in the running down action, that is to say the judgment debtor.

In most cases the judgment debtor will be a person whom the policy of insurance purported to cover at the time of the accident (*h*). It may be that he will disagree with his insurers and consider that he was entitled to indemnity under that policy in respect of the third party liability. If he considers himself entitled to an indemnity under a policy, the following position results :—

(1) Either before or after the assigned judgment is executed against him by his insurer, he may seek to recover an indemnity under the policy (i) by obtaining a declaration in a court of law that he is entitled to that indemnity (i) or (ii) by commencing arbitration proceedings against the insurer, if the policy contains an arbitration clause.

(*d*) So long as it occurs after July 1, 1946.

(*e*) *I.e.* by death of the assured, by his bankruptcy, or by the transfer of his interest in the vehicle away from himself.

(*f*) *I.e.* because the use of the vehicle on that occasion was outside the scope of the policy, or because of some breach of condition, warranty or term of the policy by the assured. Further, the existence of a valid certificate of insurance is irrelevant.

(*g*) See clause 5 (1) (c) of the M.I.B. Agreement, *ante*, p 375. If the insurer concerned undertakes the defence of the tortfeasor, agrees a certain sum with the third party as full compensation for his injuries, and then pays that sum to the third party without obtaining a judgment of the Court in respect of the liability, he will find it impossible to recover that sum from the tortfeasor unless a collateral agreement is made with the tortfeasor for an indemnity or contribution. If the tortfeasor refuses to agree to contribute the whole or part of the sum, the insurer's best course is clearly to allow the matter to proceed to judgment.

(*h*) *Aliter*, if he was in unauthorised possession of the vehicle.

(*i*) To obtain such a declaration, there must be a dispute between the parties as to their respective rights under the policy.

(2) If the "assured" commences arbitration proceedings, it may be that the terms of the dispute between the parties are not proper to be settled under the terms of the arbitration clause in the policy (*k*).

(3) Whether a declaration is sought from the Court, or the matter comes to arbitration, the assured may plead that the insurer, by his conduct of the assured's defence in the third party's running down action is estopped (*l*) from alleging a breach of condition of the policy by the assured, or has waived (*m*) any such breach.

(4) Lastly, the principles laid down in the case of *Groom v. Crocker* (*n*) should be borne in mind, of which a full discussion appears later. The insurer being concerned to reduce to a minimum the judgment sum obtained by a third party against the assured will normally undertake the defence of the assured even where the policy is void or voidable for misrepresentation or non-disclosure. The interests of the insurer and the assured to keep the damages low are of course co-existent, but it is apprehended that insurers will be wise to come to some agreement with the assured that the undertaking of the defence does not prejudice the insurer's right to avoid the policy on the grounds stated, and that he agrees to the various steps taken in his defence by insurers. If no agreement on these points can be reached, it may be necessary to leave the assured to conduct his own defence (*o*).

PART 6.—CONCLUSION

By the M.I.B. Agreement and the Domestic Agreement the final stage has been reached in the giving effect to the principle of compulsory insurance, so that third parties injured on the roads may be sure of satisfaction of their just claims. The path leading to this goal has been tortuous, and much litigation has resulted from the ineffective efforts of the Road Traffic Acts to achieve this purpose. The insurers have by this bold gesture taken upon themselves a great burden, in that they have agreed to shoulder the financial responsibilities of errant motorists in the absence of satisfaction by these wrongdoers. One thing is clear. The persons insured by contracts of motor insurance against third party risks have an equally great obligation to observe their duties under the terms of their policies. Nothing still prevents an insurer from imposing what conditions he pleases upon his assured, and only commercial practice and the intensive competition existing between insurers can compel the terms of standard policies to be easily understood by and be fair to the assured. In so far as most of these standard policies have achieved a considerable simplicity of form, the assured must be taken to know and appreciate his duties under the policy. Nevertheless many policies contain conditions and exceptions which have imposed liability in the past on the motorist in circumstances in which he might have expected, apart from the policy, to have been properly insured. It is of the highest importance therefore that motorists should still read, mark and learn the last detail of each term of their motor policies.

In the remaining four chapters of this book the relations of assured and insurer are considered in detail. The relations of the injured third parties and the insurers have been satisfactorily settled by these two Agreements.

(*k*) See, for a full discussion of this topic, p. 611, *post*, and *Heyman v. Darwins, Ltd.*, [1942] A. C. 356; [1942] 1 All E. R. 337.

(*l*) For a full discussion of this topic, see chapter IX, *post*, p. 691.

(*m*) See chapter IX, *post*, p. 691.

(*n*) [1937] 3 All E. R. 844; affirmed, [1939] 2 K. B. 194; [1938] 2 All E. R. 394 (C.A.). See the *dicta* of MACKINNON, L.J., *post*, p. 728.

(*o*) See *post*, p. 728.

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PART I.—INTRODUCTION

I.—GENERAL

Before proceeding to examine in detail the particular topics of non-disclosure (a), misrepresentation (b), materiality (c), and offer and acceptance (d), it is necessary shortly to consider the following matters :

- A. The duty of good faith ;
- B. The effect of this duty on the making and existence of the policy ;
- C. The effect of the proposal form ;
- D. The effect of certain terms in the policy.

These various matters must then be briefly considered in relation to the provisions of sections 10 and 12 of the Road Traffic Act, 1934 (e).

A. (i) The doctrine of *uberrima fides* has already been described (f), and it has been pointed out that it is not a special rule of law relating only to insurance contracts. It is applied to insurance contracts (g) in common with some other particular classes of contracts (h).

(ii) The substance of this doctrine is that every valid policy of insurance is based on this presumption that the assured has disclosed in his offer to the insurers every material fact or circumstance (i).

(iii) In this sense "material" means anything which would influence a prudent insurer as to whether he will accept the offer and, if so, at what rate of premium (j).

(iv) The effect of a breach of this duty of good faith is that as soon as it becomes known to the insurers they have the right to avoid the contract : that is to say, to declare not only that it shall cease to exist, but that no liability under it to the assured has ever arisen (k).

(a) See *post*, p. 388.

(b) See *post*, p. 397.

(c) *Post*, pp. 391-392, *passim*.

(d) See *post*, pp. 408, 416.

(e) 27 Halsbury's Statutes 534 ; chapter V, *ante*, pp. 278, 316.

(f) Chapter II, *ante*, p. 99.

(g) *Pickersgill (William) & Sons, Ltd. v. London and Provincial Marine and General Insurance Co., Ltd.*, [1912] 3 K. B. 614 ; *Blackburn, Low & Co. v. Vigors* (1887), 12 App. Cas. 531 ; SCRUTTON, L. J., in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361.

(h) E.g. contracts for the sale of land.

(i) See *post*, p. 389. So that no liability to the assured under the policy devolves upon the insurers unless the duty of disclosure has been complied with.

(j) See *post*, pp. 390 *et seq.* SCRUTTON, L. J., in *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356. Also the Road Traffic Act, 1934, s. 10 (4) ; 27 Halsbury's Statutes 545.

(k) *Post*, chapter IX. See *post*, p. 405, for further consequences of failure to disclose.

(v) This result follows from the facts of the matter (*l*). It may be regarded as a breach in fact committed before the contract was made (*m*) ; as an offer which was never accepted because never made (*n*) ; or, without exactly defining its position in law, as a matter upon which the whole contract was based (*o*).

It has been stated by some judges (*p*) that the duty of disclosure may be regarded as resting on a term implied in the contract itself, breach of which entitles insurers to avoid the whole policy *ab initio*. If this is so, any express term in the policy which deals with the same subject-matter (*q*) necessarily supersedes the implied term, with the result that insurers who have inserted such a term in the policy might be able to rely, not on the implied term, but only on the express term. In that event, they could only sue the assured under the policy, and could not declare it never to have come into existence (*r*). However this may be with regard to non-disclosure, it is now settled by the case of *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne* (*s*) that this argument cannot be applied to a case where the assured has by material misrepresentation broken his duty of good faith. It seems plain, in the words of SCOTT and LUXMOORE, L.JJ. (*t*), that the equitable jurisdiction to avoid a contract for misrepresentation cannot rest on the foundation that the duty not to make such misrepresentations is an implied term in the contract, but it arises from the jurisdiction originally exercised by the Courts of Equity to prevent imposition.

Where there is material misrepresentation, therefore, the party seeking to declare the contract void *ab initio* need not rely on any express term in the policy that he is entitled to do so.

B. In the process of making every contract there is a representation as to the subject-matter of the proposed contract made by the person who makes the offer to the person to whom the offer is made (*u*). This representation either forms part of the offer or it does not. If it does not, it has no effect whatever on the contract unless it is made for the purpose of inducing acceptance of the offer (*v*). If made for that purpose, it may have one or more of a variety of different effects in law. It may amount to what is called a collateral contract—a contract separate from the main contract in respect of which the offer it accompanies is made (*w*).

It may amount to tort of deceit (*a*). It may amount to an innocent misrepresentation (*b*). If it amounts to a collateral contract, it is regarded as an independent contract and does not directly affect the existence of or the rights created by the main contract (*w*). If it is a deceit (*a*), or an

(*l*) See, more fully, *post*, p. 405. *Dawsons, Ltd. v. Bonwin*, [1922] 2 A. C. 413.

(*m*) *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139.

(*n*) *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (1934), 49 Ll. L. R. 231; *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356.

(*o*) Generally, see *post*, pp. 405-407.

(*p*) *Moens v. Heyworth* (1842), 10 M. & W. 147; *Blackburn, Low & Co. v. Vigors* (1886), 17 Q. B. D. 553; *London Assurance v. Mansel* (1879), 11 Ch. D. 363, at p. 367; *per COCKBURN, C.J.* in *Proudfoot v. Montefiore* (1867), L. R. 2 Q. B. 511, at p. 517; *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B. 431, at p. 438, *per FLETCHER-MOULTON, L.J.*; *Pennsylvania Shipping Co. v. Compagnie Nationale de Navigation*, [1936] 2 All E. R. 1167.

(*q*) *I.e.*, with the right to avoid liability in the event of non-disclosure.

(*r*) This effect would require insurers to go against the assured by way of arbitration if the policy contained an arbitration clause.

(*s*) [1941] 1 K. B. 295; [1941] 1 All E. R. 123.

(*t*) *Ibid.*, at pp. 312, 318.

(*u*) Chapter II, *ante*, pp. 99, 100.

(*v*) *De Lassalle v. Guilford*, [1901] 2 K. B. 215.

(*w*) See chapter II, *ante*, pp. 99, 100, and *post*, p. 405.

(*u*) See *post*, pp. 388, 389.

innocent misrepresentation, it entitles the injured party to the same right which is given by the breach of the obligation to disclose in an insurance contract—namely, the right to declare that the contract was never in existence (*b*). If it is a deceit, it gives in addition to the right last mentioned the right to claim damages for any loss suffered thereby (*c*).

If the representation is a part of the offer it may amount to an innocent or a fraudulent misrepresentation, when it will have the effects above described, but it will also become a term of the contract (*d*). In such a case, insurers may either avoid the contract *ab initio* on general equitable grounds (*e*), or, if it is a fraudulent misrepresentation, they may alternatively sue for damages. If the misrepresentation is innocent, it will only give rise to a claim in damages if in addition there is an express term in the contract which gives the insurers the right so to sue (*e*).

C. A contract of motor insurance is made by means of a proposal form which constitutes the offer (*f*). This form consists of a series of questions and answers.

Since it is the offer which is accepted by the insurers it might be thought sufficiently clear that every representation in the proposal form would be a term of the contract (*g*). But this has not been thought sufficiently clear and it has become the custom expressly to state in the policy that "the proposal shall be the basis of this contract and shall be deemed to be incorporated herein" (*h*).

Whilst the inclusion in the contract of the terms offered in the proposal and accepted in the policy does not arise from but is made doubly sure by this clause, the effect of those terms is in some instances considerably altered or enlarged by it (*i*).

For the purpose of demonstrating this result the terms of a contract may be divided into two classes, viz. those the breach of which may produce the extinction of the contract, and those the breach of which cannot have that effect (*k*). Terms of the first class are sometimes called conditions, whilst those of the second class are called warranties (*l*). As has been pointed out, these descriptive words are not consistently or accurately applied in insurance law, and in this section of this chapter the terms essential stipulation and non-essential stipulation are used as descriptive of conditions and warranties respectively in the senses indicated above (*m*).

The effect of the clause in a proposal form or a motor policy making the proposal a basis of the contract is to elevate some of the terms of the proposal from the status of non-essential stipulation to that of an essential stipulation (*n*).

The purpose of the questions and answers in a proposal form is fourfold.

(*b*) See chapter II, *ante*, pp. 99, 100, and *post*, p. 405.

(*c*) *Post*, p. 415.

(*d*) See *post*, pp. 406 *et seq.*

(*e*) *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295; [1941] 1 All E. R. 123, at pp. 128, 130, *per* SCOTT and LUXMOORE, L.JJ., at pp. 312, 318.

(*f*) As a rule this is the case, but not invariably, since the insurers may meet the proposal by an offer of other terms as to premium, &c., in which case they become counter-offers. See this fully discussed, pp. 408–415, *post*.

(*g*) *South East Lancashire Insurance Co., Ltd. v. Croisdale* (1931), 40 Ll. L. R. 22; see *post*, p. 410.

(*h*) See chapter VIII, *post*, pp. 498, 625.

(*i*) *Post*, pp. 397, 398.

(*k*) 7 Halsbury's Laws, 2nd Edn. 229, 230.

(*l*) E.g. on a sale of goods. See Sale of Goods Act, 1893; 17 Halsbury's Statutes 612.

(*m*) *Re Morgan and Provincial Insurance Co.*, [1932] 2 K. B. 70.

(*n*) See *post*, p. 395; *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139; *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356.

It is to define the subject-matter of the insurance (o); to limit the risk insured (p); to obtain from the proposed assured a statement of all facts material to the rate of premium (q); and to obtain from the assured a statement of all facts (whether material in the sense indicated or not) which the insurers desire to know (r).

It now becomes necessary to examine the effect of a clause which is frequently found in a proposal form, whereby it is stipulated that all the statements and answers contained in the proposal form are warranted to be true (s).

The effect is twofold. In the first place, it turns into terms of the contract answers which might otherwise be mere representations without any effect (t). In the second place, it may turn statements which would otherwise be immaterial into material representations (u). The word "warranted" is here used without any special significance. It may have effect as an "essential stipulation" in the sense above defined or it may amount to a non-essential stipulation in that sense. Whether it operates as the one or the other depends upon the nature of the statement which it promises to be true and upon the actual wording of the relevant clauses in the proposal form and in the policy, which, as will be seen hereafter, may govern it (v).

The operation of a proposal form may be summarised as follows:

- (1) It contains the offer made by the assured.
- (2) It contains some of the terms of the contract between assured and insurers.
- (3) The character and effect of the terms which it contains are to be determined in any given case—
 - (i) by the intrinsic nature of the term itself;
 - (ii) by any other term which defines its nature to be found either in the proposal or in the policy (w).

D. The next term of the contract to be considered is that which is generally to be found at the foot of the proposal form or at the head of the policy, or in both these places. This stipulates that "the proposal shall be the basis of this contract and shall be deemed to be incorporated herein." Whether it appears in the proposal or in the policy or in both the result is the same. It is to elevate to the status of essential stipulations (in the sense indicated above) terms in the proposal form which would otherwise be non-essential (x).

Of the terms so elevated the most important is that which stipulates that the truth of the answers in the proposal form is warranted. The effect of this elevation is that those questions and answers which would otherwise amount to mere warranties, the breach of which would not entitle the insurers to cancel the contract, become conditions, the breach whereof entitles the insurers in any case to cancel the contract as from the date thereof and in some to declare that it was never in existence (y).

This is best shown by two examples. Let it be supposed that the proposal form contains the question: "Where is the car garaged?" Let it be assumed that this question is not naturally material (z). Assume

(o) *Post*, pp. 392, 411.

(p) *Post*, p. 411.

(q) *Post*, p. 411.

(r) *Post*, p. 412.

(s) *Post*, pp. 394, 413.

(t) *Post*, p. 413.

(u) *Post*, pp. 413, 414; *Machay v. London General Insurance Co.* (1935), 51 Ll. L. R. 201.

(v) See *post*, pp. 413, 414, and chapter VIII *post*.

(w) See *post*, pp. 413-415.

(x) See chapter VIII, *post*.

(y) See *post*, p. 413. *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139.

(z) Although, as will be seen, it probably is. See *post*, p. 430.

further that the answer thereto, "In the XYZ garage," is false. Without the "warranty of truth clause" in the proposal form, the answer would be a mere representation without contractual effect. With the "warranty of truth" clause the question and answer become a term of the contract, describing and limiting the risk insured (a). The falsity of the answer would be a mere breach of warranty which might or might not have effect upon the operation of the contract but would not affect its validity. It might entitle the insurers to repudiate liability to make good a particular loss which occurred on the ground that it was a risk not covered by the policy as defined by this term. It would never of itself entitle the insurers to declare the policy void or to cancel it. But with the "basis clause," or by the "condition precedent" clause, or by some combination of these, the question is made material and the falsity of the answer produces the same result as the failure to disclose or the false statement of a material fact, viz. to vitiate the whole contract and entitle the insurers, if they choose, to repudiate any liability to the assured under the policy (b).

II.—EFFECT OF THE ROAD TRAFFIC ACT, 1934, ON MATERIALITY AND NON-DISCLOSURE OR FALSE REPRESENTATIONS

It must now be pointed out that at Common Law the non-disclosure or false representation of a fact or circumstance during the negotiations from which an insurance contract arises will vitiate that contract only if the fact or circumstance concealed or misrepresented is *material* (c). The meaning of "material" has already been defined and is further explained below (d). But before Part II of the Road Traffic Act, 1934, was passed the question of materiality was rarely of direct importance in motor insurance contracts (e).

This was so for two reasons.

First, because it had become the practice of motor insurers to ask in the proposal form so many questions of such a searching character that there was rarely any material fact or circumstance which was not covered by these questions (f).

Secondly, because almost invariably a clause of the "basis" or "warranty of truth" type, as described above, was inserted in the contract. In most cases the contract (consisting as it does of the proposal form plus the policy) contained clauses of both types (g), and often a third having the same effect (h).

The effect of either of these was (as has been explained) to make the question of materiality irrelevant in respect to any matter covered by the questions in the proposal form. The effect, expressed in another way, was to make everything so covered artificially or contractually material. The

(a) *Dawsons, Ltd. v. Bonnin* (*infra*); *Paxman v. Union Assurance Society, Ltd.* (1923), 15 Ll. L. R. 206; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139; *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240; *Machay v. London General Insurance Co.* (1935), 51 Ll. L. R. 201.

(b) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139; *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356; *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (1934), 49 Ll. L. R. 231; *Machay v. London General Insurance Co.* (1935), 51 Ll. L. R. 201.

(c) *Post*, pp. 385 *et seq.*, and *ante*, chapter II, p. 100.

(d) *Post*, pp. 391 *et seq.*

(e) See generally chapter V, pp. 303 *et seq.*, *ante*.

(f) *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356.

(g) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(h) *I.e.* a "condition precedent" clause. See *post*, chapter VIII, p. 625.

effect of section 10 of the Road Traffic Act, 1934, has already been explained (i). In proceedings by insurers under subsection (3) of that section for a declaration that they were entitled to avoid the policy on the ground of non-disclosure or false representation the position was different from that in proceedings at Common Law in three respects :

(1) In the first place, the insurers had to show that *they were induced to and did issue* the policy in question by reason of the concealment or misrepresentation, whereas in Common Law proceedings it was necessary *only to prove the fact of concealment or misrepresentation, the inducement and consequent issue of the policy being presumed, or at any rate requiring no proof (k).*

(2) In the second place, in such proceedings under section 10, the question of materiality had to be treated as if there were no "basis" or "warranty of truth" clauses (or neither) in the contract. For the purposes of the section such clauses are irrelevant and wholly ineffective (l) ;

(3) Thirdly, in such proceedings under section 10, the question of materiality was not determined by the proposal form or the questions contained therein (m).

It must also be clearly noticed that the Act of 1934 affected proposal forms and clauses of the "basis" or "warranty of truth" type in another way. In proceedings by third parties against insurers under subsection (1) of section 10 of the Act of 1934 for payment of the indemnity provided by the policy, insurers were not as a rule entitled to rely upon the untruth of statements made by the assured in the proposal form or upon such clauses as entitling them to refuse payment (n). Insurers were obliged, under that subsection, to satisfy the judgment obtained against their assured, wherever the judgment was in respect of a liability covered by the terms of the policy. In regard to the obligation to satisfy the third party judgment under subsection (1) of section 10 insurers could rely upon untrue or inaccurate answers in the proposal form or upon the "basis" or "warranty of truth" clause only in so far as such answer or such clause had the effect of excluding the liability in respect of which the judgment was obtained from the cover given by the policy (o). This may be illustrated by one example :

Supposing that the proposal form in a particular case contained the question "For what purposes will the vehicle be used?" and the answer thereto given by the assured was "For private pleasure purposes only." The proposal form contains a warranty that all answers to questions therein are true. The policy contains a basis clause.

Liability to a third party is incurred whilst the vehicle is being used for commercial purposes. In proceedings by the third party against the insurers to enforce payment of the amount recovered by him in an action against the assured, the insurers could not rely upon the allegation that the statement that the vehicle would be used only for private pleasure was untrue, and that therefore, by reason of the "basis" or "warranty of truth" clause, the policy was void. In such proceedings the insurers could only rely upon the answer to the question in the proposal form, or upon the "basis" and "warranty of truth" clauses

(i) Chapter V, *ante*, pp. 278 *et seq.*

(k) *Post*, pp. 391 *et seq.*; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529, *per* MACKINNON, L.J.

(l) Chapter V, *ante*, pp. 278 *et seq.*

(m) Chapter V, *ante*, pp. 278 *et seq.*

(n) *Ibid.*, pp. 278 *et seq.*

(o) Chapter V, *ante*, pp. 303 *et seq.*, and also see p. 406, *post*.

as constituting a term of the policy, of which the effect was to exclude from the risks covered liability incurred whilst the vehicle was being used otherwise than for private pleasure (*p*).

Although, as stated, the question of materiality was not determined by the questions asked in the proposal form, in proceedings by insurers against the assured under section 10 of the 1934 Act, that matter was not wholly unaffected by those questions (*q*). It was affected in two ways.

First, insurers found the burden of proving that a particular fact or circumstance was material was more onerous if that fact or circumstance was not covered by the questions in the proposal form (*r*).

Conversely, although the materiality of facts and circumstances covered by questions in the proposal form was not assumed, in most cases the presence of a question in the proposal form was considerable though not conclusive evidence in support of the allegation that the fact or circumstance to which it is directed was material (*s*).

Secondly, the fact that the insurers asked a specific question concerning a particular fact or circumstance was strong evidence in support of the allegation that the concealment or misrepresentation of that fact or circumstance operated upon their minds so as to cause them to issue the policy (*t*).

Having regard to the views expressed above, it is proposed in this chapter to treat the question of materiality in so far as that question is dealt with by way of practical illustration or example only in relation to the various questions which have hitherto been commonly found in motor insurance proposal forms (*u*). It is not proposed to explore the possibilities of hypothetical facts which might in certain circumstances be held to be material, or to suggest questions which may hereafter be added to those now usually to be found in proposal forms.

There are many facts not now completely covered by these questions which might be regarded as material. Some of these have become material only since and by reason of the Road Traffic Acts, 1930 and 1934, and the M.I.B. Agreements (*v*). One instance may be suggested.

Under section 38 of the Act of 1930 and under section 12 of that of 1934, and by operation of the M.I.B. Agreements, insurers become obliged in certain circumstances to pay the full indemnity provided by the policy when their assured has by the terms of his policy no sort of right to demand it. In such circumstances the insurers are obliged to look to their assured for reimbursement of monies which they have thus been forced to pay (*w*). In this state of the law it is submitted that the financial resources of the pros-

(*p*) *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590; *Gray v. Blackmore*, [1934] 1 K. B. 95; *Passmore v. Vulcan Boiler and General Insurance Co.* (1935), 154 L. T. 258; *Levinger v. Licenses and General Insurance Co.* (1936), 54 Ll. L. R. 68; *Jones v. Welsh Insurance Corporation, Ltd.*, [1937] 4 All E. R. 149.

(*q*) Chapter V, *ante*, pp. 303 *et seq*.

(*r*) *Per SCRUTTON, L. J.*, in *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356; and in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 50 T. L. R. 528; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

(*s*) See *ante*, p. 303, *post*, pp. 391 *et seq*. But see *Zurich General Accident and Liability Insurance Co. v. Livingston*, [1940] S. C. 406; *Broad v. Waland* (1942), 73 Ll. L. R. 263; *Zurich General Accident and Liability Insurance Co. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

(*t*) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356. But see *Broad v. Waland* (1942), 73 Ll. L. R. 263; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

(*u*) *Post*, pp. 419 *et seq*.

(*v*) See chapters IV, V and VI, *ante*.

(*w*) Chapter V, *ante*, p. 327; chapter VI, *ante*, p. 374.

pective assured might well be a fact which insurers would regard as material to the risks which they undertake to insure. This, of course, involves an analysis of the meaning "risk" in this connection, but if that word includes the risk which the insurers run of losing money *under the policy* by reason of the issue of the policy, the fact that the proposed assured is a person of small financial means is clearly material thereto (x).

For the above reasons, in the section of this chapter which deals with the proposal form in motor insurance the various matters to which each question in that form is directed are considered in their relation to the topic of materiality as well as in relation to the terms of the contract (y).

PART 2.—NON-DISCLOSURE

As has been previously indicated a contract of insurance is *uberrimae fidei* (a). It is one of those classes of contracts in which the utmost good faith is required of both parties during the making of the contract (b). The essential features of these contracts in which good faith is required are well known from the dicta in many authorities, of which the best known are *Carter v. Boehm* (c), *Dalglish v. Jarvie* (d), *London Assurance v. Mansel* (e), and *Joel v. Law Union and Crown Insurance Co.* (f). The following dicta are taken from the cases last named as illustrative of the principle:

"Insurance is a contract on speculation (g). The special facts, upon which the contingent chance is to be computed, lie more commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such a circumstance is fraud and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement" (h).

"Upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the utmost degree of good faith, *uberrima fides*. In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of insurance, but all

(x) Thus insurers will, it is apprehended, at least feel more secure in issuing a policy to a wealthy corporation than to an impecunious individual. For if, in the case of the corporation the insurers become obliged to pay the amount of an indemnity by reason of the provisions of section 38 of the Act of 1930 or section 12 of the Act of 1934, which indemnity the corporation has by the terms of its policy no right to claim, the insurers will be able to recover the amount thereof and will suffer no loss. But in the case of an impecunious individual in like circumstances the insurers will probably suffer an irrecoverable loss. Nevertheless, no case has yet been reported in which this point has been taken. For cases on the "moral hazard" inherent in insurance business, see *Locker and Woolf, Ltd. v. Western Australian Insurance Co.*, [1936] 1 K. B. 408; *Merchants and Manufacturers Insurance Co. v. Davies*, [1938] 1 K. B. 196; [1937] 2 All E. R. 767; *Cleland v. London General Insurance Co.* (1935), 51 Ll. L. R. 156.

(y) *Post*, pp. 419 *et seq.*

(a) Chapter II, *ante*, pp. 99, 100.

(b) *Cf.*, SCRUTTON, L.J., in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361.

(c) (1766), 3 Burr. 1905.

(d) (1850), 2 Mac. & G. 231.

(e) (1879), 11 Ch. D. 363.

(f) [1908] 2 K. B. 863.

(g) See chapter II, pp. 73 *et seq.*, *ante*.

(h) *Carter v. Boehm* (1766), 3 Burr. 1905, *per* Lord Mansfield, L.J., at p. 1909.

"which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment vitiates the policy" (i).

"The contract of life insurance is one *uberrimae fidei*. The insurer is entitled to be put in possession of all material information possessed by the insured" (k).

The principle is conveniently summarised in the Marine Insurance Act, 1906 (l), section 17 of which runs:

"A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party the contract may be avoided by the other party."

While this definition is expressly limited to contracts of marine insurance it is recognised that precisely the same principle applies to all other contracts of insurance (m). The contents of those sections of the Act cited which deal with non-disclosure and representations may be usefully and conveniently employed, with certain exceptions, for the purposes of the present chapter (n). To use a dictum of FLETCHER MOULTON, L.J.:

"Sections 17 and 18 (of the Act cited) apply to policies of every kind whatever be the risk insured against. They apply to every policy by reason of the nature of the contract of insurance" (o).

The good faith which is the basis of the contract of insurance is mutual. The insurers just as much as the assured are bound to make full disclosure of all the material facts (p). But inasmuch as, particularly in contracts of motor insurance, it is only the prospective assured who has knowledge of the particular risks of which he desires to effect insurance, in the branch of the law of insurance now under discussion disclosure by insurers is of little practical importance.

The duty of disclosure which rests upon the parties to the contract of insurance is to make a *complete* disclosure and an *accurate* disclosure. Not only must the party fully disclose every material fact of which he knows or ought to know, but everything which he discloses must be accurate both in itself and in the light of other existing circumstances which are not disclosed (q). Not only must what is stated be true, but nothing must be kept back which might make what is stated substantially untrue (r).

1. The Nature of the Duty of Disclosure

It is said that the duty of disclosure is not contractual and that it depends upon some rule of law applying to particular classes of contracts (s).

(i) *Dalglisch v. Jarvie* (1850), 2 Mac. & G. 231, per Baron ROLFE, at p. 243.

(k) *London Assurance v. Mansel* (1879), 11 Ch. D. 363, per JESSEL, M.R., at p. 367.

(l) 9 Halsbury's Statutes 851.

(m) *London Assurance v. Mansel* (supra); *Seaton v. Burnand*, [1899] 1 Q. B. 782.

(n) Cf. *Yorke v. Yorkshire Insurance Co.*, [1918] 1 K. B. 662, per MCCARDIE, J., at p. 666.

(o) *Cantiere Meccanico Brindisino v. Janson*, [1912] 3 K. B. 452.

(p) Per FARWELL, L.J., in *Re Bradley and Essex and Suffolk Accident Indemnity Society*, [1912] 1 K. B. 415, at p. 430.

(q) *Brownlie v. Campbell* (1880), 5 App. Cas. 925; *Everett v. Desborough* (1829), 5 Bing. 503; *Carter v. Boehm* (1766), 3 Burr. 1905.

(r) *Holt's Motors, Ltd. v. South East Lancashire Insurance Co., Ltd.* (1930), 37 Ll. L. R. 1; *Zurich General Accident and Liability Insurance Co. v. Livingston*, [1940] S. C. 406; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

(s) E.g. *Welford's Accident Insurance*, 2nd Edn., p. 24; *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295, at p. 312; [1941] 1 All E. R. 123, at p. 128.

It is also argued that the duty to disclose is one which is implied in every contract of insurance by virtue of the terms of that contract rather than by force of general law (t). The treatment of the duty to disclose as proceeding from an implied term in the contract of insurance may be put on two grounds, the first that disclosure is a condition precedent to the liability of the underwriters on the policy (u), the second that failure to disclose prevents the existence of the *consensus ad idem* necessary to constitute the contract of insurance (a). In *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (b), MACKINNON, J., clearly regarded the duty as arising from an implied term of the contract. But in *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne* (c), SCOTT, L.J., (d), distinguishing the basis of the duty of disclosure from that of accurate representation, stated that he found it difficult to explain fully the Common Law duty of disclosure on the theory of its resting on an implied term of the contract. If it did, it would not arise until the contract had been made, and then its only effect would be to unmake it (e).

If this submission be correct it will have the consequence that every breach of the duty to make complete and accurate disclosure will be tantamount either to a breach of a stipulation of the contract itself, or else be evidence of such lack of *consensus ad idem* as will entitle the parties to avoid the contract on the ground of mistake. These results will ensue whether the non-disclosure in question be made fraudulently or innocently.

2. Extent of the Duty of Disclosure

Subject to certain exceptions the assured must before the contract of insurance is concluded disclose to the insurer "every material fact which is known to the assured and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him" (f).

The extent of the duty of disclosure necessitates the separate examination of two of its constituent elements as above defined, viz. knowledge and materiality.

The assured (or insurer) must disclose material facts which he knows or ought to know. The time at which his knowledge is important is the time when he is making or under the duty to make disclosure (g). Thus in *Whitwell v. Autocar Insurance Co.* (h) the assured was held not obliged to communicate to the insurers rejections of the proposed risk by other insurers which had come to his knowledge after he had complied with his duty of disclosure, and he was held entitled to enforce the contract of insurance of his motor car into which the insurers had entered (i). Even though the

(t) *Moens v. Heyworth* (1842), 10 M. & W. 147, at p. 157.

(u) *Blackburn, Low & Co. v. Vigors* (1887), 12 App. Cas. 531, at p. 539; *Pickersgill (William) & Sons, Ltd. v. London and Provincial Marine and General Insurance Co., Ltd.*, [1912] 3 K. B. 614, and *Jester-Barnes v. Licenses and General Insurance Co., Ltd.*, *infra*.

(a) *Laing v. Union Marine Insurance Co., Ltd.* (1859), 11 T. L. R. 359. It might be said that every case of non-disclosure involves a mistake, i.e. a mistake of the insurers as to the quality of the risk proposed to them for insurance, and since such mistake is known to the assured it operated to prevent the making of a binding contract.

(b) (1934), 49 Ll. L. R. 231.

(c) [1941] 1 K. B. 295; [1941] 1 All E. R. 123.

(d) *Ibid.*, at p. 313.

(e) And see *ibid.*, LUXMOORE, L.J., at p. 318.

(f) Marine Insurance Act, 1906, s. 18.

(g) The assured is under such duty until there is a binding contract of insurance made. Some motor policies contain an express term to this effect, but notwithstanding its absence, the same principle applies. See *Looher v. Law Union and Rock Insurance Corporation Ltd.*, [1928] 1 K. B. 554.

(h) (1927), 27 Ll. L. R. 418.

(i) Cf. *Wake v. Atty* (1812), 4 Taunt. 493; *Willmott v. General Accident Insurance Co.* (1935), 53 Ll. L. R. 156.

assured was actually ignorant of the facts concerned, if he ought to have known of them in the ordinary course of events then he will be deemed to have known them for the purposes of applying the rules as to non-disclosure. Thus in *Dunn v. Ocean Accident and Guarantee Corporation, Ltd.* (*k*), the view was expressed that a wife should have known of her husband's previous driving record, although the case was decided upon other grounds (*l*). The knowledge of the assured's agent is generally to be treated as the knowledge of the assured, so that non-disclosure by either principal or agent will affect the validity of the contract (*m*). The subject of agency as regards disclosure and representations is treated in more detail later in the present chapter (*n*).

The knowledge of the assured which is relevant in applying the rules of non-disclosure, is not knowledge of the materiality of any particular facts, but knowledge of the facts themselves (*o*). The question as to whether certain facts are or are not material is not one for the assured to decide, but is determined by the views of reasonable, prudent insurers (*p*).

"The proper question is whether any particular circumstance was in fact material and not whether a party believed it to be so" (*q*).

Thus, in *Bond v. Commercial Union* (*r*), the non-disclosure by a father of his son's previous motoring convictions, where the son, *inter alios*, was intended to drive the insured car, was held to be such non-disclosure as entitled the insurers to avoid the contract of insurance. While in *Farra v. Hetherington* (*s*) the failure of an assured to disclose the fact that cars which he had previously owned had on several occasions been temporarily stolen or abstracted from his possession was also held a sufficient non-disclosure to entitle the insurers to avoid a policy, even though the assured had not deemed it to be material.

3. Materiality

Materiality is a question of fact in the circumstances of every case (*t*). It may be defined as :

"Every circumstance . . . which would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk" (*u*).

(*k*) (1933), 50 T. L. R. 32 ; 47 Ll. L. R. 129.

(*l*) *Post*, p. 425.

(*m*) *Newsholme Brothers v. Road Transport and General Insurance Co.*, [1929] 2 K. B. 356.

(*n*) *Post*, pp. 400 *et seq.*

(*o*) *Brownlie v. Campbell* (1880), 5 App. Cas. 925, *per* Lord BLACKBURN, at p. 954 ; *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863, *per* MOULTON, J., at p. 884.

(*p*) See *post*, pp. 391 *et seq.*

(*q*) BAYLEY, J., in *Lindenau v. Desborough* (1828), 8 B. & C. 586.

(*r*) (1930), 36 Ll. L. R. 107. See also on this point *Zurich General Accident and Liability Insurance Co. v. Livingston*, [1940] S. C. 406 ; *Cleland v. London General Insurance Co.* (1935), 51 Ll. L. R. 156 ; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53 ; [1942] 1 All E. R. 529 ; *Broad v. Waland* (1942), 73 Ll. L. R. 263 ; *Merchants and Manufacturers Insurance Co. v. Davies*, [1938] 1 K. B. 196 ; [1937] 2 All E. R. 767 ; *Taylor v. Eagle Star Insurance Co.* (1940), 67 Ll. L. R. 136.

(*s*) (1931), 47 T. L. R. 465 ; cf. *Carlton v. Park* (1922), 10 Ll. L. R. 776, 818 ; 12 Ll. L. R. 246 ; *Ewer v. National Employers' Mutual General Insurance Association, Ltd.*, [1937] 2 All E. R. 193 ; *Cornhill Insurance Corporation v. Assenheim* (1937), 58 Ll. L. R. 27 ; *Norman v. Gresham Insurance Co.* (1935), 52 Ll. L. R. 292.

(*t*) *Joel v. Law Union and Crown Insurance Co.* (*supra*), 6 Edw. 7. c. 41, s. 18 (4).

(*u*) Marine Insurance Act, 1906, s. 18 (2) ; 9 Halsbury's Statutes 856 ; cf. *Yorkshire Insurance Co., Ltd. v. Campbell*, [1917] A. C. 218.

the contrary by Lord MANSFIELD in the old case of *Carter v. Boehm* (z), that the evidence of experts in insurance is admissible as to whether a given fact or circumstance was material in the sense defined (a). In the words of McCARDIE, J.:

" . . . Expert evidence with respect to the materiality of a fact has
" been freely admitted in recent years by the experienced judges who have
" administered and are now administering justice in the Commercial Court.
" . . . The practice I conceive is settled. . . . I conceive that no sound
" distinction can be drawn between life, fire or other heads of insurance
" business . . ." (b).

Whilst all facts which may affect the judgment of the insurer in accepting or estimating upon what terms he will accept the risk are material, there are nevertheless certain well-defined types of circumstances which need not be disclosed to the insurers (c). These are:

(i) Circumstances which diminish the risk (d).

(ii) Circumstances which are known or presumed to be known to the insurer. He is presumed to know matters of common notoriety of knowledge (e), and matters which in the ordinary course of his business as such he ought to know (f).

(iii) Circumstances as to which he waives information (g). An insurer will be deemed to waive information when facts are disclosed, even in the shape of a hesitating or uncertain answer (h), which should have put him as a reasonable man on inquiry and he fails to make inquiry (i).

(iv) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty (j).

(z) (1766), 3 Burr. 1905. "Great stress was laid upon the opinion of the broker. But we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly proved, could only be drawn from the same premises from which the court and jury were to determine the cause; and therefore it is improper and irrelevant in the mouth of a witness" (Lord MANSFIELD).

(a) Sm. L. C., Notes to *Carter v. Boehm* (1766), 3 Burr. 1905, and cases there cited. In *Merchants and Manufacturers Insurance Co. v. Davies*, [1938] 1 K. B. 196, [1937] 2 All E. R. 767, where insurers were avoiding the policy for non-disclosure of previous motoring convictions, an application was made for discovery of the insurers' documents which related to policies granted or refused previously where the assured had made disclosure of such convictions. The application was refused, on the ground that it was irrelevant. Insurers might well refuse to insure a man who failed to make such a disclosure, if they could have discovered that he was such a person.

(b) *Yorke v. Yorkshire Insurance Co.*, [1918] 1 K. B. 662, at p. 670; and see *Horne v. Poland*, [1922] 2 K. B. 364, at p. 368.

(c) Marine Insurance Act, 1906, s. 18; 9 Halsbury's Statutes 856.

(d) *Carter v. Boehm* (*supra*). See *post*, p. 395.

(e) *E g.* war (*Bales v. Hewitt* (1867), L. R. 2 Q. B. 595), rebellion (*Leen v. Hall* (1923), 16 Ll. L. R. 100).

(f) *Harrower v. Hutchinson* (1870), L. R. 5 Q. B. 584; *Tate v. Hyslop* (1885), 15 Q. B. D. 368.

(g) *Carter v. Boehm* (*supra*); *Thomson v. Weems* (1884), 9 App. Cas. 671. The principle of implied waiver is important in motor insurance where insurers invariably set out a series of questions to which they require replies in order to aid them in "determining" their acceptance of the risk.

(h) *Thomson v. Weems* (*supra*).

(i) *Seaton v. Burnand*, [1900] A. C. 135; *Mann, Macneal and Stoves v. Capital and Counties Insurance Co.*, [1921] 2 K. B. 300; *Greenhill v. Federal Insurance Co.*, [1927] 1 K. B. 65.

(j) *Haywood v. Rodgers* (1804), 4 East. 590.

6. Effect of Questions in Proposal Form

(a) **On Materiality.**—The general practice of insurers of motor cars and the risks arising from their use is to submit to the prospective assured a proposal form upon which certain questions relating to the risk to be insured are asked. This practice is different from that adopted by marine insurers, who are content with the onus which the implied terms of such contract throw upon the assured to disclose every material fact (*k*). The practice of motor car insurers, which is common to life and accident insurers in this respect, has considerable bearing upon the question of materiality involved in non-disclosure and in misrepresentation. The proposal form as a rule contains express terms or, as they are called, "warranties," in which the truth of the answers to the questions of the proposal form is made the basis of or a condition precedent to the liability of the insurers under the contract (*l*). Where such a term appears in the contract of insurance, as is generally the case, it is well settled that the question of materiality in relation to any circumstance which is dealt with in the proposal form or the answers thereto becomes irrelevant (*m*). By making the truth of the matters stated a part of the contract, the assured and insurers are deemed mutually to agree that every circumstance therein included is a material circumstance in fact, in relation to which non-disclosure or misrepresentation will avoid the contract (*n*). On the other hand, the fact that a specific question is directed to it, may afford strong proof of the materiality of a fact (*nn*).

(b) **On Duty.**—This practice of preceding the contract of insurance by comprehensive questioning, with or without the inclusion of an express term in the contract that the circumstances so covered are deemed to be the basis or a condition of the contract, may have one further important consequence on the question of materiality. The Courts have shown a tendency towards the view that only circumstances which are in fact raised in the questions and answers of the proposal form are material. As SCRUTTON, L.J., remarked in *Newsholme Brothers v. Road Transport & General Insurance Co.* (o) :

"The insurance companies also run the risk of the contention that matters they do not ask questions about are not material, for if they were they would ask questions about them."

This tendency may be illustrated by reference to two other motor insurance cases. In the first of these, *Arlé v. Lancashire and General Insurance Co.* (p), it was alleged *inter alia* that the assured had failed to disclose that he had entered into a hire-purchase agreement relating to the insured car; in the second of these, *Brewtnall v. Cornhill Insurance Co.* (q), the assured had disclosed the value of the insured car as £145, the facts being that the vendor to her had agreed to take her old car for £100 on the sale

(k) *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356, *per* SCRUTTON, L.J., at p. 362.

(l) See *post*, pp. 411-15, for a general warranty of "truth and disclosure."

(m) *Newcastle Fire Insurance Co. v. Macmorran & Co.* (1815), 3 Dow. 255; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139. But not in the sense that nothing else need be disclosed.

(n) *Condogianis v. Guardian Assurance Co.*, [1921] 2 A. C. 125; *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413 (motor car); *Parman v. Union Assurance Society, Ltd.* (1923), 15 Ll. L. R. 206 (motor car).

(nn) *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139.

(o) [1929] 2 K. B. 356, at p. 363. Cf. SCRUTTON, L.J., in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361.

(p) (1927), 27 Ll. L. R. 454. Cf. also the remark of GODDARD, L.J., in *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529: "I cannot help thinking that if it is material to know whether the proposer has failed in a driving test, the insurer would ask the question."

(q) (1931), 40 Ll. L. R. 166.

of the insured car, and that only £45 had actually passed in cash from the insured purchaser to the vendor. In the former case, SWIFT, J., in giving judgment for the assured, remarked :

" If the defendant company wanted to know the name of the owner of the car nothing would have been simpler than to have asked the question. The worst that can be said against the plaintiff is that he answered the questions that he was asked to answer and has not answered the questions that he was not asked."

In the latter case, CHARLES, J., giving a similar judgment, said :

" If the insurance company really wish and if their intention really is in asking the question as to the cost price to the proposer to have all the ingredients of the costs, not only the cash but all the ingredients, set out in the proposal form, then they should frame their questions in such a way as will show to the proposer what it is that is expected of him and just what is intended."

This line of reasoning may be justified by reference to the well-known doctrine of waiver in insurance contracts. The insurers, that is, may be deemed to have said, " we are only interested in *these* matters ; we are not concerned and have no desire to be concerned with anything else." Whether or not such principle falls to be applied depends upon the facts and circumstances of every particular case (r).

(c) **On performance of Duty.**—Where, as is customary, questions as to the material circumstances are formulated in the proposal form (s), the insurers thereby indicating that the matters therein comprised are, at all events, material in the sense that they desire to be informed of them whatever be the position of extrinsic matters, important questions arise as to the form in which such questions are asked.

" In a contract of insurance it is a weighty fact that the questions are framed by the insurer and that if an answer is obtained to such a question which is upon a fair construction a true answer, it is not open to the insuring company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question. Otherwise the ambiguity would be a trap against which the assured would be protected by courts of law " (t).

The form in which a question relating to a material circumstance is framed may thus preclude the insurers from relying upon non-disclosure or misrepresentation in relation to the answer to such question. This principle is well settled in application to life insurance contracts (u), and has been applied to motor insurance contracts in the case of *Corcos v. De Rougement* (v), where the assured, in reply to the question : " How long have you driven a motor car ? " made answer : " Several years," the fact being that although in the course of her life she had had several years'

(r) *Carler v. Boehm* (1766), 3 Burr. 1905 ; *Greenhill v. Federal Insurance Co.*, [1927] 1 K. B. 65 ; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139.

(s) See *post*, pp. 418 *et seq.*

(t) *Condogianis v. Guardian Assurance Co.*, [1921] 2 A. C. 125, *per* Lord SNAW, at p. 130. See also *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295, at p. 311 ; [1941] 1 All E. R. 123, at p. 127 ; *Revell v. London General Insurance Co.* (1934), 50 Ll. L. R. 114.

(u) *Re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K. B. 591 ; *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863.

(v) (1926), 23 Ll. L. R. 164. *Cp.* *MACKINNON, J.*, in *Mundy's Trustees v. Blackmore* (1928), 32 Ll. L. R. 150, on the ambiguity of the phrase " minor accidents," and *CHARLES, J.*, in *Brewtall v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 166, on " cost price."

driving experience spread over a long period she had not any such experience during the time immediately preceding the insurance effected. The insurers argued that she should have disclosed the true facts of her experience, but it was held by MCCARDIE, J., that the reply which she furnished to the question was a complete and accurate reply to the question as framed, and that the assured therefore was guilty of neither non-disclosure nor misrepresentation. The important point which arises when the inquiry in this kind of question is limited to a certain period is discussed below (vv).

7. Immaterial facts

Circumstances which on the facts of any given case do not affect the risk need not be disclosed. Accordingly, if nothing is said of such facts, or if such facts are misrepresented, the contract is unaffected unless in the latter case it contains a warranty of accuracy (w). Immaterial circumstances in this sense are determined as at the time when the negotiations preceding the contract are afoot. It is according to the facts as they are at that time, and not in the event which happens, that the materiality of circumstances known or which should have been known to the assured is determined (x).

The effects of non-disclosure upon the contract of insurance, whether as an implied as or an express term thereof, as well as the consequences of the provisions of the Road Traffic Act, 1934 (y), on the Common Law relating to non-disclosure or misrepresentation have been discussed and are considered later in this chapter (z), and the consequences of repudiation and avoidance of the policy are discussed in Chapter IX.

PART 3.—MISREPRESENTATION

The making of every contract of insurance is preceded by representations as to the subject-matter of such contract, i.e. the risk (u), which are made by the assured or his agent to the insurers for the purpose of inducing them to enter into the contract. Sometimes, and frequently in the case of motor insurance contracts, representations later become actual terms of the contract by being embodied in the proposal form as completed by the assured, which later becomes incorporated into the policy (b). Where such is the case, they fall to be treated upon a footing different from that upon which representations not becoming part of the contract must be considered. Where a representation becomes a term of the contract, and subsequently turns out to be untrue in fact, there will have been the breach of such contract giving rise to rights on the part of the insurer under the contract itself (c).

Where, however, representations are made which do not become terms of the contract itself, then every such representation which is material, in that it would influence the judgment of a prudent insurer in fixing the

(vv) *Post*, pp. 445 *et seq.*

(w) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Machay v. London General Insurance Co.* (1935), 51 Ll. L. R. 201.

(x) *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co., Ltd.*, [1925] A. C. 344.

(y) Road Traffic Act, 1934, s. 10 (see *ante*, chapter V, pp. 307 *et seq.*).

(z) *Post*, pp. 405 *et seq.*; see chapter V, *ante*, pp. 307 *et seq.*

(a) The subject-matter of the risk, e.g. the motor car or other property insured, is not, strictly speaking, the subject-matter of the insurance.

(b) See *post*, pp. 467 *et seq.*, and chapter VIII, *post*, p. 625.

(c) *Ante*, pp. 385 *et seq.*

premium or determining whether he will take the risk (*d*), must be true. Materiality has exactly the same connotation as in non-disclosure. It is a question of fact in every case (*e*), which is to be determined by reference to circumstances prevailing at the time when the statement complained of was made (*f*). Representations may be either as to matters of fact, which are true only when the representation is substantially accurate, that is, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer (*g*), or as to matters of expectation or belief, which are true when they are made in good faith (*h*), that is, by an assured who *bona fide* entertains the expectation or belief concerned (*i*).

The principle that all material representations must be true is applied in two ways: firstly, that such representations shall not be false but accurate; secondly, that representations shall be completely true not only in their content but in their implication (*j*). The cases of *Mundy's Trustees v. Blackmore* (*k*) and *Dent v. Blackmore* (*l*), in the second of which a number of accidents were disclosed under the description "damaged wings" when some of them had serious consequences, illustrate the former of these applications. The cases of *Holt's Motors, Ltd. v. South East Lancashire Insurance Co., Ltd.* (*m*), and *Broad and Montagu v. South East Lancashire Insurance Co.* (*n*), in both of which some previous rejections or non-renewals of insurance were concealed whilst others were stated, illustrate the latter application of the principle.

The rule in marine insurance is that every material representation must be true in fact (*o*), and that if a representation turns out untrue, whether it were made fraudulently or innocently, the insurer is entitled to avoid the contract (*p*). Upon the authority of two cases, *Anderson v. Fitzgerald* (*q*) and *Wheelton v. Hardisty* (*r*), it has commonly been regarded as settled law that the marine insurance rule as to the consequences of innocent misrepresentation does not extend to other types of insurance (*s*). It is sub-

(*e*) Marine Insurance Act, 1906, s. 20 (7); 9 Halsbury's Statutes 858

(*d*) Marine Insurance Act, 1906, s. 20, 9 Halsbury's Statutes 858. Cf. Road Traffic Act, 1934, s. 36 (4); 27 Halsbury's Statutes 562. *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

(*f*) *Ante*, p. 391. Cf. *Looker v. Law Union and Rock Insurance Co., Ltd.* [1928] 1 K. B. 554, and *Re Wilson and Scottish Insurance Corporation*, [1920] 2 Ch. 28.

(*g*) Marine Insurance Act, 1906, s. 20 (4), 9 Halsbury's Statutes 858

(*h*) *Thomson v. Weems* (1884), 9 App. Cas. 671; *Yorke v. Yorkshire Insurance Co.* [1918] 1 K. B. 662.

(*i*) *Bowden v. Vaughan* (1809), 10 East 415; *Anderson v. Pacific Fire and Marine Insurance Co.* (1872), L. R. 7 C. P. 65; *Merchants and Manufacturers Insurance Co., Ltd., v. Hunt and Thorne*, [1940] 4 All E. R. 205; affirmed, [1941] 1 K. B. 205; [1941] 1 All E. R. 123 (C.A.); *Zurich General Accident and Liability Insurance Co. v. Livingston*, [1940] S. C. 406; *Broad v. Waland* (1942), 73 Ll. L. R. 263.

(*j*) *London Assurance v. Mansel* (1879), 11 Ch. D. 363; *Dent v. Blackmore* (1927) 29 Ll. L. R. 9, in both of which some insurances were, whilst others were not, disclosed. If the assured gives an unqualified negative to a question (*i.e.*, "has any person who to your knowledge will drive the car ever been convicted, etc."), that answer is an assertion that he has the knowledge which he purports to impart, and that that knowledge is what he is imparting. It does not mean "to the best of my knowledge and belief." *Zurich General Accident and Liability Insurance Co. v. Livingston*, [1940] S. C. 406; *Broad v. Waland* (1942), 73 Ll. L. R. 263.

(*k*) [1928], 32 Ll. L. R. 150. See *ante*, p. 392, note (*g*).

(*l*) [1927], 29 Ll. L. R. 9.

(*m*) (1930), 37 Ll. L. R. 1.

(*n*) [1931], 40 Ll. L. R. 328.

(*o*) Marine Insurance Act, 1906, s. 20 (1); 9 Halsbury's Statutes 858.

(*p*) *Ionides v. Pacific Insurance Co.* (1872), L. R. 7 Q. B. 517.

(*q*) (1853), 4 H. L. Cas. 484.

(*r*) (1858), 8 E. & B. 232.

(*s*) *E.g. per VAUGHAN WILLIAMS, L.J.*, in *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863, at pp. 877-9. Cf. *Welford's Accident Insurance*, 2nd Edn., pp. 36-7.

mitted that this opinion cannot be sustained in law. The basis of the decision in the two cases relied upon as authoritative was the Common Law principle that no remedy was available for misrepresentation not amounting to fraud which was no part of the terms of a contract (*t*). Since the decisions in those cases, by the application of equitable principles, the Courts first arrived at the rule that innocent misrepresentation could be relied upon as a ground for rescinding any contract, though not as a ground for obtaining damages (*u*). Indeed, it is difficult to see why the principle which is now taken to apply to other types of contract should not be applicable to all contracts of insurance. Complete and accurate knowledge by the insurers of the risk to be insured is, as has been seen, of the essence of the contract as far as the liability of the assured to disclose material facts is concerned. It would therefore be strange if an untrue representation, made innocently, concerning a material circumstance did not have the same consequences as in all other types of contract (*w*). Misrepresentation as much as non-disclosure affects the basis of the contract of insurance and, in fact, the one is substantially the corollary of the other (*x*). On the other hand misrepresentation in insurance differs from misrepresentation in regard to other contracts in that it is unnecessary, save in the case of an action for a declaratory judgment under section 10 (3) of the Road Traffic Act, 1934, to show that the false statement induced the issue of the policy (*y*).

No such difficulty as is discussed above arises when representations made by the assured are incorporated either specifically as separate terms or generally by a comprehensive stipulation in the nature of a "basic term," or a warranty of truth and disclosure, or condition precedent incorporated into the contract itself (*a*). There, as with non-disclosure in such circumstances, the question of materiality is irrelevant (*b*). The parties agree that the representations thus embodied shall form part of their contract, and for their breach, however immaterial, however innocent, the insurer will be entitled to avoid the policy (*c*).

Although misrepresentation as affecting contracts of insurance is always treated separately from non-disclosure (*d*), in practice the two subjects frequently merge into one another. Whenever any material fact is concealed, either by silence (which may amount to a representation (*e*)) or by the expression of a falsehood or a half-truth, there is non-disclosure as well as misrepresentation, and the insurers are entitled to rely upon either ground as entitling them to repudiate liability (*f*).

(*t*) *Behn v. Burness* (1863), 3 B. & S. 751.

(*u*) *Redgrave v. Hurd* (1881), 20 Ch. D. 1; *Newbigging v. Adam* (1886), 34 Ch. D. 582.

(*w*) *Derry v. Peck* (1889), 14 App. Cas. 337, *per* Lord BRAMWELL, at p. 347. "To this may now be added the equitable rule that a material misrepresentation though not fraudulent may give a right to avoid or rescind a contract where capable of such rescission."

(*x*) Misrepresentation usually also amounts to non-disclosure. It would indeed be strange if a contract could be avoided for one and not for the other.

(*y*) Sections 17 and 18 of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), and *per* FLETCHER MOULTON, L.J., in *Cantiere Meccanico Brindisino v. Janson*, [1912] 3 K. B. 452.

(*a*) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(*b*) *Ante*, pp. 385 *et seq.*

(*c*) See further, *post*, pp. 413 *et seq.*

(*d*) *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295, *per* SCOTT, L.J., at p. 312, and LUXMOORE, L.J., at p. 318.

(*e*) *R. v. Barnard* (1837), 7 C. & P. 784; *Horsfall v. Thomas* (1862), 1 H. & C. 90; *Arkwright v. Newbold* (1880), 17 Ch. D. 301.

(*f*) *Peck v. Gurney* (1873), L. R. 6 H. L. 377; *London Assurance v. Mansel* (1879), 11 Ch. D. 363.

PART 4.—NON-DISCLOSURE AND MISREPRESENTATION
BY AGENTS

Since insurers in practice invariably (g), and insured persons frequently, act through agents in the making of contracts of insurance, it becomes important to consider the effect of agency upon the principles of non-disclosure and misrepresentation (h). Where an insurance transaction is entered into through agents it may happen that material facts are known either to the principal or to the agent himself which are not known to the other. In such a case it becomes a question of utmost importance to determine to what degree the knowledge of the one is to be attributed or imputed to the other so as to affect the disclosure or representations made to the insurer by the assured or his agent (i). The subject of agency in motor insurance is treated more generally later (k).

1. Imputed Knowledge.—The principle of "imputed knowledge" is founded upon two legal hypotheses: the first that, as a general rule, the knowledge of the principal is deemed to be the knowledge of the agent; the second, that a person knows what he ought in the ordinary course of business to know (l). The rules relating to disclosure by agents for insured persons in marine insurance contracts are to be found in the Marine Insurance Act (m), and may be here reproduced as applicable to contracts of motor insurance (n).

" . . . The agent must disclose to the insurer :

- " (a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance
 - " which in the ordinary course of business ought to be known
 - " by or to have been communicated to him ; and
- " (b) Every material circumstance which the assured is bound to disclose unless it came to his knowledge too late to communicate it to the agent."

Mutual communication between principal and agent is presumed not only to the extent that the principal is unable to rely upon the agent's ignorance of material circumstances known to his principal, but the principal himself is deemed to know all material facts which come to the agent's knowledge during his employment which he is bound to communicate to his principal (o). The presumption of communication by the agent to his principal so as to affect the latter with knowledge of what the former knows only arises however, where the knowledge is acquired by the agent in the course of his employment by the principal, and it was the duty of the agent to communicate such fact to his principal (p).

(g) *Re Norwich Equitable Fire Assurance Society, Royal Insurance Co.'s Claim* (1887), 57 L. T. 241.

(h) *Blackburn, Low & Co. v. Vigors* (1887), 12 App. Cas. 531.

(i) See generally *Blackburn, Low & Co. v. Vigors* (1887), 12 App. Cas. 531.

(j) *Post*, p. 473.

(l) Marine Insurance Act, 1906, s. 18, *ante*, p. 389; *Evans v. Employers Mutual Insurance Association* (1935), 51 Ll. L. R. 13.

(m) *Ibid.*, s. 20.

(n) See *ante*, p. 389.

(o) *Blackburn, Low & Co. v. Vigors* (1887), 12 App. Cas. 531; *Blackburn v. Haslam* (1888), 21 Q. B. D. 144; *Paxman v. Union Assurance Society, Ltd.* (1923), 15 Ll. L. R. 206.

(p) *Blackburn, Low & Co. v. Vigors* (*supra*). In *Holt's Motors, Ltd. v. South East Lancashire Insurance Co., Ltd.* (1930), 37 Ll. L. R. 1, the assured's agent had proposed them to certain insurers, who had rejected the proposal. The agent had not, however, informed his principals of this, and consequently they did not disclose it in their proposal to the defendants. It was held, however, that their agent's knowledge was their knowledge and that failure to disclose such rejection entitled the insurers (*inter alia*) to repudiate liability.

With these general principles in mind it is necessary in the light of the decided cases to treat separately of disclosure and representation made by agents for the assured and for the insurers respectively.

2. Agents for the Assured.—It is the duty of the agent for the assured to communicate to the insurers or their agents every material circumstance which he personally knows or ought to know in the ordinary course of business and also every material circumstance, whether he knows it or not, which is or ought to be known to the assured (g). Similarly, every representation made by an agent for the assured must be accurate in fact, according to the same criteria (r). It is immaterial that the assured left the whole matter in the hands of the agent, or that he gave him general or even specific instructions to disclose material circumstances fully and accurately (s). The knowledge of the agent is also imputed to the principal where such knowledge is gained by the agent in the course of his employment by the principal. Thus, for example, where an agent employed to effect an insurance experiences rejections, both he and his principal are bound to disclose those rejections when negotiating with other insurers to effect insurances (t). It should always be remembered that *brokers* are as a rule the agents of the assured (u).

3. Agents for the Insurers.—The doctrine of imputed knowledge operates in principle so as to affect the insurers with knowledge of all the circumstances which have been communicated to or are known by their agent acting in the course of his employment and within the scope of his authority (a). Disclosure or representation to the insurer's agent by the assured is disclosure or representation to the insurers where it is made to the agent acting as such, and within his authority so to act on behalf of the insurers. Thus, where full and accurate disclosure of the material facts is made to the insurers' agent in such circumstances, the assured is not adversely affected by any failure of the agent properly to perform his duty of communication to the insurers his principals (b).

This proposition is illustrated by the case of *Thornton-Smith v. Motor Union Insurance Co., Ltd.* (c), where the assured had experienced rejection at the hands of an insurance company. He mentioned this to the agent of the defendants, another insurance company, who offered to propose him to his principals. Upon receiving a proposal form with a question upon previous rejections the assured discussed the matter with the insurer's agent, and on being informed that it would be all right omitted to supply an answer to the relevant question. The insurers accepted the proposal and issued a policy.

(g) *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356. Cf. Marine Insurance Act, 1906, s. 19; 9 Halsbury's Statutes 857.

(r) *Biggar v. Rock Life Assurance Co.*, [1902] 1 K. B. 516; *Allen v. Universal Automobile Insurance Co.* (1933), 45 Ll. L. R. 55.

(s) *Gedge v. Royal Exchange Assurance Corporation*, [1900] 2 Q. B. 214; *Seaton v. Burnand*, [1900] A. C. 135; *Biggar v. Rock Life Assurance Co.* (supra); *Evans v. Ward* (1930), 37 Ll. L. R. 177.

(t) *Thornton-Smith v. Motor Union Insurance Co., Ltd.* (1913), 30 T. L. R. 139; *Whitwell v. Autocar Insurance Co.* (1927), 27 Ll. L. R. 418; *Holt's Motors, Ltd. v. South East Lancashire Insurance Co., Ltd.* (1930), 37 Ll. L. R. 1.

(u) See post, p. 473.

(a) *Ayrey v. British Legal and United Provident Assurance Co.*, [1918] 1 K. B. 136; *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399; *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356; *Zurich General Accident Insurance Co. v. Buch* (1939), 64 Ll. L. R. 115; *Davey v. Pearl Assurance Co.* (1939), 63 Ll. L. R. 54; *The Princess Juliana*, [1936] P. 139; [1936] 1 All E. R. 685; *Norman v. Matthews Wrightson* (1937), 58 Ll. L. R. 351.

(b) *Kaufmann v. British Surety Insurance Co., Ltd.* (supra); *Thornton-Smith v. Motor Union Insurance Co., Ltd.* (supra).

(c) (1913), 30 T. L. R. 139.

An accident occurred and the insurers refused to pay on the ground of misrepresentation by the assured as to the previous rejection. CHANNELL, J., held on the facts that the assured had made full disclosure to the insurers' agent, which was tantamount to making disclosure to the insurers themselves, and prevented them from refusing to indemnify the assured under the policy.

An agent employed to obtain proposals for contracts of insurance, which are to be made on forms supplied to him for the purpose, is deemed to have authority to explain the meaning of any questions appearing thereon, and to determine the limits of disclosure. Thus, if he indicates that there is sufficient disclosure of facts or that no further disclosure is required, such intimation is enough to bind the insurers (d). Where, however, the agent of the insurers is acting in collusion with the assured, the doctrine of imputed knowledge ceases to apply, and the assured is not able in such case to rely upon disclosure to the insurers' agent (e).

4. Completion of Proposal Form by Agent.—Considerable difficulty arises where, as is invariably the case in motor insurance, a written proposal consisting of statements made by the assured in answer to questions or otherwise forms an important part of the negotiations leading up to the contract or a part of the contract itself. Frequently in such cases the insurers' form is completed by their own agent on the basis of the information supplied, to a greater or lesser degree, by the assured personally. Where the assured withholds or fails to disclose material circumstances to the agent the general principles apply and are not affected by the intervention of the agent, who merely transmits to his principals what has been told him by the assured. Where, however, the agent is aware of the true circumstances, but in completing a written statement fails to communicate them fully or accurately to the insurers, the question arises as to how far the doctrine of imputed knowledge applies so as to prevent the insurers from relying upon non-disclosure or misrepresentation as a ground for avoiding the contract (f).

The position is clear where the agent in such case is acting in collusion with the assured and in fraud of or contrary to the interests of his principals (g). Where, however, there is no such collusion, the question is more difficult. Of the numerous cases upon the question some three are particularly in point, namely, *Bawden v. London, Edinburgh and Glasgow Assurance Co.* (h), *Biggar v. Rock Life Assurance Co.* (i), and *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.* (k). In *Bawden v. London, Edinburgh and Glasgow Assurance Co.* (l) the assured was one-eyed and illiterate; the insurers' agent completed the proposal form, stating that Bawden had no physical infirmity. It was held that the agent in so completing the proposal form was acting as agent for the insurers and that the doctrine of imputed

(d) *Bawden v. London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q. B. 534; *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863; *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 350.

(e) *Biggar v. Rock Life Assurance Co.*, [1902] 1 K. B. 516, and cases cited in note (d), *supra*.

(f) This constantly occurs in practice. See *Daley v. Pearl Assurance Co.* (1939), 63 Ll. L. R. 54; *Zurich General Accident Insurance Co. v. Buch* (1939), 64 Ll. L. R. 115; *Willmott v. General Accident Insurance Co.* (1935), 53 Ll. L. R. 156. It must always be proved that the relation of principal exists between the insurers and the agent (*Evans v. Ward* (1930), 37 Ll. L. R. 177).

(g) See note (d), *supra*; cf. *Dunn v. Ocean Accident and Guarantee Corporation, Ltd.* (1933), 47 Ll. L. R. 129; *Kaufmann v. British Surety Insurance Co., Ltd.* (*supra*).

(h) [1892] 2 Q. B. 534.

(i) [1902] 1 K. B. 516.

(j) [1902] 1 K. B. 516.

(k) [1892] 2 Q. B. 534.

knowledge operated (m). In *Biggar v. Rock Life Assurance Co.* (n) the insurers' agent filled in answers which he knew to be false and the assured signed the proposal form without reading it and without knowledge of the untrue answers. It was held that the agent was acting as the proposer's agent, and that the company was therefore entitled to resist the enforcement of the policy. The decision in *Bawden's Case* was subjected to much criticism in the English as well as in the Scotch and Irish Courts (o).

In the case of *Paxman v. Union Assurance Society, Ltd.* (p), the assured signed a proposal, the answers contained in which had been inserted by the insurers' agent. The assured had made full and accurate disclosure to the agent, but the latter in completing the proposal had furnished inaccurate answers as to the age and price of the insured car, and as to the extent of a previous insurance (q). The policy incorporated the statements in the proposal form, which contained a warranty of the truth of the statements therein. McCARDIE, J., held on the facts of the case that the insurers' agent was only acting as agent for the assured in completing the proposal form, and that therefore knowledge of the true facts could be imputed to the insurers so as to bind them. Although in this respect McCARDIE, J., followed the decision in *Biggar v. Rock Life Assurance Co.* (r), he distinguished that authority in the following terms:

"In my opinion, *Biggar's Case* turned on the particular facts of the case
"and *Bawden's Case* was distinguished by WRIGHT, J., upon the grounds
"which were indicated . . . in his judgment."

With respect to *Bawden v. London, Edinburgh and Glasgow Assurance Co.* (s) the learned judge said:

"I desire to state plainly . . . that in my view *Bawden's Case* remains
"an absolute and binding authority. It has never been overruled; it
"has never been criticised in the Court of Appeal (t); it is an effective
"working authority and it has been followed repeatedly (u) . . . Therefore
"in my view it is a valid and binding authority."

In the later case of *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.* (v), the proposers made the true facts known to the insurers' agent, who in completing the proposal form inserted facts which were untrue in material respects. The proposers then signed without reading the form so completed, which contained a term warranting the answers to the questions therein to be true and to be the basis of the contract. It was held that the agent of the insurers was acting as the mere amanuensis of the proposer in the completion of the form, and that his knowledge of the

(m) *Cp. Holdsworth v. Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521; *Thornton Smith v. Union Insurance Co., Ltd.* (supra); *Golding v. Royal London Auxiliary Insurance Co., Ltd.* (1914), 30 T. L. R. 350.

(n) [1902] 1 K. B. 516.

(o) *Levy v. Scottish Employers' Insurance Co.* (1901), 17 T. L. R. 229; *M'Millan v. Accident Insurance Co., Ltd.*, [1907] S. C. 484; *Yule's Case* (1879), 6 F. 437; *Taylor v. Yorkshire Insurance Co.*, [1913] 2 I. R. 1.

(p) (1923), 15 Ll. L. R. 206.

(q) The question of the materiality of the misstatements did not arise owing to the warranty of truth incorporated in the policy.

(r) [1902] 1 K. B. 516.

(s) [1892] 2 Q. B. 534.

(t) But see now *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356, discussed post, p. 404.

(u) In *Holdsworth v. Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521; *Thornton-Smith v. Motor Union Insurance Co., Ltd.* (1913), 30 T. L. R. 139; *Golding v. Royal London Auxiliary Insurance Co., Ltd.* (1914), 30 T. L. R. 350.

(v) [1929] 2 K. B. 356.

true facts could not in such circumstances be imputed to the insurers. In distinguishing the facts of *Bawden's Case*, SCRUTTON, L.J., concluded with the following instructive passage :

"In my view the decision in *Bawden's Case* is not applicable to a case
 "where the agent himself at the request of the proposer fills up the answers
 "in purported conformity with information supplied by the proposer. If
 "the answers are untrue, and he knows it, he is committing a fraud which
 "prevents his knowledge being the knowledge of the insurance company.
 "If the answers are untrue, but he does not know it, I do not understand
 "how he has any knowledge which can be imputed to the insurance company.
 "In any case I have great difficulty in understanding how a man who has
 "signed, without reading it, a document which he knows to be a proposal
 "for insurance, and which contains statements in fact untrue, and a promise
 "that they are true, and the basis of the contract, can escape from the con-
 "sequences of his negligence by saying that the person he asked to fill
 "it up for him is the agent of the person to whom the proposal is
 "addressed" (w).

The case of *Evans v. Employers' Mutual Insurance Association* (x) should be noted.

Newsholme Brothers v. Road Transport and General Insurance Co., Ltd. (y), must be taken as resolving the difficulties which arose in the course of the attempts to reconcile the decision in *Bawden's Case* with that in *Biggar's Case*. Although the former was followed in the English Courts and in one instance expressly approved as authoritative (z), *Biggar's Case* must now be regarded as the better decision, and *Bawden's Case* distinguished on its own peculiar facts. The Courts to-day lean very strongly against the rules of "constructive notice" and "imputed knowledge" in commercial matters (a) and are therefore disinclined to affect insurers with the knowledge or notice of their agents when such agents are acting not strictly within the scope of their authority and on behalf of the other party to the transaction in which they are engaged as agents (b).

5. Facts outside Proposal Form disclosed to Agent.—It remains, however, to be decided what is the position when, although the statements in the proposal form are wholly and completely accurate, the insurers seek to repudiate upon the grounds of non-disclosure concerning some other material circumstance which was, in fact, communicated to their agent by the assured. It is submitted that where, in such a case, the insurers' agent acquires his knowledge whilst acting in the course of his employment and scope of his authority, the assured is not concerned with or affected by

(w) *Newsholme Brothers v. Road Transport and General Insurance Co.*, [1929] 2 K. B. 356, at pp. 375, 376; *Zurich General Accident Insurance Co. v. Buch* (1939), 64 Ll. L. R. 115.

(x) (1935), 52 Ll. L. R. 51. See also *Keeling v. Pearl Assurance Co., Ltd.* (1923), 129 L. T. 573.

(y) [1929] 2 K. B. 356.

(z) *Holdsworth v. Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521; *Parman v. Union Assurance Society, Ltd.* (1923), 15 Ll. L. R. 399, ante, p. 403, McCARDIE, J.'s dicta must be now regarded as overruled.

(a) *Blackburn, Low & Co. v. Vigors* (1887), 12 App. Cas. 531; *Houghton & Co. v. Nothard, Lowe and Wills*, [1928] A. C. 1. See per SCRUTTON, L.J., in *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356, at p. 375.

(b) *Dunn v. Ocean Accident and Guarantee Corporation, Ltd.* (1933), 47 Ll. L. R. 129. Where the insurer's agent completed a proposal form for his wife (in her maiden name) it was held that he was acting as his wife's agent and not as agent for the insurers (*Zurich General Accident Insurance Co. v. Buch*, (1939), 64 Ll. L. R. 115). But see *Willmott v. General Accident Insurance Corporation* (1935), 53 L. L. R. 156.

his failure to pass the knowledge on to his superiors or principals (c) (d). In *Kaufmann v. British Surety Insurance Co., Ltd.* (e), the assured through his brokers was desirous of insuring a private motor vehicle to be used for both private pleasure and private hire. The insurers' underwriter showed the brokers a form of policy which he indicated would cover both types of risk. The assured then signed a proposal form in which the purpose for which the car was to be used was stated as "private hire." The insurers issued a policy covering use of the insured car for "private pleasure and private hire." An accident having occurred whilst the car was being used by the assured for private pleasure the insurers sought to repudiate. ROCHE, J., held that the knowledge of the underwriter, their agent, was the knowledge of the insurers, and that the principle of *Holdsworth v. Lancashire and Yorkshire Insurance Co.* (f) and similar cases applied (g).

PART 5.—CONSEQUENCES OF NON-DISCLOSURE AND MISREPRESENTATION

Insurers who are desirous of avoiding liability under a subsisting policy of insurance, whether at Common Law or under the Road Traffic Act, 1934 (h), on the ground of non-disclosure or misrepresentation by the assured or his agent, must prove their right to do so (i). A subsisting policy is presumed to be valid until the contrary is proved (k) and the onus of showing that the assured is in breach of his duty of good faith is upon the insurers (l). What exactly the insurers are obliged to prove in order to discharge this onus depends upon the nature and basis of the proceedings in which they are seeking to exercise such right to avoid the policy. There are three types of circumstance in which such an issue will arise :

(1) Where a claim or defence based upon breach of a term of the contract is relied on by the insurers (m).

(2) Where a claim or defence based upon non-disclosure or misrepresentation, innocent or fraudulent, is relied on by the insurer (n).

(3) Where the insurers take proceedings under section 10 of the Road Traffic Act, 1934, for a declaratory judgment (o).

(c) *Bawden v. London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q. B. 534; *Holdsworth v. Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521; *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399; *Evans v. Employers' Mutual Insurance Association, Ltd.* (1935), 152 L. T. 333; *Cornhill Insurance Co. v. Assenheim* (1937), 58 Ll. L. R. 27; *The Prinses Juliana*, [1936] P. 139; [1936] 1 All E. R. 685.

(d) As to agents, see further, *post*, pp. 473 *et seq.* (e) (1929), 45 T. L. R. 399.

(f) (1907), 23 T. L. R. 521.

(g) The actual *ratio decidendi* of the judgment was based upon other grounds relating to the construction of the policy and the admissibility of extrinsic evidence with respect thereto. See also *Davey v. Pearl Assurance Co.* (1939), 63 Ll. L. R. 54; *Sun Life Assurance Co. of Canada v. Jervis*, [1943] 2 All E. R. 425.

(h) Road Traffic Act, 1934, s. 10. See chapter V, *ante*, pp. 303 *et seq.*

(i) *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863; *Stebbing v. Liverpool and London and Globe Insurance Co.*, [1917] 2 K. B. 433; *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295; [1941] 1 All E. R. 123.

(k) *Goodbarne v. Buck*, [1940] 1 K. B. 771; [1940] 1 All E. R. 613.

(l) *Whitwell v. Autocar Insurance Co.* (1927), 27 Ll. L. R. 418; *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39.

(m) See *ante*, chapter V, pp. 307 *et seq.*; also pp. 384 *et seq.*, *ante*, and cases there cited.

(n) See chapter II, *ante*, pp. 99, 100, and pp. 388-397, *ante*.

(o) Road Traffic Act, 1934, s. 10 (3), chapter V, *ante*, pp. 303 *et seq.* These proceedings, since the M.I.B. Agreements became operative, will be very rare.

The essential points in each of the above claims or defences must be dealt with *seriatim*.

1. Breach of Contract.—As has been stated above (*p*), non-disclosure and misrepresentation are often expressly imported into the contract of insurance itself by means of a term that the truth of the matters stated in the proposal form as completed shall be a condition precedent to the liability of the insurers, or that the truth and completeness of information supplied to the insurers shall be the basis of the contract of insurance, or that the assured warrants that he has made full and accurate disclosure to the insurers (*q*). The effect of any one of these three terms is to make the assured's duty to tell the whole truth and nothing but the truth a condition of the contract of insurance, a breach of which, however immaterial the circumstance which it affects, entitles the insurers to repudiate liability to the assured under the policy (*r*). It is submitted that, apart from repudiation (or in addition thereto) *material* non-disclosure will entitle the insurers to at least nominal damages for breach of contract, whether the breach is of one of the express terms just indicated, or of the implied term from which the duty to disclose arises (*s*).

Where these two facts are present the insurers are entitled to escape liability under the policy, subject to the provisions of the Road Traffic Act, 1934, and the terms of the M.I.B. Agreements (*t*).

2. Avoidance of Policy.—A claim to avoid the policy *ab initio* based on non-disclosure or misrepresentation apart from its express terms may be framed either on fraud or more commonly on innocent misrepresentation. The former may be made the subject of a claim for damages, the latter only of a claim or counterclaim for rescission or as a defence. Where the insurers seek to rely upon fraud they must prove—

- (1) that the assured or his agent made a representation ;
- (2) that the representation affected a material circumstance (*u*) ;
- (3) that the representation was untrue ;
- (4) that the representation was made by the assured with knowledge of its falsity, or without a belief in its truth, or recklessly, without caring whether it was false or true (*v*) ;
- (5) that the representation was made for the purpose of inducing the insurers to grant the policy to the person making it (*w*) ;
- (6) that the insurers were deceived by the representation ;
- (7) that in consequence of being so deceived they issued the policy to the assured which they are now seeking to repudiate (*a*).

(*p*) Chapter V, *ante*, p. 307 ; also pp. 384 *et seq.*, *ante*.

(*q*) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(*r*) *Thomson v. Waems* (1884), 9 App. Cas. 671 ; *York Hire Insurance Co., Ltd. v. Campbell*, 1917, A. C. 218 ; *Condogianis v. Guardian Assurance Co.* [1921] 2 A. C. 125 ; *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413 ; *Parman v. Union Assurance Co.* (1923), 15 Ll. L. R. 206 ; *Glicksman v. Lancashire and General Assurance Co.* [1927] A. C. 139 ; *Heyman v. Darwins, Ltd.* [1942] A. C. 356 ; [1942] 1 All. E. R. 337 ; *Mackay v. London General Insurance Co.* (1935), 51 Ll. L. R. 201.

(*s*) See *ante*, pp. 307 *et seq.*, and *post*, chapters IX and X. If indeed the duty of full disclosure is an implied term. See p. 390, *ante*.

(*t*) *Dawsons, Ltd. v. Bonnin* (*supra*) ; *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356. And see chapters IV, V and VI, *ante*.

(*u*) *Ante*, pp. 391-3, see also chapter II, pp. 99, 100.

(*v*) *Derry v. Peek* (1889), 14 App. Cas. 337 ; *Barnett v. Blackmore* (1926), 23 Ll. L. R.

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(*w*) Chapter II, pp. 99, 100, *ante*.

(*a*) *Mundy's Trustees v. Blackmore* (1928), 32 Ll. L. R. 150.

In the case where the insurers are relying upon innocent misrepresentation as the ground for avoiding the policy, as it is submitted they are entitled to do (b), they will discharge the burden of proof by showing :

- (1) that the assured or his agent made a representation ;
- (2) that the representation concerned a material circumstance ;
- (3) that the representation was untrue ;
- (4) that the insurers induced by the representation (c) issued the policy to the assured which they are now seeking to repudiate (d).

Where the insurers seek to rely upon non-disclosure as a ground for repudiating the policy they must show :

- (1) that an alleged circumstance did exist at the time when the negotiations between the assured and the insurers had not been completed (e) ;
- (2) that the assured knew or should have known of the existence of that circumstance ;
- (3) that the circumstance in question was material ;
- (4) that the circumstance was not disclosed to the insurers.

Non-disclosure will entitle the insurers to avoid a policy when the above four conditions are present even if such non-disclosure consists in fact in a representation false because it knowingly suppresses something which should be disclosed or because, by suppressing something, it suggests that something is true which is in fact false (f). Thus, non-disclosure of material circumstances is the most common ground upon which insurers seek to avoid policies. The onus which they thereby undertake is considerably less heavy than that which is undertaken where fraudulent or even innocent misrepresentation is alleged, and the consequences are usually the same (g). It is not necessary in this case to prove that the non-disclosure influenced or induced the issue of the policy. The consequences of repudiation and avoidance of the policy are considered fully in Chapter IX.

3. Declaratory Judgment (h).—Under section 10 (3) of the Road Traffic Act, 1934 (i), the general rule of insurance law that an insurer can avoid a policy *ab initio* if he proves that there has been misrepresentation or concealment of a material fact by the assured was modified (k). That section

(b) *Ante*, pp. 397–399.

(c) In general misrepresentation and non-disclosure are co-existent in motor insurance policies where the proposal form requires comprehensive representations as to the risk to be made in the form of answers. But in avoiding for non-disclosure it is not necessary for the insurers to prove "inducement," materiality is sufficient.

(d) *Derry v. Peek* (*supra*) ; *Redgrave v. Hurd* (1881), 20 Ch. D. 1 ; *Newbigging v. Adam* (1886), 34 Ch. D. 582 ; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53 ; [1942] 1 All E. R. 529 (C. A.) ; *Contingency Insurance Co. v. Lyons* (1940), 65 Ll. L. R. 53 ; *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295 ; [1941] 1 All E. R. 123.

(e) *Cf* Marine Insurance Act, 1906, ss. 17, 18 ; 9 Halsbury's Statutes 856 ; *Looker v. Law Union and Rock Insurance Co., Ltd.*, [1928] 1 K. B. 554 ; *Whitwell v. Autocar Fire Insurance Co.* (1927), 27 Ll. L. R. 418.

(f) E.g. non-disclosure of motoring convictions (*Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (1934), 49 Ll. L. R. 231), or of nature of accidents (*Dent v. Blackmore* (1927), 29 Ll. L. R. 9).

(g) *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295 ; [1941] 1 All E. R. 123. Apart from express condition in the policy premiums are returnable where the insurers avoid for non-disclosure or innocent misrepresentation, but not where they avoid for fraud.

(h) Chapter V, *ante*, pp. 307 *et seq.*

(i) 27 Halsbury's Statutes 534. *Ante*, chapter V, pp. 303 *et seq.*

(k) *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, as reported in (1942), 72 Ll. L. R. 167, at p. 172, *per* MACKINNON, L.J.

required the insurer to establish in addition that the policy was obtained by that non-disclosure or misrepresentation. The action for a declaration has been fully discussed in an earlier chapter (*l*). In so far as an action for a declaration under this section of the 1934 Act will become infrequent for the reasons there given (*m*), it is not proposed to reiterate the conditions under which insurers may succeed in such proceedings. It will be remembered that to avoid liability to a third party injured in a motor accident which occurs after July 1, 1946, the insurer who has issued a policy purporting to cover the tortfeasor at the time of the accident can only succeed, in consequence of the Domestic Agreement (*n*), if he shows that in fact the policy has been brought to an end before the date of the accident. A successful action for a declaration that the policy was obtained by material misrepresentation or non-disclosure is one of the means, and the most cumbrous means, whereby this end may be achieved, and it is expected that very few such actions will in future be brought (*o*). Such an action for a declaration that the policy is void *ab initio* must be brought and completed by insurers before the assured has incurred any Road Traffic Act liability to a third party, and in such a case the provisions of section 10 (3) of the Road Traffic Act, 1934, will normally apply, while the general rules of insurance law as explained above will not (*p*).

PART 6.—THE OFFER OF INSURANCE

Contracts of motor insurance, like all contracts, are formed by the making of an offer by one party and the communicating of acceptance by the other. Although in practice the negotiations leading up to the formation of such a contract as well as the contract itself are in writing, there is no legal requirement that a motor insurance policy should be in writing (*q*) or even evidenced by a note or memorandum in writing (*r*). As far as liabilities in respect of the death or personal injuries of third parties are concerned the Road Traffic Act, 1930 (*s*), requires that a written certificate

(*l*) *Ante*, chapter V, pp. 303 *et seq*.

(*m*) See also *ante*, chapter VI, p. 350.

(*n*) Normally the policy will have lapsed by effluxion of time, or have been brought to an end by means of the cancellation clause contained therein, or by agreement between insurers and assured. It is only where the assured is not available, so that notice of cancellation cannot be served upon him, that an action for a declaration under s. 10 (3) of the 1934 Act may have to be brought. Such a declaration will be granted by the Court even in the absence of the defendant assured. *Cf. Croxford v. Universal Insurance Co., Ltd.*, [1936] 2 K.B. 253 (C.A.), at p. 282; [1936] 1 All E.R. 151, at p. 153, and *Guardian Assurance Co., Ltd. v. Sutherland*, [1939] 2 All E.R. 246.

(*o*) *Ante*, pp. 303 *et seq*.

(*p*) Since the action for a declaration will only be brought if the policy cannot be cancelled in the ordinary way. This will almost always result from the inability of the insurers to trace the assured and serve a notice of cancellation upon him. The disappearance of the assured has this second disadvantage, that an ordinary action for a declaration that the policy is avoided cannot be brought apart from the provisions of s. 10 (3) of the 1934 Act, for in the absence of the assured defendant, the Court will not grant a declaration, there being no dispute between the parties. See *ante*, chapter V, p. 303.

(*q*) See, however, the "Stamp" Acts and *cf.* marine insurance contracts.

(*r*) Since most motor insurance policies are designed only to last for twelve months. See the reference to the Domestic Agreement, p. 377, *ante*. As to whether a motor insurance policy need be in writing, embodied in one document, see *Norman v. Gresham Fire and Accident Insurance Society, Ltd.*, [1936] 2 K.B. 253, [1936] 1 All E.R. 151, and *Palmer v. Cornhill Insurance Co.* (1935), 52 Ll.L.R. 78. In these cases the assured claimed indemnity although there was no policy. The Road Traffic Acts, 1930 (ss. 35 and 36) and 1934 (s. 10), seem clearly to require writing either in the form of a policy or a cover-note.

(*s*) Road Traffic Act, 1930, s. 36 (5); 23 Halsbury's Statutes 633.

should have been delivered to the assured in order to make the policy valid, but this does not bear upon the formation of the contract of insurance itself (f). Nor need a policy be delivered to the assured in order to constitute a binding contract of insurance (u). Insurance, with its resultant rights and obligations, can and often does exist quite apart from the delivery or existence of a policy, as, for example, under a cover note (v).

It is not possible to lay down any general rule as to which party is the offeror and which the acceptor in a contract of insurance. Whilst in the normal case the offer proceeds in fact from the proposer and the acceptance from the insurers, the positions are very frequently reversed. The point at which a binding contract is completed, that is, by the acceptance of an offer, must be determined according to the facts of every particular case (w), bearing in mind the general rules as to offer and acceptance.

An offer is commonly defined as an "expression of a willingness to be bound" (x). No words, writing or conduct can therefore constitute an offer unless the person making it indicates with precision and completeness the legal relationship into which he is prepared to enter, and at the same time intends that the acceptance of his offer shall result in a binding contract governed and limited by the terms of his offer. An offer once made is by acceptance turned into a binding contract unless before acceptance it has been revoked or has lapsed (y).

1. Analysis of Offer.—In the ordinary contract of insurance the parties do not as a rule arrange the whole of the terms by which their legal relationship is to be determined for the purposes of each particular transaction. Insurers, whose business it is to enter into contracts of insurance, in practice have set terms by which each individual contract will be regulated. Thus, the completed proposal form including the proposer's answers and the rates of premium incorporated therein, as a general rule constitutes the offer which the insurers may at their discretion meet by acceptance or rejection (a). The terms of such an offer consist not only in the specific proposal put forward by the assured and defined and limited by his answers, but also of such other terms as are included expressly or impliedly in the application, such as, for example, are included by a comprehensive reference to the insurers' "usual terms and conditions" (b). Frequently, however, the circumstances are less easily construed. It may be that the insurers are unwilling to accept the proposal at their normal rates of premium or unless the proposer consents to some limitation of the risk or some restriction of the insurance; in such case they will meet the proposal with a counter-offer based upon the proposer's offer but subject to qualifications. In such an event the insurers become offerors, and the proposer an offeree, who by accepting the insurer's counter-offer completes the binding contract (c).

(f) *Sed quære*: see *Ocean Accident and Guarantee Corporation, Ltd. v. Cole*, [1932] 2 K. B. 100, discussed at length in chapter IV, pp. 178 *et seq.*, *ante*.

(u) *Adie & Sons v. Insurance Corporation, Ltd.* (1898), 14 T. L. R. 544, and see further, *post*, p. 416.

(v) See *post*, pp. 416 *et seq.* See also note (r), *supra*.

(w) *Canning v. Farquhar* (1886), 16 Q. B. D. 727.

(x) Anson, *Law of Contract*, 19th Edn., pp. 48 *et seq.*

(y) *Ibid.*, p. 29. See also chapter I, *ante*, pp. 2, 3.

(a) *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399.

(b) *Acme Wood Flooring Co., Ltd. v. Marten* (1904), 90 L. T. 313.

(c) *General Accident Insurance Corporation v. Cronk* (1901), 17 T. L. R. 233. Cf. *Sum Life Assurance Co. of Canada v. Jervis*, [1943] 2 All E. R. 425; where an application for insurance was only intelligible as embodying the terms of an illustration drawn up by an agent, it was held that the documents formed the contract and the policy was ordered to be rectified to give effect to that contract.

The mere fact that insurers have issued a prospectus or a proposal form for completion does not amount to an offer, since in such case they neither indicate their willingness to be bound to the person to whom such document is issued, nor do they put forward a complete statement of the terms upon which they are willing to insure the risks which may be proposed to them (*d*).

As a general rule, there can be no question of the formation of a contract of insurance until there is a definition of the precise risks, their character and extent, which are to be the subject-matter of the contract. The completion of the proposal is the most common means whereby such definition is (by means of the proposer's replies to questions) obtained, and it is usually, therefore, the completion of the proposal form which constitutes the offer in a contract of motor insurance.

Where the proposal form constitutes the offer, as is the common case, by accepting it, the insurers become obliged to issue to the proposer an insurance policy in their usual form and including and subject only to the terms offered and accepted in the proposal form (*e*). Should they subsequently issue a policy otherwise than in the agreed or usual terms, the assured is not bound to accept it or to pay premiums thereunder (*f*). The assured, his offer having been accepted, is entitled to have a policy issued to him upon the terms which the insurers have accepted for insurance. Thus in *South East Lancashire Insurance Co Ltd v Croisdale* (*f*) the proposer's offer to insure his vehicles with the plaintiff company, which included a term that he was to be entitled to a rebate in the premium when the insured vehicles should be "off risk," was accepted without qualification. The insurers subsequently issued a policy without any provision for the agreed rebate; upon the assured refusing to pay premiums thereunder the insurers sued him therefor, but their claim failed as they had broken their contract in such a way as entitled the proposer to repudiate his obligations thereunder, by failing to issue a policy embodying the terms of the offer (*g*).

In *Kaufmann v British Surety Insurance Co Ltd* (*h*) the policy issued by the insurers was not, upon the face of it, in accordance with the terms bargained for by the assured, and it was held that the assured was entitled to give oral evidence to show what these were and that the policy must be construed accordingly.

The rights and liabilities of both parties to the contract of insurance will be determined by the terms of the offer and acceptance. Where, therefore, an offer is made in a proposal form which makes reference to the "usual terms and conditions" of the insurers' policies, the proposer is deemed to incorporate such terms into his offer, even though he may not be actually aware of them (*i*). The general position where a policy is issued containing

(*d*) In other kinds of insurance there may be exceptional cases—such as coupon insurance—in which the insurers do by advertisement or in some other manner make an offer susceptible of acceptance and resulting, therefore, in a contract between them and any person acting in accordance with the terms of such offer. See *General Accident Fire and Life Assurance Corporation v Robertson*, [1929], A.C. 404.

(*e*) *South East Lancashire Insurance Co, Ltd v Croisdale* (1931), 40 Ll. L. R. 22.

(*f*) *Ibid.*, *General Accident Insurance Corporation v Cronk* (1901), 17 T. L. R. 233. See further as to the position in these circumstances, *post* p. 415.

(*g*) Alternatively, the assured could, if it is submitted, sue for the issue of a policy. *Adie & Sons v Insurance Corporation* (1898), 14 T. L. R. 354; *Sun Life Assurance Co of Canada v Jarvis*, [1943], 2 All E. R. 425.

(*h*) *Kaufmann v British Surety Insurance Co, Ltd* (1929), 45 T. L. R. 390; 33 Ll. L. R. 315. See further as to this insurance, *post*, chapter VIII, and *Sun Life Assurance Co of Canada v Jarvis* (*supra*); *Davey v Pearl Assurance Co, Ltd*, (1930), 63 Ll. L. R. 54; *Zurich General Accident Insurance Co v Buck* (1939), 64 Ll. L. R. 115.

(*i*) *Adie & Sons v Insurance Corporation, Ltd* (1898), 14 T. L. R. 344; *General Accident Insurance Corporation v Cronk* (1901), 17 T. L. R. 233.

terms to which the assured has not assented or for which he has not bargained is considered more fully in the next chapter (j).

The usual practice of motor vehicle insurance wherein the completion of the proposal form constitutes the offer upon which the contract ensues, and which thereby determines the scope and operation of the insurance, necessitates some examination into the contents and effect of the completed proposal. In practice, as will hereafter appear, a clause will be found in every proposal form and policy to the effect that the truth and accuracy of statements in the proposal is "warranted and shall be the basis of the contract" (k).

The proposer's statements can constitute mere representations only when his proposal does not constitute the offer, for where, as is the general rule the proposal is the offer, its contents constitute terms of the contract whether or not such a general term as has been last described has been included in the proposal or the policy. Since it is the practice of insurers to insert similar general terms in every policy of motor insurance, it is important to recollect that in the ordinary case its presence adds little to the liabilities of the proposer or the rights of the insurers (l). Apart altogether from such term the proposer is under the duty of full and accurate disclosure, and further, when his proposal constitutes the offer, his statements will become terms of the contract concluded in reliance upon them so that the truth and completeness of each statement becomes a matter essential to the contract in that any shortcoming will constitute a breach and be so construed.

2. Functions of Proposal Form.—The purpose of the questions and answers in the proposal form, whether they take effect as representations or as terms of the contract, is fourfold. Whilst it is impossible to attempt an exhaustive classification of the questions and answers contained in the proposal form, they may, nevertheless, for the purpose of convenience, be grouped under the following four heads to the elucidation of which they are directed (m). It should, however, be borne in mind at the outset that many of the questions and answers are relevant to more than one of the following points:

(i) *Identification and description of the subject-matter.*

This object is achieved by questions relating to the make (n), age (o), horse-power (p), value (q) and description of the vehicle to be insured; and to the personality (r), residence (s) and occupation (t) of the proposer and his interest in the vehicle to be insured (u).

(ii) *The limitation of the risk (v).*

The terms concerning this are arrived at on the basis of questions and answers directed to determining the purposes for which the vehicle is to be used (w); the area within which its use will take place (x); the place where it will be kept (y); its mechanical condition (z); the

(j) Chapter VIII, *post*.

(k) See *post*, pp. 407 *et seq.*, and chapter VIII, *post*. See *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(l) Its only important effect will, as a rule, be to dispense with an investigation of the question of materiality.

(m) See *ante*, p. 392.

(n) *Post*, p. 420.

(o) *Post*, p. 428.

(p) See *post*, pp. 433-438, generally.

(q) See *post*, pp. 433-438.

(r) *Crossley v. Road Transport and General Insurance Co.* (1925), 21 Ll. L. R. 219; *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 35 Ll. L. R. 135.

(n) *Post*, p. 421.

(q) *Post*, pp. 422, 423.

(t) *Post*, p. 428.

(x) See *post*, p. 429.

(o) *Post*, pp. 421, 422.

(r) *Post*, pp. 4-5-431.

(u) *Post*, pp. 439 *et seq.*

(y) *Post*, p. 430.

numbers and identity of persons who will drive the car whilst it is covered by the policy (a).

(iii) *The elucidation of material facts.*

Questions under this head are of two main types, those which affect the subject-matter of the insurance, and those which bear upon the "moral hazard" of the assured. Of the first, questions relating to the age (b) and condition (c) of the vehicle are perhaps the most common; of the second, those which cover the age, health, and previous driving experience of the insured (d) are together with his previous insurance (e), claims (f), accident (g) and conviction (h) record invariably found in practice. Amongst the most important of all material circumstances is the fact that other insurers have declined to accept or accorded exceptional treatment to the risk proposed (i).

(iv) *Elucidation of immaterial facts.*

Questions are sometimes asked in proposal forms which do not inquire as to any matter which is by itself naturally material to the rate of the premium, but which insurers desire answered for the purpose of formulating the terms of the contract and which as such is made artificially or contractually material (j). It would be idle to speculate upon the reasons why insurers desire such questions to be answered. One very good reason might be that they desire to relieve the proposer as far as possible of the burden of himself deciding what facts the insurers are likely to consider material.

Whilst it is comparatively easy to enumerate a category under all of the above heads, it is often extremely difficult to determine into which a particular question falls in any given case. Some questions come under more than one head. Thus the questions directed to the description of the vehicle or the identity of the proposer are necessary both to define the subject-matter and determine the rate of the premium (k). Again, questions falling under the fourth head as immaterial may serve to limit the risks the subject-matter of the insurers' liability. This will be so, for example, when the "sole use" to which the vehicle will be put is defined in the proposal form; although this may be immaterial from the viewpoint of the insurers in accepting the proposal, its presence will frequently serve

(a) *Bond v Commercial Union Assurance Co* (1930), 30 Ll. L. R. 107, and see post, p. 438. *Paulson v. Co-operative Insurance Society* (1930), 38 Ll. L. R. 237.

(b) Post, p. 421.

(c) Post, p. 423.

(d) See post pp. 426, 445.

(e) See post, p. 455.

(f) See post, p. 453.

(g) See post, p. 453.

(h) See post, p. 445. *Taylor v. Eagle Star, etc., Insurance Co.* (1940), 67 Ll. L. R. 136; *Cleland v. London General Insurance Co.* (1935), 51 Ll. L. R. 156; *Merchants and Manufacturers' Insurance Co. v. Davies*, [1938] 1 K. B. 196; [1937] 2 All E. R. 767.

(i) *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863; *Gluckman v. Lancashire and General Insurance Co.*, [1927] A. C. 139; *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356; *Ewer v. National Employers' Mutual General Insurance Association, Ltd.*, [1937] 2 All E. R. 193; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529; *Locker and Woolf, Ltd. v. Western Australian Insurance Co., Ltd.*, [1936] 1 K. B. 408.

(j) Such questions must not be confused with questions which are designed to adduce material facts, but which may be answered by a false statement which is not material. E.g. where a wrong number is given to a house or garage. See also *Dawsons, Ltd. v. Bownen*, [1922] 2 A. C. 413.

(k) Post, pp. 421-431 *passim*.

to enable the insurers to repudiate liability if the vehicle is used for some other purpose (l).

3. Effect of Questions and Answers.—Whilst it is the answers and not the questions in the proposal form which form the basis of the contract of insurance which ensues, it is nevertheless necessary to construe questions and answers as one for the purpose of determining whether the proposer has carried out the obligation of full and accurate disclosure incumbent upon him and, in the second place, to ascertain the exact meaning of each term of the contract thereby constituted when a question of its breach arises for consideration. The effect of an immaterial answer to a material question is considered later (m). The proposer's answers must be full and accurate replies to the questions to which they purport to relate; if anything of which the proposer knew or ought to have known is misstated or is left unsaid, the insurers will be entitled to repudiate either upon the grounds of misrepresentation or non-disclosure or for breach of a term of the contract, where, as is usual, the contents of the proposal form constitute the offer or where they are subsequently incorporated by reference into the concluded contract (n). The assured who leaves a blank in his proposal when he knew or should have known the true answer (o) is guilty of non-disclosure, just as he who makes an answer of half truth (p) or of complete falsity (q). A hesitating or unsatisfactory answer, however, puts the insurers upon inquiry as to the true facts (r), and where without inquiry they proceed in face of such answer to issue a policy there has been held to be waiver disentitling the insurers from subsequently repudiating the policy (s).

4. Contractual Terms in Proposal Form.—It remains to consider the importance of certain clauses commonly to be found in proposal forms to the following effect:

(i) that the truth of the answers is a condition precedent to the liability of the insurers under the contract;

(ii) that the answers are declared to be true and complete replies, and that the proposer has not misstated or concealed any material fact (t);

(iii) that the truth and completeness of the answers in the proposal form and the answers themselves are the basis of the contract.

(l) See this matter fully discussed at pp. 431 *et seq.*, *post*; *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 500; *Jones v. Welsh Insurance Corporation, Ltd.*, [1937] 4 All E. R. 149; *Levinger v. Licenses and General Insurance Co.* (1936), 54 Ll. L. R. 68; *Passmore v. Vulcan Boiler and General Insurance Co.* (1936), 154 L. T. 258; *Stone v. Licenses and General Insurance Co.* (1942), 71 Ll. L. R. 256.

(m) *Post*, p. 414.

(n) *Post*, chapter VIII; cf. *Marcovitch v. Liverpool Victoria Friendly Society* (1912), 28 T. L. R. 188.

(o) *London Assurance v. Mansel* (1879), 11 Ch. D. 363; *Blackburn, Low & Co. v. Vigors* (1887), 12 App. Cas. 531; *Lindenau v. Desborough* (1828), 8 B. & C. 586; *Marcovitch v. Liverpool Victoria Friendly Society* (1912), 28 T. L. R. 188; *Perrins v. Marine Insurance Society* (1859), 2 E. & E. 317.

(p) *Biggar v. Rock Life Assurance Co.*, [1902] 1 K. B. 516; *Broad and Montagu v. South East Lancashire Insurance Co.* (1931), 40 Ll. L. R. 328; *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295; [1941] 1 All E. R. 123.

(q) *Anderson v. Fitzgerald* (1853), 4 H. L. Cas. 484.

(r) *Thomson v. Weems* (1884), 9 App. Cas. 671; *Keeling v. Pearl Assurance Co., Ltd.* (1923), 129 L. T. 573; *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295; [1941] 1 All E. R. 123.

(s) But cf. *Holls Motors, Ltd. v. South East Lancashire Insurance Co., Ltd.* (1930), 37 Ll. L. R. 1.

(t) This is the so-called "warranty of truth and disclosure." See *post*, pp. 467 *et seq.*

The effect of these clauses is substantially similar whichever formula is employed (u), and whether it be embodied in the proposal form and signed by the proposer or incorporated subsequently into the policy (v).

In the first place, these terms do not affect the duty of disclosure resting upon the assured by virtue of the implied terms of every contract of insurance (w). Apart from and outside the questions and conditions of the proposal form the proposer is obliged to make full and accurate disclosure of every material circumstance of which he knows or ought to know (x), unless the insurers expressly or by implication waive the performance of this duty in relation to any particular circumstance (y).

Secondly, the inclusion of such a term makes contractual answers which might otherwise be mere representations without contractual force (a). As has been stated, the completed proposal form as a rule constitutes the offer in motor insurance contracts, although in exceptional cases the offer proceeds not from the assured but from the insurers (b). When and however the statements in the proposal form become terms of the contract of insurance, their breach by the proposer will constitute a breach of contract entitling the insurers to repudiate liability to the assured when it has occurred. This has particular importance when the consequences of the "warranty of truth and disclosure" are considered. Should one of the proposer's statements in such case be untrue or incomplete in some particular, however insignificant or immaterial (c), the insurers will be entitled to evade their obligations under the policy on the ground that the proposer has been guilty of breach of the terms of his contract (d).

Thirdly, the effect of the inclusion of such term will generally render considerations of "materiality," as far as the statements in the proposal form are concerned, irrelevant (e). Once the parties agree that all the proposer's statements are exclusively and completely true, it matters not whether these statements bear upon material or immaterial matters (f). The parties have, by the inclusion of such a term, agreed that all the proposer's statements shall be treated alike, so that the insurers are enabled to relieve themselves of liability under the policy independently of the nature in and extent to which the proposer's duty under the contract to tell the whole truth and nothing but the truth has been broken (g). Take, for example, the common question, "Where is the car garaged?" the reply to which may be taken, as a rule, to be immaterial. Where a false answer is furnished, however unwittingly, to such question and the proposal form or policy contains a "warranty of truth" or similar clause, the insurers are, it seems, entitled to repudiate liability under the policy to the assured (h).

(u) For special treatment of (u), see *post*, pp. 467 *et seq*.

(v) As to which see chapter VIII, *post* (u) *Ante*, p. 389.

(x) *Ante*, pp. 389, 390. See *Zurich General Accident and Liability Insurance Co. v. Livingston*, [1940] 5 C 406, *Broad v. Waland* (1942), 73 Ll. L. R. 263.

(y) *Ante*, p. 393.

(a) *Condogianis v. Guardian Assurance Co.*, [1921] 2 A. C. 125; *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139.

(b) *Post*, p. 416.

(c) See *post*, p. 467, and *ante*, pp. 385-7.

(d) See *post*, pp. 467 *et seq*.

(e) In proceedings between insurer and assured.

(f) *Condogianis v. Guardian Assurance Co.*, [1921] 2 A. C. 125; *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139. Though in *Dawsons, Ltd. v. Bonnin* (*supra*) the question by itself was treated as being material. See also *Machay v. London General Insurance Co.* (1935), 51 Ll. L. R. 201; *Revell v. London General Insurance Co.* (1934), 50 Ll. L. R. 114; *Farra v. Hetherington* (1931), 47 T. L. R. 465.

(g) *E.g. Pasman v. Union Assurance Society, Ltd.* (1923), 15 Ll. L. R. 206, *per McCARDIE, J.* at p. 207.

(h) *Cf. Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

5. Summary of Effect of Proposal Form.—The effect of a proposal form may be summarised as follows :

- (i) It usually contains the offer made by the assured ;
- (ii) It usually contains some of the terms of the contract of insurance (i) ;
- (iii) It determines, both by the nature of the terms themselves and by the operation of any other general term contained in the proposal or policy, the character and effect of the individual statements of which the proposal is composed (k).

Whilst the questions and answers in the proposal form must as a rule be read together and construed as one (k) in determining the extent of the duty of the assured to make complete and accurate replies, and whether or not he has complied therewith (as, for example, where considerations arise as to the ambiguity of a particular question and its effect on the duty of disclosure (l)) for certain purposes, questions and answers require separate treatment.

6. Immaterial Answer to Material Question.—A question may be asked concerning a material fact, to which the assured, whether innocently or otherwise, may make a reply which is untrue, as where an incorrect address is furnished by him (m), yet the mere materiality of the question to which such reply is furnished does not make the falsity of the reply material unless the misstatement is material, in the sense that a prudent insurer's judgment would have been adversely influenced by the correct reply (n). This was inferentially decided in *Dawsons, Ltd. v. Bonnin* (o).

In such cases the test of the materiality of the reply would appear to be whether or not it is a substantial misstatement of the facts of the matter to which it adverts (m). When a reply is substantially a true statement, trivial inaccuracies or omissions would not serve to render it a false representation (p). The rule that to effect the validity of a policy a mere representation must be substantially untrue in what it states or conceals is applied by statute to marine insurance (q). It is submitted that, there being nothing in principle against it, the same rule would apply to other types of insurance, amongst them the class now under consideration (r). But in practice the question of substantial misstatement is, as far as the assured and the insurers are concerned, academic. The established practice of insurers other than marine insurers of issuing proposal forms and policies incorporating all the statements of the assured as warranties or conditions into the contract of insurance, has made it unnecessary as a

(i) Either expressly or by incorporation into the policy.

(k) *Provincial Insurance Co. v. Morgan*, [1933] A.C. 240.

(l) See *post*, p. 448 and cases there cited, and cf. *ante*, pp. 395, 396.

(m) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A.C. 413; *Mackay v. London General Insurance Co.* (1935), 51 Ll. L. R. 201; *Revell v. London General Insurance Co.* (1934), 50 Ll. L. R. 114.

(n) See *post*, p. 415.

(o) *Supra*.

(p) *Morrison v. Muspratt* (1827), 4 Bing. 60; *De Hahn v. Hartley* (1786), 1 Term Rep. 343; affirmed (1787), 2 Term Rep. 186, n.; *Dawsons, Ltd. v. Bonnin* (*supra*); *Revell v. London General Insurance Co.* (*supra*); *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K.B. 295; [1941] 1 All E. R. 123.

(q) Marine Insurance Act, 1906, s. 20; 9 Halsbury's Statutes 858.

(r) *De Hahn v. Hartley* (*supra*); *Fowkes v. Manchester and London Assurance Association* (1863), 3 B. & S. 917 (life assurance); *Re Universal Non-Tariff Fire Insurance Co., Forbes & Co.'s Claim* (1875), L. R. 19 Eq. 485 (fire insurance).

general rule to inquire further than the truth or falsity of any particular answer (s). A false answer, however immaterial or unsubstantial the falsity may be, invariably, for this reason, takes effect as a fundamental breach of the contract of insurance by the assured and entitles the insurers to repudiate liability thereunder to the assured (t). The effect of questions on the duty to disclose matters not specifically referred to therein is discussed elsewhere (u).

PART 7.—ACCEPTANCE

So long as no complete and effective offer has been made by one party, containing expressly or by implication (v) a statement of the whole of the terms upon which he is willing to become insured on the one hand, or to effect insurance on the other, no contract can arise. Once, however, one party has communicated to the other a complete and effective statement of the terms upon which he is willing to become bound, an offer has been made which is susceptible of acceptance by the other party so as to constitute a binding contract of insurance (w). In order to be effective, however, an acceptance must be an acceptance of the whole offer and of nothing but the offer (a). A purported acceptance of a proposal, made subject to additional terms or to qualifications, or conditional upon payment of the premium (b), is ineffective to constitute a binding contract, and in such case neither the insurers nor the assured will be bound to one another (c). In such a case, where the assured's proposal is met by a purported acceptance conditional upon payment of the stated premium or otherwise varying the terms of the proposal, such purported acceptance may in law constitute a "counter-offer" by the insurers (d) to the assured which he will have the option of accepting or rejecting as he wills (e).

It must be remembered, however, that a "counter-offer," like any other offer, must be communicated (f), and it is therefore submitted that in most motor insurance cases the issue of a policy containing terms not bargained for or agreed to by the assured constitutes an acceptance, and not a counter-offer (d), unless the assured's attention is drawn to the unexpected terms or he otherwise accepts them (g).

1. "Cover Notes."—One of the most common methods whereby insurers purport to accept a proposal is by the issue of a cover note to the assured. Before proceeding to examine the various modes by which accep-

(s) See *post*, pp. 467 *et seq.*, and *ante*, pp. 384-6, 412, 413.

(t) See *ante*, pp. 412, 413, *Dawsons, Ltd. v. Bowmin*, [1922] 2 A. C. 413.

(u) *Ante*, pp. 394 *et seq.*, and *post*, pp. 459 *et seq.*

(v) See *Adie & Sons v. Insurance Corporation* (1898), 14 T. L. R. 544; *General Accident Insurance Corporation v. Cronk* (1901), 17 T. L. R. 233, cited at p. 409, *ante*.

(w) *Canning v. Farquhar* (1886), 16 Q. B. D. 727; *Murfill v. Royal Insurance Co., Ltd.* (1922), 38 T. L. R. 334.

(a) Chapter I, *ante*, p. 2.

(b) *Canning v. Farquhar* (*supra*); *Canning v. Hoare* (1885), 1 T. L. R. 526.

(c) *South East Lancashire Insurance Co., Ltd. v. Croudale* (1931), 40 Ll. L. R. 22; *Linford v. Provincial Horse and Cattle Insurance Co.* (1864), 34 Beav. 291; *Re Yager and Guardian Assurance Co.* (1912), 108 L. T. 38.

(d) As to the position when the policy issued contains terms not bargained for by the assured, see *post*, chapter VIII and chapter IX.

(e) *Canning v. Farquhar* (*supra*).

(f) See *ante*, chapter I, p. 2.

(g) See *South East Lancashire Insurance Co., Ltd. v. Croudale* (1931), 40 Ll. L. R. 22; *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399; 33 Ll. L. R. 315, and see further, *post*, chapter VIII and chapter IX, as to how far the assured may be bound by terms not bargained for by him.

tance may be validly made and communicated, it is necessary briefly to indicate the nature and effect of a "cover note."

In practice, cover notes are issued by insurers' agents in exchange for a deposit on account of premium, or for the premium itself, in order to afford provisional protection to the assured until such time as his proposal is accepted or rejected (*h*), or, where a binding contract is already in existence, until such time as a policy of insurance is delivered to the assured person (*i*). The issue of a cover note as "provisional insurance" must be carefully distinguished from its issue as "temporary cover" (*k*) where a binding contract of insurance has already been entered into, since the latter will merely constitute evidence of an already existing contract, to carry out the subsisting terms of which a policy is bound to be issued.

Since the precise effect of a cover note depends upon its own terms it is difficult to lay down rules of general application. The following principles may, however, be taken for guidance in any particular case :

(i) A cover note is a contract of insurance (*l*), but not necessarily the contract (*m*). It is necessarily of a temporary nature and its effect determines when a policy in respect of the same risks is issued by the insurers (*n*), or when the insurers decline the proposer and notify him of their rejection of his offer (*o*), or when its effect is determined by the operation of its own internal terms, such as by the lapse of a specified period (*p*).

(ii) During its currency the cover note governs the rights and liabilities, *inter se*, of the assured and insurers (*q*). Thus, the assured, provided he has complied with any conditions contained therein, e.g. as to the payment of premium, is entitled to enforce the note against the insurers, who are obliged to indemnify him against any loss within its scope, arising during its currency (*r*). The rights and liabilities of the parties under the cover note are governed by its own terms and not by the terms of the policy which may be subsequently issued (*s*), unless the terms of the policy are expressly or impliedly

(*h*) *Queen Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; *Levy v. Scottish Employers' Insurance Co.* (1901), 17 T. L. R. 229.

(*i*) *South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402; *Ocean Accident and Guarantee Corporation, Ltd. v. Cole*, [1932] 2 K. B. 100.

(*k*) In place of the policy and until such policy is issued.

(*l*) And as such, it is submitted, is governed by the same principles as to non-disclosure or misrepresentation by the assured. See cases cited in notes (*m*) and (*n*), *infra*.

(*m*) *Thompson v. Adams* (1889), 23 Q. B. D. 361; *Queen Insurance Co. v. Parsons* (1881), 7 App. Cas. 96; *General Accident Insurance Corporation v. Shuttleworth* (1938), 60 Ll. L. R. 301.

(*n*) *Roberts v. Security Co.*, [1897] 1 Q. B. 111.

(*o*) *Machie v. European Assurance Society* (1869), 21 L. T. 102.

(*p*) *Levy v. Scottish Employers' Insurance Co.* (1901), 17 T. L. R. 229; *Norman v. Gresham Fire and Accident Insurance Society*, [1936] 2 K. B. 253. In this case the insurers issued after receiving, but before accepting, a proposal for a year's policy, a series of cover notes valid each for 14 days only. No policy was issued to the assured, who had paid part of the premium. During an interval between cover notes, an accident happened in which a third party was injured. The question was whether insurers had accepted the proposal and were bound to issue an annual policy accordingly. It was held by Lewis, J., that they were not.

(*q*) *Re Coleman's Depositories, Ltd. and Life and Health Assurance Association*, [1907] 2 K. B. 798.

(*r*) *Re Coleman's Depositories, Ltd. and Life and Health Assurance Association (supra)*; *Ellerbech Collieries, Ltd. v. Cornhill Insurance Co., Ltd.*, [1932] 1 K. B. 401.

(*s*) *Queen Insurance Co. v. Parsons* (1881), 7 App. Cas. 96.

incorporated therein (t), or unless the parties agree to treat the cover note as so governed (u).

(iii) The issue of a cover note binds neither the insurers nor the assured to enter into a subsequent contract of insurance unless they have already agreed to do so (a).

As far as motor insurance contracts are concerned it is clear that a cover note may constitute a "policy of insurance" for the purposes of the insurance against third party liability which is legally compulsory (b). It is equally clear that as far as the purposes of the Road Traffic Acts are concerned, neither policy nor cover note is effective unless a proper "certificate of insurance" has been delivered by the insurers to the assured (c).

2. Other Modes of Acceptance.—Otherwise than by issue of a cover note by the insurers' properly authorised agents (d), which will either (i) effect a temporary contract of insurance, or (ii) constitute evidence of any already binding contract of insurance in accordance with the principles discussed above, there are a variety of other ways in which the acceptance of an offer of insurance may be effected. Since, as has been explained (e), in practice acceptance usually proceeds from the insurers, it is proposed shortly to indicate the variety of ways in which the act necessary to turn an offer into a binding contract is commonly performed (f).

Acceptance may be expressly communicated by the posting of a formal letter of acceptance to the assured (g), or by the issue of a policy (h) or of a receipt for or the acknowledgment of the agreed premium (i), or orally (k).

Acceptance may also, but rarely does, take place by implication, when the insurers so conduct themselves towards the assured as to indicate that they have accepted his offer even though no premium may have been paid

(t) *Wyndham v. Eagle Star and British Dominions Insurance Co.* (1925), 21 Ll. L. R. 214, *Re Coleman's Depositories, Ltd.* (supra), *Neil v. South East Lancashire Insurance Co.*, [1932] S. C. 35. In this case it was held that the words "issued subject to the terms and conditions of the company's policy" did not entitle insurers to avoid the cover note, on the ground of untrue answers in the proposal form. It seems very doubtful if this case would be followed in the English Courts, on the other hand, cover notes are often issued before the proposal form has been examined and sometimes by agents who have no instructions to reject unsatisfactory proposals. In such cases insurers would have difficulty in proving that the cover note had been obtained by untrue statements in the proposal form, though they would more often be able to rely on non-disclosure.

(u) *Golding v. Royal London Auxiliary Insurance Co., Ltd.* (1914), 30 T. L. R. 350.

(a) *Queen Insurance Co. v. Parsons* (1881), 7 App. Cas. 96, *Mackie v. European Assurance Society* (1869) 21 L. T. 102.

(b) Road Traffic Act, 1930, s. 36 (6), see chapter IV, ante, p. 219, cf. *Broad v. Waland* (1942), 73 Ll. L. R. 263, at p. 275.

(c) Road Traffic Act, 1930, s. 36 (5), see chapter IV, ante, pp. 214 et seq. Such a certificate may be issued with respect to or as part of a "cover note" issued to the assured. S. R. & O. 1941, No. 926. But the operation of the Domestic Agreement is not affected by the absence of a certificate. See chapter VI, ante, p. 378.

(d) *Murfill v. Royal Insurance Co., Ltd.* (1922), 38 T. L. R. 334.

(e) Ante, pp. 409, 416.

(f) For a more detailed examination the reader is referred to Welford's *Accident Insurance*, 2nd Edn., pp. 54-7.

(g) *Adie & Sons v. Insurances Corporation, Ltd.* (1898), 14 T. L. R. 344.

(h) *Roberts v. Security Co.*, [1897] 1 Q. B. 111, *Pearl Life Assurance Co. v. Johnson*, [1909] 2 K. B. 288. But not if it contains new terms, or is virtually a counter offer; *South East Lancashire Insurance Co., Ltd. v. Croudale* (1931), 40 Ll. L. R. 22.

(i) *Re Economic Fire Office Ltd.* (1896), 12 T. L. R. 142, *Canning v. Farquhar* (1886), 16 Q. B. D. 727; *Re Norwich Equitable Fire Assurance Society, Royal Insurance Co.'s Claim* (1887), 57 L. T. 241; *Harrington v. Pearl Life Assurance Co.* (1914), 30 T. L. R. 613.

(k) See, e.g., *Colles v. Young (F), Ltd.* (1929), 33 Ll. L. R. 83.

or no policy issued (*l*). A mere demand for the agreed premium may suffice for this purpose (*m*), but delay in notification of rejection or in dealing with the application will not be equivalent to acceptance.

Once acceptance has taken place the negotiations are at an end and the assured's duty of disclosure ceases. Whilst after there is a concluded contract the assured is released from his obligation to make complete and accurate disclosure of material circumstances (*n*) he becomes subject to the terms and conditions of the contract and must observe them in every particular (*o*). From the same moment onwards the insurers, whether a policy has been issued or not, and independently of receipt of the premium (*p*), are bound to carry out their obligations towards the assured, if no policy has been issued to deliver a policy embodying the whole terms of the contract and a "certificate of insurance" under the Road Traffic Act (*q*), and to indemnify him against any loss or liability covered by the policy (*r*). The issue of cover notes by motor traders to cover the driving of hired cars by customers is considered later (*s*).

PART 8.—EXAMINATION OF PROPOSAL FORM AND MATERIAL FACTS

Having considered the fundamental factors in every contract of motor insurance, the offer and acceptance whereby it is formed, and the duties of full and accurate disclosure and representation which attend its validity, it remains to examine and discuss the terms of proposal forms, which, by the practice and experience of insurers, have come to be substantially similar in every contract of motor insurance. It will be the object of the following pages to analyse at some length the precise scope of the questions which are usually asked, to consider the independent (*l*) materiality of various facts, and then to examine the practical effect of such questions, commenting, as occasion arises, upon the relevant authorities.

Before proceeding to the examination of the individual clauses of the policy, it is, however, necessary briefly to recapitulate certain principles affecting the proposal form which have been elucidated in the preceding pages.

Whilst in theory amounting to nothing more than representations preliminary to the contract, the statements made by the assured in the proposal form in practice invariably become terms of the contract itself. This occurs either by the construing of the proposal form as an offer which by the insurers' acceptance of its terms becomes with all its contents a part of the binding contract of insurance between them and the assured, or by the inclusion of a term warranting "truth and disclosure," and/or making the statements of the assured "bases" of the contract or "conditions

(*l*) *Christie v. North British Insurance Co.* (1825), 3 Shaw (Ct. of Sess.) 519; *Bhugwandass v. Netherlands, India, Sea and Fire Insurance Co. of Batavia* (1888), 14 App. Cas. 83; *Royal Exchange Assurance Corporation v. Tod* (1892), 8 T. L. R. 669.

(*m*) *Xenos v. Wickham* (1866), L. R. 2 H. L. 296.

(*n*) Cf. *Re Yager and Guardian Assurance Co.* (1912), 108 L. T. 38; *Whitwell v. Autocar Insurance Co.* (1927), 27 Ll. L. R. 418; *Willmott v. General Accident Insurance Co.* (1935), 53 Ll. L. R. 156.

(*o*) Cf. *Re Coleman's Depositories, Ltd. and Life and Health Assurance Association*, [1907] 2 K. B. 798.

(*p*) Unless pre-payment is a term of the policy; *Canning v. Farguhar* (*supra*).

(*q*) Road Traffic Act, 1930, s. 36 (5); 23 Halsbury's Statutes 638.

(*r*) *Adie & Sons v. Insurances Corporation, Ltd.* (1898), 14 T. L. R. 544; cp. *Ocean Accident and Guarantee Corporation, Ltd. v. Cole*, [1932] 2 K. B. 100.

(*s*) *Post*, chapter IX, pp. 651 *et seq.*

(*l*) *I.e.* independent of any term of the contract.

precedent" of the insurers' liability (u). Such terms have already been discussed and will again be alluded to in the detailed examination of the clauses of the proposal form (v); it suffices at this stage again to indicate the far-reaching effects which this elevation of representations into warranties creates in the construction of motor insurance policies, with regard to relations between insurers and assured (w).

(1) The question of the degree of misstatement, *i.e.* whether or not it is substantial, becomes immaterial (x).

(2) The question of the materiality of the misstatement or the non-disclosure in question is irrelevant (a).

(3) The insurers are enabled to repudiate liability on the ground of breach of the terms of the contract of insurance itself and are not obliged to go *dehors* the contract to the Common Law of misrepresentation or non-disclosure which must operate as "inducement" or as to materiality, respectively (b).

Since in practice the completed proposal form is invariably part of the concluded insurance, either as constituting the offer upon which it proceeds, or as being expressly or impliedly incorporated into the policy itself, its contents become of importance in considering the respective positions of the insurers and the assured when a dispute arises (c). As the succeeding pages will show, the questions and answers in the proposal form must always be read with the terms of the policy when, for example, a question of the user of the insured vehicle arises (d). Similarly, like the policy itself, the proposal form is to be construed *contra proferentem*—usually, that is, against the insurers (e); this principle is of considerable importance in applying the doctrine of "waiver" by the insurers of the assured's duty of disclosure (f), or in determining whether or not the ambiguity of a particular question is such as to disentitle the insurers from relying upon misstatement or non-disclosure by the assured in relation to some particular matter (g).

The utmost difficulty is experienced in dealing, as must necessarily be done, with hypothetical questions of materiality in relation to the various clauses of the proposal form. "Materiality" in insurance, as the definitions, statutory (h) and otherwise (i), which have been quoted abundantly illustrate, is a question of fact, and as such it can only be answered upon and in relation to the circumstances of every particular transaction (k). This being the case, broad legal propositions cannot be validly laid down, but the following principles as to materiality may be submitted, in

(u) *Ante*, pp. 385, 413.

(v) *Post*, pp. 467 *et seq.*

(w) The relations between insurers and Road Traffic Act third parties are defined by the M.I.B. Agreement. See chapter VI, *ante*.

(x) See *ante*, p. 413.

(a) See *ante*, p. 413.

(b) See *ante*, pp. 385, 413.

(c) *Ante*, pp. 408-415.

(d) *Post*, pp. 431 *et seq.*

(e) *Post*, pp. 448 *et seq.*; *Thomson v. Weems* (1884), 9 App. Cas. 671. But not always, see *A/S Ocean v. Black Sea Insurance Corporation* (1934), 50 Ll. L. R. 179.

(f) *Post*, p. 448.

(g) *Ante*, p. 393; *post*, p. 448; *Zurich General Accident and Liability Insurance Co. Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529; *Cornish v. Accident Insurance Co.* (1880), 23 Q. B. D. 453.

(h) Marine Insurance Act, 1906, s. 18 (2); 9 Halsbury's Statutes 856; Road Traffic Act, 1934, s. 10; 27 Halsbury's Statutes 544.

(i) *Ante*, pp. 388-391.

(k) See *per SCRUTTON, L. J.*, in *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

conclusion of these introductory remarks, to be borne in mind throughout the examination of the proposal form :

(1) The questions set forth in the proposal form may be taken as a strong *prima facie* index of materiality (l) ;

(2) Subject to waiver (m), or the use of ambiguous language by the insurers (n), nothing in the proposal form should be taken to qualify or diminish the extent of the Common Law duty resting upon the assured as to disclosure (o) ;

(3) "Materiality" is not a matter of the assured's knowledge or opinion (p) ; it is a question of fact as to whether or not the judgment of insurers would be affected (q), and as to this insurers are the best judges and expert evidence from them is admissible (r) ;

(4) The facts as to which the question of materiality may arise (s) are, however, a matter of the knowledge (t) or belief of the assured (a), who will be taken to know in fact everything which a reasonable man in his circumstances ought to know (b), or everything which his agent or principal in fact knows or ought to know (c).

I.—PARTICULARS OF VEHICLE

SCHEDULE.—Particulars of Cars to be Insured

Registered letter and No.	Makers' H.P.	Treasury H.P.	Make of car.	Type of body.	Seating capacity including driver.	Year of make.	When bought.	Actual cash price paid by proposer for car and accessories.	Proposer's estimate of present value of car, accessories and spare parts.
								£	£
Chassis No.....									
Engine No.....									

1. Registered letter and number.—These are the identification marks of the vehicle necessary for licensing, taxation and police purposes. Identification marks are provided by the licensing authority in pursuance of their powers under the Roads Act, 1920 (d), and the Regulations made by the Minister of Transport thereunder (e). For insurance purposes these particulars serve to identify the motor car which is to be the object of the risk. For the purposes of the Road Traffic Acts, 1930–34, this identification

(l) See *per* SCRUTTON, L.J., in *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 350 ; and in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361.

(m) *Post*, p. 448.

(n) *Post*, p. 448.

(o) *Ante*, p. 413, and *post*, pp. 467 *et seq.*

(p) *Ante*, p. 389, and see chapter II, pp. 99, 100.

(q) *Ante*, pp. 390 *et seq.*

(r) *Ante*, p. 393.

(s) Confusion arises sometimes through the difference between (3) and (4) of the points being overlooked. The questions may be thus formulated : (i) does assured know, &c., these facts (as (4)) ? ; (ii) if *yes*, are they material (as in (3)) ? Cf. *Zurich General Accident and Liability Insurance Co. v. Livingston*, [1940] S. C. 406.

(t) *Ante*, p. 390.

(a) Belief, where a matter of belief is being stated.

(b) *Ante*, p. 390.

(c) *Ante*, pp. 388–404, and see *post*, p. 473.

(d) Roads Act, 1920, s. 12 ; 19 Halsbury's Statutes 95.

(e) See *ante*, p. 235 *et seq.*

has direct importance in two matters: one, the duty of the driver of a motor vehicle to stop in case of any accident and to furnish, *inter alia*, particulars of the identification marks of his vehicle (f); the other, that any condition, it seems, providing that the policy should not be effective when the car was being driven without the statutory identification marks would be good and binding so as to deprive the assured who is in breach thereof of his right to claim indemnity under the policy.

2. Maker's horse-power.—This is a technical point which has some bearing on the risk to be insured from the insurers' point of view. Its only legal significance is that given to it by section 12 of the 1934 Act, rendering inoperative as against third parties any limitations or conditions of the policy which purport to restrict the insurance against statutory risks by reference, *inter alia*, to:

"the horse-power or value of the vehicle" (g).

3. Treasury horse-power.—This is the, apparently fictional, horse-power ascribed to every vehicle for taxation and revenue purposes under the Finance Act, 1920 (h), and the Regulations made thereunder (i). From the legal aspect the same comment may be passed in relation to Treasury horse-power as in relation to maker's horse-power. Although it is nowhere stated in the Act, it is submitted that "horse-power" within section 12 of the 1934 Act comprises both types of horse-power. Treasury horse-power is used generally as the basis for determining the premium which will be asked for any particular vehicle. Both Treasury and maker's horse-power are, it is submitted, material circumstances, any substantial misstatement of which would enable the insurers to avoid the policy against the insured.

4. Make of car.—This is designed to elucidate the name of the manufacturer and the particular design of the car, risks arising from the ownership and use of which are to be insured against. Both these matters are clearly material. Some insurers will not insure particular makes of motor car, whilst the majority, in the absence of extraordinary circumstances, are reluctant to insure certain makes or types of car at ordinary premiums.

5. Type of body.—Whilst this point is of little importance in relation to third party risks, it is of considerable moment in relation to risks to the car itself, as by loss or by fire, in which contingencies the value of the coachwork particularly affects the *quantum* of the liability falling upon the insurers.

6. Seating capacity.—This point is one which affects the insurers not so much from the point of view of the statutory third party risks, but from the aspect of additional benefits, such as compensation for injury to voluntary passengers. As far as public service vehicles are concerned the seating capacity is a question which vitally affects the insurers' liability in respect of the death of or injury to third parties. Nevertheless, the effect of the M.I.B. Agreements (k) is to render ineffective against "Road Traffic Act third parties" any condition or limitation in a policy of motor insurance

(f) Road Traffic Act, 1930, ss. 22, 40; chapter IV, *ante*, pp. 249 *et seq.*

(g) By Finance Act (No. 2), 1945, s. 5 (2) (c), after the word horsepower in s. 12 of the 1934 Act the words "or cylinder capacity" are to be added.

(h) Finance Act, 1920, s. 13; 16 Halsbury's Statutes 852.

(i) S. R. & O. 1924, No. 1462. As a general rule it may be expressed in the mystic but well-known formula $\frac{D^3 \times N}{2.5}$

(k) Chapter VI, *ante*, p. 359.

which affects to restrict that insurance by reference, *inter alia*, to the "number of persons that the vehicle carries."

7. Year of make.—The age of the vehicle to be insured is important in connection with the following factors, which the insurer must consider in determining whether and upon what terms to accept a risk: the value of the vehicle (*l*), the incidence of depreciation and disrepair (*m*), the condition of the vehicle at the time when insurance is effected, and particularly, from the viewpoint of fire risks, the condition of the petrol connections, the braking and steering of the vehicle. The materiality of the age of the vehicle has arisen for discussion in several cases, in none of which, however, has a direct decision upon the point been given. In *Santer v. Poland* (*n*), where this appears to have been the main point in the insurers' defence of non-disclosure, the case concluded in a compromise, the learned judge having expressed a very strong view to the effect that such a factor was material. In *Paxman v. Union Assurance Society, Ltd.* (*o*), the misstatement of the age of the vehicle was one in a series of points which had been misstated by the assured's agent. In *Allen v. Universal Automobile Insurance Co.* (*p*) the misstatement of the age of the vehicle by the agent of the assured was merely one in a chain of undisclosed and misstated circumstances, and the case was decided upon two other points which will be referred to subsequently (*q*). It is submitted, in the light of the somewhat indecisive authorities summarised above, that the age of the vehicle to be insured is a material circumstance, in that a prudent insurer's judgment would be influenced thereby in the determination of his acceptance of the risk. Thus failure to disclose or substantial misstatement of a vehicle's age would, it is submitted, be grounds sufficient to enable the insurer to avoid liability to his assured on the grounds thereof (*r*).

8. When bought.—This inquiry is sometimes supplemented, particularly in relation to motor cycle insurance, by the further question: "New or second-hand?" The date when the vehicle to be insured was acquired by the insurer is material not only in its relation to the actual risks attached to its use, but also in bearing upon the other material factors of the price paid and the value of the vehicle. The date of acquisition appears to have been one of the many misstatements made by the assured's agent without his knowledge in the case of *Barnett v. Blackmore* (*s*), in which the assured abandoned his claim. Although the inquiry does not directly indicate that the insurer requires to know when the vehicle to be insured was bought by the proposer, it is submitted that it is obvious that it is this information which is being sought, and that the inquiry cannot be evaded by a disingenuous answer to be excused on the score of ambiguity (*t*). The date of acquisition by the assured is, it is submitted, a material fact, and even if no question were specifically directed to the point such fact would have to be disclosed by the proposer (*u*).

(*l*) See *post*, p. 424.

(*m*) See *post*, pp. 424, 425.

(*n*) (1924), 19 Ll. L. R. 29.

(*o*) (1923), 15 Ll. L. R. 206; see *ante*, p. 403.

(*p*) (1933), 45 Ll. L. R. 55.

(*q*) *Post*, p. 424.

(*r*) As to this, see generally, "The effects of Non-disclosure," *ante*, pp. 405-8. It is submitted that the fact that no inquiry was made as to the vehicle's age would not alter its materiality unless from the terms and other contents of the proposal form bearing on the insured vehicle's value, condition, &c., it could be argued that the insurers had impliedly waived their "interest in the vehicle's age." The point is academic inasmuch as the vehicle's age is invariably inquired.

(*s*) (1926), 23 Ll. L. R. 137.

(*t*) See also p. 448.

(*u*) *Sed quare*: see note (*r*), *supra*.

9. Cash price.—This is the more common formulation of an inquiry which also appears as to "price" or "cost price." While both the latter phrases were open to the objection of ambiguity, the expression "cash price" directly raises the question of how much money has been paid for the vehicle. It is submitted that the decision of CHARLES, J., in *Brewtnall v. Cornhill Insurance Co.* (v) that a policy was not avoided by non-disclosure or misrepresentation where the "cost price" of a new car disclosed as £145 was in fact made up of £45 cash and £100 allowance for the proposer's old car, would not apply to the phrase "cash price."

Misstatement of the price paid for the insured vehicle was one of the main elements in the decisions against the insured persons of the two cases of *Paxman v. Union Assurance Society, Ltd.* (w), and *Allen v. Universal Automobile Insurance Co.* (x), in the latter of which it was the ultimate foundation of the decision. The facts there were that the assured's agent had stated the price paid without deducting a rebate of £14 which had subsequently been allowed to the assured to meet his complaints that the car he had purchased was not new and bore traces of fire. Misstatement of price was an element in the abortive proceedings in *Barnett v. Blackmore* (y), the facts of which have been previously summarised.

10. Estimate of present value.—Unlike the other points previously discussed in relation to the particulars required of the assured, this inquiry necessarily relates to a question of opinion. The proposer thus complies with what is required of him pursuant to the duty of good faith if he states genuinely and honestly what he believes to be the vehicle's present value, having regard to all the relevant circumstances (z). In the particulars furnished in reply to the inquiries as to price, date of make and of purchase, the insurers will be supplied with material sufficient to enable them to make some rough estimate of the value of the vehicle, and it is therefore only when there is misstatement or non-disclosure concerning some of these other factors that the accuracy and completeness of the assured's estimate of value can be seriously urged as material (a). Where the assured makes full and accurate disclosure of the age, make, price and date of purchase of the vehicle, the insurers knowing, as they should know in the course of their business (b), the conditions and rate according to which the value of cars depreciates are frequently in a better position to form an accurate estimate of value than the proposer himself. It is submitted, therefore, that the assured does what is required of him by the duty of good faith by giving an honest and genuine statement of his opinion. In *Allen's Case* (a) the proposer, who was a motor dealer, had bought back in ignorance for £285, as a new car, one which was old and which he had previously purchased and after reconditioning sold for a more or less nominal sum. His estimate of the value of the car was stated as £285. In fact, he had obtained an allowance of £14 when the car was sold to him, and a later repayment of £30, when he had discovered the facts and complained of being cheated. It was held that this estimate of value, considering that the car was an old model, that the proposer knew he had paid a very high price for it (even though he was ignorant of the car's true history at the time of the purchase), and that he had in fact obtained two rebates bringing the price well below £285, was not a true estimate and that upon this ground as well as upon the

(v) (1931), 40 Ll. L. R. 166.

(w) (1923), 15 Ll. L. R. 206

(x) (1933), 45 Ll. L. R. 55.

(y) (1926), 23 Ll. L. R. 137.

(z) See *ante*, p. 396; cf. *Marine Insurance Act*, 1906, s. 20 (4).

(a) *Allen v. Universal Automobile Insurance Co.* (1933), 45 Ll. L. R. 55.

(b) *Ante*, p. 393.

misstatement of the price paid for the car, the policy could be avoided by the insurers (c).

It remains briefly to refer to a matter bearing upon the answers to the three inquiries last dealt with. At the present day many car "owners" are in fact purchasers of cars under hire-purchase agreements, the cars being in fact the property of the vendor until the agreement is completed. Whereas the word "owner" under the Road Traffic Act, 1930, is defined so as to include "the person in possession of the vehicle" under a hiring or hire-purchase agreement (d), that term cannot be similarly interpreted in the policy of insurance or other documents such as the proposal form which bear upon it (e). Proposal forms in common use invariably contain a question covering this point, which will be discussed later (f), but the existence of a hire-purchase agreement must necessarily affect the answers given to the inquiries as to "price," purchase and estimate of value. It is submitted, subject to the observations later to be made concerning the materiality of hire-purchase agreements (g), that where such agreement exists and the proposer's interest is derived thereunder, the inquiries as to price, date of purchase and estimate of value must be answered with reference to such agreement, the consideration paid or agreed to be paid by the proposer thereunder being disclosed to the insurers.

II.—PARTICULARS OF PROPOSER AND HIS INTEREST

Full Name of Proposer.....Age

Private Address.....Business |
or |

Business AddressProfession |

Address at which Motor Car(s) is/are usually garaged.....

1. Full name of proposer.—This inquiry involves the identity of the person proposing to become insured. It concerns firstly those considerations involving the name of the proposer, and secondly his interest in the vehicle to be insured.

The materiality of the proposer's name has arisen in three cases of motor car insurance. In *Carlton v. Park* (h), to which reference on other points will be made later, the proposer failed to disclose that his real name was not Carlton but Schwartz, but the case did not turn on this point. In *Dunn v. Ocean Accident and Guarantee Corporation, Ltd.* (i), the proposer, who was a married woman, gave particulars of her maiden name and not of her married name, and failed to disclose the fact that she was married. Her

(c) In the years succeeding the recent war, motor vehicle values have become greatly inflated. The premium payable is dependent in many policies on the money value of the vehicle as assessed by the assured. Whereas he will have to pay an increased premium if the car is assessed at more than its market value, he will not necessarily, unless the value of the car as stated in the policy is an agreed value, obtain from insurers that value in money in the event of a total loss. Indeed, in the event of a gross over-valuation by the assured, he may not receive any payment at all. But see *Ewer v. National Employers' Mutual General Insurance Association, Ltd.*, [1937] 2 All E. R. 193.

(d) Road Traffic Act, 1930, s. 121 (1); 23 Halsbury's Statutes 686.

(e) But see *ROCHE, J.*, in *James v. British General Insurance Co.*, [1927] 2 K. B. 311; 27 Ll. L. R. 328, at p. 330. "I find it (the car) was the plaintiff's own in the sense that he was the legal owner of it. He was the person entitled to the use and possession of the car, and in the sense in which the words are used in the documents I find he was the owner of the car." See also *Coles v. Young (F.), Ltd.* (1929), 33 Ll. L. R. 83.

(f) *Post*, p. 439.

(g) *Post*, p. 439.

(h) (1922), 10 Ll. L. R. 776; 12 Ll. L. R. 246.

(i) (1933), 47 Ll. L. R. 129; 50 T. L. R. 32.

husband, who was also intended to drive the car insured, was to the knowledge of the insurers, whose agent he was, a bad risk with a bad record. It was held that the insurers were entitled to avoid the policy on the ground that the proposer had failed to disclose material facts, *inter alia*, her married name. The question also arose in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (j), where a proposer had falsely stated his name as Dickson (when in fact it was Dadswell), and also that he had no previous conviction for any offence in connection with the use of a motor vehicle. The Court of Appeal, reversing the decision of SWIFT, J., held that the policy under which Dickson had been insured was properly avoided by the insurers upon the latter ground. From these three cases it is submitted that the true and full name of the proposer is a fact which must be completely and accurately disclosed, and, whether or not it is material in fact to the risk (k), if it is not accurately disclosed it may vitiate the contract on the ground of mistake (l). This submission will be valid, *a fortiori*, when the proposal contains a warranty of truth and disclosure, or some similar term making the truth of the proposer's answers the basis or condition of the policy.

While the materiality of the assured's interest in the vehicle to be insured is discussed more fully later, certain aspects of the matter may usefully be raised at this juncture, in relation to the term "proposer." Where this word is used in contrast with "owner" found elsewhere in the proposal form, it is quite obvious that its meaning is wider than that of the latter term. Three instances in which difficulties arise are:

- where a partnership is the proposer (m);
- where there is a hire-purchase agreement (n);
- and where there is a "collusive" proposal (o).

2. Partnership.—Although some proposal forms, particularly in relation to commercial vehicles, make express reference to answering certain questions thereon by a partnership, this is uncommon in the case of private motor car insurance. The question was directly raised in *Jenkins v. Deane* (p) whether a proposal of insurance relating to partnership property should disclose the existence and identity of the individual partners. The point became irrelevant by reason of GODDARD, J.'s, decision on the facts of that case, but from the learned judge's observations in the course of the judgment it appears that he regarded such disclosure as necessary. It is submitted that this view is correct, and that the existence and identity of other partners is a fact of obvious materiality (q).

(j) (1934), 50 T. L. R. 528, 49 Ll. L. R. 361.

(k) *Per* SCRUTTON, L. J., in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361, at p. 364. "Up to the second day of the trial all that the insurance company knew was that he had two names. That by itself may become very material if one name is the name of an honest man and the other is a name of a man known to be a notoriously dangerous driver." The case of *Richards v. Port of Manchester Insurance Co.* (1934), 50 Ll. L. R. 88, suggests that the name should be disclosed in certain cases as indicative of the assured's race, religion, or nationality. As to whether these are material, see *post*, pp. 430, 431. See also the facts of *Jonas v. Meatyard*, [1939] 1 All E. R. 140, 63 Ll. L. R. 4, *Guardian Assurance Co., Ltd. v. Sutherland*, [1939] 2 All E. R. 246, *Zurich General Accident Insurance Co. v. Buch* (1939), 64 Ll. L. R. 115.

(l) This question is considered *post*, chapter IX.

(m) This is uncommon except in commercial vehicle insurance; although it is met with in insurance of cars for business purposes, e.g., house agents.

(n) See *post*, more fully.

(o) Cf. *Barnett v. Blackmore* (1926), 23 Ll. L. R. 137.

(p) (1933), 103 L. J. K. B. 250; 47 Ll. L. R. 342.

(q) Cf. cases in which the previous insurance records of partners have been decided as material; *post*, pp. 455 *et seq.*; *Locher and Woolf, Ltd. v. Western Australian Insurance Co., Ltd.*, [1936] 1 K. B. 408.

3. Hire-purchase interest.—It has been several times suggested in motor insurance cases that the proposer is under a duty to disclose the existence of a hire-purchase agreement if his interest in the vehicle concerned in his proposal arises thereunder. In *Arlet v. Lancashire and General Insurance Co.* (r) the defence, *inter alia*, was raised by the insurers that the assured had failed to disclose that he was not the owner and that the insured car was covered by a hire-purchase agreement. SWIFT, J., in giving judgment for the assured, appears (s) to have flouted the suggestion that such matters, in the absence of questions directed specifically to them, should be disclosed. In *Coles v. Young (F.), Ltd.* (t) it was held that an insurance on a vehicle of which the assured had not yet become owner was unenforceable. In *Bonney v. Cornhill Insurance Co., Ltd.* (u), in which *Arlet's Case* was not apparently cited, the claim of the assured for indemnity against loss by fire of the insured vehicle was met, *inter alia*, with the defence that the plaintiff had wrongly stated he had bought the vehicle when in fact it was acquired under a hire-purchase agreement. Upon that defence CHARLES, J., found as a fact (v) that the insurers were aware that the vehicle was being acquired under a hire-purchase agreement, thereby inferentially holding, in distinction to SWIFT, J., that such facts were material. The question was also raised in *Allen v. Universal Automobile Insurance Co.* (w), where the existence of the agreement in question apparently figured in an endorsement on the policy (a), but the case was decided on other grounds and, in Lord WRIGHT's words: "For the purposes of this case the hire-purchase transactions may be disregarded" (b). Despite the fact that as a rule the inclusion of specific questions makes the point academic, it is submitted that the existence of a hire-purchase agreement under which the proposer's interest in the vehicle arises should be disclosed as material (c). The anomalous position and nebulous rights of the hire-owner under a policy issued to the hire-purchaser are considered later (d).

4. Collusion.—The case of collusive insurance is always difficult to consider apart from the non-disclosure or misrepresentation of material facts other than the real identity of the person interested in effecting the insurance. Thus in cases in which the question of "collusive insurance" might be raised, the policy is avoided on grounds of non-disclosure or misrepresentation in relation to the non-disclosure of previous accidents or rejections of risk sustained by the person on whose behalf or for whose benefit the insurance was really intended to be effected (e).

5. Age.—In the case of *Mundy's Trustees v. Blackmore* (f), the assured had *inter alia* misstated his age in the proposal form. The misstatement was

(r) (1927), 27 Ll. L. R. 454. (s) See *ante*, p. 396, for citation from his judgment.

(t) (1929), 33 Ll. L. R. 83.

(u) At p. 44.

(w) (1931), 40 Ll. L. R. 39.

(w) (1933), 45 Ll. L. R. 55.

(a) As to the effect of such endorsements, see chapter VIII, *post*.

(b) At p. 57.

(c) *Sed quare*: but the extent of the assured's interest in the vehicle is certainly a material fact, and see the dictum of ROCHER, J., in *James v. British General Insurance Co.*, [1927] 2 K. B. 311; 27 Ll. L. R. 328, at p. 330, cited at p. 425, *ante*, note (r). See also *Coles v. Young (F.), Ltd.* (1929), 33 Ll. L. R. 83; *Guardian Assurance Co., Ltd. v. Sutherland*, [1939] 2 All E. R. 246; *Zurich General Accident Insurance Co. v. Buck* (1939), 64 Ll. L. R. 115. Cf. *Banton v. Home and Colonial Insurance Co.* (1921), *Times*, 27th April, cited in *Welford on Accident Insurance*, 2nd Edn., at p. 313.

(d) *Post*, chapter IX.

(e) Cf. *Dunn v. Ocean Accident and Guarantee Corporation, Ltd.* (1933), 47 Ll. L. R. 129; *Barnett v. Blackmore* (1926), 23 Ll. L. R. 137; *Zurich General Accident Insurance Co. v. Buck* (1939), 64 Ll. L. R. 115; *Guardian Assurance Co., Ltd. v. Sutherland*, [1939] 2 All E. R. 246.

(f) (1928), 32 Ll. L. R. 150.

hardly material as it involved only a difference of two years, but the proposal contained a warranty of "truth and disclosure." Although the case was decided upon other grounds it was *intimated* by MACKINNON, J., in the course of his judgment, that such misstatement in the circumstances would have sufficed to enable the insurers to repudiate the policy (g). The case of *Richards v. Port of Manchester Insurance Co.* (h) suggests that the age of the assured may be regarded as material.

While in the majority of cases, apart from any condition in the policy, a mere innocent misstatement by the proposer as to his age would probably be immaterial, age nevertheless is, connected with the following types of matters, clearly material from the interest of the insurer: as to whether the proposer is qualified to obtain a driving licence (i); as to whether he is likely by the infirmity of age to obtain a licence; and whether the proposer is a learner (k), and as to the period for which he may have been qualified to drive; as to the efficiency and celerity with which he will learn to drive. Thus as a rule age will be a material circumstance as to which the proposer should furnish accurate information.

6. Address and business address.—It is suggested that the exact place where a man lives is likely to be material, since his correct address is of great importance to insurers for serving notice of cancellation or taking proceedings for the recovery of the certificate (l). The *district* or *area* in which the car is to be used is clearly material (m). This point has only been raised in one reported case of motor insurance, *Barnett v. Blackmore* (n). As has been stated, this case proved abortive, the plaintiff having submitted to judgment, and cannot be quoted as an authority upon this or any other point.

7. Business or profession.—The practice of motor insurers has led to the division of risks into three broad classes, corresponding with the various types of use to which the vehicle to be insured will be put (o). It is mainly as bearing upon the classification of a particular risk that the business or profession of the proposer becomes relevant; insured persons who are, for example, commercial travellers or engaged in the motor trade will be accepted only at an increased premium unless they are effecting insurance for purely pleasure purposes. Since the proposal form invariably contains the classifications of risks and, further, questions specifically directed to establishing within which category the risk to be insured falls, the proposer's profession or business, to the extent that it bears upon the "class" risk of his insurance, will necessarily be the subject of full and accurate disclosure (p). The question remains, however, to what extent beyond this disclosure of

(g) A misstatement of age may have considerable importance, as when it lengthens the period for which the assured has been qualified to drive.

(h) (1934), 50 Ll. L. R. 88. And see *post*, chapter IX. In that case the policy excluded driving by, *inter alios*, undergraduates.

(i) *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295; [1941] 1 All E. R. 123; *Broad v. Waland* (1942), 73 Ll. L. R. 263.

(k) *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

(l) Otherwise they may be unable to escape liability under the terms of the M.I.B. Agreements. See chapter VI, *ante*.

(m) As increases of premiums for vehicles used in certain areas have shown. Cf. *Palmer v. Cornhill Insurance Co.* (1935), 52 Ll. L. R. 78.

(n) (1926), 23 Ll. L. R. 137.

(o) See these classes set out and discussed at pp. 431 *et seq.*, *post*.

(p) Incorporated with the policy expressly or by inference the assured's statement of his profession may become a "warranty as to use" or a description of the risk incurred. See chapter VIII, *post*.

the proposer's business or profession is necessary (g). The answer to this question must depend upon whether or not the circumstance concealed or misrepresented is a material one: an answer, therefore, which necessarily varies with the circumstances of each particular case (r). The case of *Richards v. Port of Manchester Insurance Co.* (s) shows that some insurers regard the driver's profession as material, since the policy excluded driving by "Air Force Officers, Actors, Actresses, or Turf Commission Agents." The question has arisen in life and accident insurance cases, and as the comprehensive policy includes these, the following are mentioned. In *Perrins v. Marine Insurance Society* (t), the failure of the proposer to disclose that he was an ironmonger (he described himself as "esquire") was held to be immaterial. It was likewise intimated that a peer carrying on business as a brewer, banker or ironmonger could properly describe himself as a peer (u), or a banker and wine merchant as a banker. This case may usefully be contrasted with *Biggar v. Rock Life Assurance Co.* (v), discussed in another context, where the proposer, who was a publican and tea traveller, was held improperly described under the latter designation only, and the Scottish case of *Equitable Life Assurance Society v. General Accident Assurance Corporation* (w), in which in a reinsurance against motor accidents the reinsured described the original proposer as a "gentleman" when he was actually a motor car driver, and had so described himself in his proposal. Two other cases, *Woodall v. Pearl Assurance Co.* (x) and *Ayrey v. British Legal and United Provident Assurance Co.* (y), have some bearing on the matter. In the former the proposer described himself as "haulier and contractor, master working"; in fact he was a haulier by land and water; the insurers contending that the policy was void by misrepresentation. The Court of Appeal held that the proposer had correctly described his occupation as it was understood in the district, and that the insurers' contention on this ground failed. In the latter case, the proposer was described as a fisherman, which was his usual occupation; he was also a member of the Royal Naval Reserve, which exposed him to additional risks. The latter circumstance was orally communicated to the insurers' agent, who communicated it to their district manager. In the facts of that case, the circumstance having been communicated to the manager of the insurers, premiums having been accepted and a policy issued, the insurers were held not entitled to repudiate for non-disclosure.

From these cases it is possible to adduce the principles which, it is submitted, are applicable on this point to motor insurance if full and complete disclosure as to his occupation or profession is not made by the proposer:

- (i) If there is a stipulation of "truth and disclosure" in the proposal form and policy, the insurers are entitled to avoid the policy (a).

(g) Cf. those special policies in which limitations as to use of members of various races, &c., are contained. See chapter V, p. 319, *ante*.

(r) The statement of the assured's profession or business is indirectly material when coupled with the limitations as to user of the assured vehicle. In *Jones v. Welsh Insurance Corporation, Ltd.*, [1937] 4 All E. R. 149, the assured had described himself as a motor engineer. Use of the vehicle assured was limited to social, domestic and pleasure purposes and use by the insured in person in connection with his business or profession as stated. It was held that insurers were not liable to indemnify him in respect of an accident which occurred while the car was being driven by his brother and used for the conveyance of sheep belonging to the assured, who engaged in sheep farming as a spare time occupation.

(s) *Post*, p. 652.

(t) (1859), 2 E. & E. 317.

(u) *Sed quare*: "Peer" would not appear to be a business or profession

(v) [1902] 1 K. B. 516.

(w) [1904] 12 Sc. L. T. 348.

(x) [1919] 1 K. B. 593.

(y) [1918] 1 K. B. 136.

(a) Subject to the 1934 Act as concerns third parties.

provided there is real inaccuracy (b), and that the truth has not in any way been communicated to the insurers (c).

(ii) If there is no such stipulation, immaterial concealment or misrepresentation does not affect the policy (d).

(iii) Failure fully and accurately to disclose a material circumstance on this point will entitle the insurers to repudiate the policy :

(a) where the classification of the risk is affected, in any case (e) ;

(b) where the " class risk " is not affected, then if the circumstance is such that it would have influenced the insurers in their acceptance of the risk (f).

8. Where usually garaged.—Under the comprehensive policy of motor insurance the place of the vehicle's garaging is important in its bearing upon the risk of loss by fire or theft (g). It is more important as showing the area or district in which the vehicle will be used (h). Answers to this inquiry may be inaccurate by inadvertence or by design. An inadvertent misstatement will, as a general rule, not be a material one, although it may, when the policy is affected by the inclusion of a general warranty covering the truth of the statements in the proposal form, be a sufficient ground upon which the insurers will be able to avoid the policy (i). Even inadvertent misstatements will, however, be material when the matters so misstated can be said by the insurer to be such as would have influenced him in his acceptance of the risk.

The matter under discussion is usually covered more fully in commercial vehicle policies where, in addition to the question now considered, further inquiry is made upon such points as the type of garage (wood, iron or brick) in which the vehicle is usually stored when not in use, the amount of petrol stored with the garaged vehicle, the number of other vehicles usually stored with the vehicle in question. These matters, where they are raised, must be fully and accurately answered.

The case of *Dawsons, Ltd. v. Bonnin* (k) has already been discussed. It will be recollected that in that case the situation of the insured vehicle's usual garage was misstated, and that the House of Lords held that the insurers were entitled to repudiate the policy on the ground of breach of the condition of truth and disclosure which was contained in the proposal form and policy, although the fact, as was admitted, was immaterial to the insurers' acceptance of the risk.

9. Nationality, race, religion and status of proposer.—The question is sometimes raised as to whether the nationality or racial origin of the proposer is a fact which should be disclosed when he is negotiating

(b) Cf. *Woodall v. Pearl Assurance Co.*, [1919] 1 K. B. 593.

(c) Cf. *Ayrey v. British Legal and United Provident Assurance Co.*, [1918] 1 K. B. 136.

(d) *Perrins v. Marine Insurance Society* (1859), 2 E. & E. 317.

(e) See post, pp. 431 et seq.

(f) Including always, in the terms upon which the risk was accepted; *Bigger v. Rock Life Assurance Co.*, [1902] 1 K. B. 510; *Equitable Life Assurance Society v. General Accident Assurance Corporation* (1904), 12 Sc. L. T. 348.

(g) As to what is a garage in this context, see *Barnett and Bloch v. National Parcels Insurance Co.*, [1942] 2 All E. R. 55 n. The definition in that case was " a place where one can get reasonable protection and shelter for a car " An open yard, not being a building with a roof, was held not to be a garage within the meaning of the term in that policy.

(h) Which is an extremely material circumstance in some instances.

(i) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413. In this case the question—as to place of garaging—was material. The answer was inaccurate, but its inaccuracy was agreed to be immaterial, as making in fact no difference in the risk to be insured.

(k) [1922], 2 A. C. 413.

for insurance. The case of *Richards v. Port of Manchester Insurance Co. (l)* shows that some insurers, at any rate, regard the race, religion, profession, and status of the proposer as material. Thus the cautious proposer, if he is a Jew by race or religion, a foreigner, or an undergraduate, should disclose that fact (*m*). While the point has been taken in other forms of property insurance (*n*), it appears to have been raised only once in relation to motor car insurance, in *Carlton v. Park (o)*, where the assured failed to disclose to the insurers that he was in fact a Rumanian subject named Schwartz. The case was, however, decided upon other grounds, although SANKEY, J. (as he then was), intimated that these facts were sufficiently material to require disclosure. It is apprehended that the nationality of the proposer is a material fact, which, as a general rule, should be disclosed to insurers. It is not in all cases that non-disclosure of the proposer's nationality entitles the insurers to avoid the policy. The words of LUSH, J., in *Horne v. Poland (p)* may be usefully cited :

" I cannot agree with the view which was pressed upon me, and in support of which the evidence was given, that the mere fact that a person
" is a foreigner and not a British subject is in all cases a material fact, so
" that the non-disclosure of it invalidates the policy. One can easily think
" of cases in which it could not affect the mind of a reasonable underwriter."

It is, therefore, impossible to lay down a general rule upon the matter. Every case must necessarily depend upon its own particular circumstances. The proposer should, therefore, be on the safe side and disclose his nationality, race and status, lest in the event of loss it should be alleged against him that his policy is void for non-disclosure. For, as LUSH, J., said :

" Many aliens are carrying on business in this country, and probably
" many are insured under policies which are unenforceable, though quite
" honestly effected. The risks incurred by persons who effect insurances
" without being carefully advised are often quite unknown to them. It
" would seem more just that underwriters should inquire as to the nationality
" of proposed insurers if they attach importance to it. However, the law is
" as I have stated, and I must apply the law " (*a*).

III.—CLASS OF COVER

1. Do you desire (*a*) A Comprehensive Policy, or } (*a*).....
- (*b*) A Policy covering Third Party risks only, or } (*b*).....
- (*c*) A Policy restricted to the cover required by the } (*c*).....
- Road Traffic Acts ?
- (*d*) If (*a*) or (*b*) required, do you desire to cover any } (*d*).....
- of the additional benefits ?

These points are directed to eliciting from the proposer against what risks he is desirous of insuring. The precise nature of the contract to be entered into—i.e. whether an indemnity or otherwise—will be determined by the proposer's answers on these points (*b*). It should be noted that (*b*) will extend beyond the risks of personal injury or death to third parties to cover damage to property. To such insurance in its widest aspect the Third Parties (Rights against Insurers) Act, 1930 (*c*), is applicable. Thus

(l) (1932), 50 Ll. L. R. 88.

(m) See *post*, p. 652.

(n) *Horne v. Poland*, [1922] 2 K. B. 364.

(o) (1922), 10 Ll. L. R. 776 ; 12 Ll. L. R. 246.

(p) [1922] 2 K. B. 364, at p. 365.

(a) *Horne v. Poland*, [1922] 2 K. B. 364, at p. 367.

(b) See chapter II, *ante*, pp. 71-72.

(c) Third Parties (Rights against Insurers) Act, 1930, s. 1 ; chapter III, *ante*, p. 120.

the insurers under such a contract will, therefore, be exposed to liability to third parties in the events specified in that enactment. The Road Traffic Act cover referred to will be such liabilities as are comprised in section 36 (1) (b) of the principal Act (d) as amended by the Act of 1934 (e).

It is open to the proposer to specify against what risks, including those covered in the "Additional Benefits," he desires to effect insurance. He will, of course, become chargeable with premiums determined in accordance with the extent of the risks against which he desires to insure.

2. (a) Will the Motor Car(s) be used solely for social, domestic and pleasure purposes? (a).....
 (b) If not, will the use come within the scope of one of the classes on p. 2? (b).....
 (c) State whether Class 1, 2 or 3 (c).....

The points which arise for consideration under the present head relate to the limitations of the risk of which the proposer is desirous of effecting insurance (f). The risks to be insured will be defined by the information furnished by the proposer as to the subject-matter to be insured, his own identity and the type of "cover" involved. Within the circumstances thus defined and delimited, since it is well known that certain types of use of vehicles involve more risk than other types, the insurers in many cases will desire to limit the risks of the type insured against by reference to the use to which the insured vehicle may be put. The quantum of the risk to be borne by the insurers will vary in accordance with the purposes for which the insured vehicle is to be used. It is to the ascertainment of these purposes that the present questions as well as the particulars as to "classes" to which reference has been previously made are directed. The replies furnished thereto will have twofold importance: firstly, in determining the premium at which the insurers will accept the risk, and secondly, in giving rise to the insertion of conditions in the policy limiting the risk insured.

Motor insurance risks are in practice invariably divided by insurers into three classes, which are found reproduced in terms substantially similar in all proposal forms, and to which the questions under consideration have reference. The classification is formulated in the following terms:

Class 1.—Cars used for social, domestic, and pleasure purposes, also used by the assured in person in connection with his business or profession, excluding use for hiring or for commercial travelling or racing, pacemaking, or speed testing or for the carriage of goods or samples in connection with any trade or business or use for any purpose in connection with the motor trade, or use by commission agents, insurance branch managers, insurance surveyors, and insurance collectors, wholly or partly for business purposes.

Class 2.—Cars used for social, domestic and pleasure purposes, also for the business or trade purposes (including transport of goods) of the assured, including use by the assured's employees for such purposes, but excluding use for hiring or for commercial travelling or racing, pace-making or speed testing or by commission agents wholly or partly for business purposes, or use for any purpose in connection with the motor trade.

(d) As to which, see chapter IV, *ante*, p. 188.

(e) Road Traffic Act, 1934, s. 16 (4); chapter V, *ante*, p. 348.

(f) See chapter V, *ante*, p. 316, as to the effect of s. 12 of the Act of 1934 upon certain types of limitation of risk.

Class 3.—Cars used for social, domestic, and pleasure purposes, also for any business or trade purposes of the assured (including commercial travelling), but excluding racing, pace-making or speed testing, or the carriage of passengers for hire or reward.

It has twofold importance: firstly, in determining the terms upon which the proposal of the assured will be accepted, and secondly, in indicating beyond ambiguity or doubt that certain circumstances are regarded by the insurers as material to the risk. Failure fully and accurately to disclose *circumstances bearing upon the classification of the risk to be insured* would without the least doubt entitle the insurers to avoid the policy (*g*). The exact nature of the risk to be insured, according to which the terms, particularly the premium payable, of the completed insurance will be fixed, is determined by the answers made by the proposer to the questions now under consideration (*h*).

Although important in their bearing upon the premium and terms of the insurance, the answers of the proposer upon these points are vital as affecting the uses to which the insured vehicle is intended to and may be put. Almost every motor car insurance policy contains stipulations by which the risk insured is limited. These limitations, which are now as against third parties subject to the effect of the M.I.B. Agreements (*i*) relate sometimes to the condition of the vehicle (*k*), sometimes to the area within which the vehicle is to be used (*l*), but more commonly to the purposes for which the insured vehicle shall be employed (*m*). It is to the latter type of limitation that the questions now under discussion most nearly relate. It is necessary to examine, therefore, the effect of the proposer's replies upon these points. Questions and answers of this nature fall into three classes:

IV.—DESCRIPTIONS AND WARRANTIES

- (i) representations as to the subject-matter to be insured;
- (ii) definition or description or limitation of the risks insured;
- (iii) continuous warranties, that is, stipulations the accuracy whereof is made essential to the contract (*n*).

The effect of a question and answer relating directly or indirectly (as by reference to classification) to the user of the vehicle will depend upon whether such statement is to be construed as a representation, or definition of the risk insured, or a warranty.

(*g*) See *per* SCRUTTON, L.J., in *Re Morgan and Provincial Insurance Co.*, [1932] 2 K. B. 70, at pp. 80-2.

(*h*) These questions do not always appear in the same form, but are always directed to the same purposes.

(*i*) *Anle*, chapter VI, p. 364.

(*k*) *Crossley v. Road Transport and General Insurance Co.* (1925), 21 Ll. L. R. 219; *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 46 T. L. R. 71; *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39.

(*l*) *Bonney v. Cornhill Insurance Co.* (*supra*); *Palmer v. Cornhill Insurance Co.* (1935), 52 Ll. L. R. 78.

(*m*) *Farr v. Motor Traders Mutual Insurance Society*, [1920] 3 K. B. 669; *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590; *Re Morgan and Provincial Insurance Co.*, [1932] 2 K. B. 70; on appeal, *sub nom. Provincial Insurance Co. v. Morgan*, [1933] A. C. 240; *Piddington v. Co-operative Insurance Society*, [1934] 2 K. B. 236; *Jones v. Welsh Insurance Corporation, Ltd.*, [1937] 4 All E. R. 149; *Levinger v. Licenses and General Insurance Co.* (1936), 54 Ll. L. R. 68; *Passmore v. Vulcan Boiler and General Insurance Co.* (1936), 154 L. T. 258; *Baker v. Provident Accident and White Cross Insurance Co.*, [1939] 2 All E. R. 690; *Stone v. Licenses and General Insurance Co.* (1942), 71 Ll. L. R. 256; *Wyatt v. Guildhall Insurance Co.*, [1937] 1 K. B. 653; [1937] 1 All E. R. 792; *McCarthy v. British Oak Insurance Co.*, [1938] 3 All E. R. 1.

(*n*) *McGillivray on Insurance*, p. 360, adopted by BANKES, L.J., in *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 669, at p. 673.

In the first sense questions concerning the use to which the vehicle to be insured is to be put can only be answered in accordance with the intentions of the proposer. If, therefore, he replies with an honest and genuine statement of his intentions, he fulfils what is required of him and the insurers are not entitled to rely upon some later and different use of the vehicle as constituting a violation of the proposer's duty as a ground for repudiating liability under the policy (o).

Wherever the question and answer as to "user" constitutes a definition of the risk insured, the position is different; there the liability of the insurer is limited to risks arising out of that particular user of the vehicle which is covered by the proposer's answer. The mere fact that the vehicle is used subsequently for extraneous purposes does not entitle the insurers to repudiate liability (p) unless the loss or liability with respect to which the proposer seeks to be indemnified arises when the vehicle is being used for purposes other than those defined in the proposal form and policy (q). Thus where the question and answer provided the information which is used by the insurers, expressly or impliedly by its incorporation into the policy under a general provision (r), as a limitation of the risk insured, the fact that the assured has made some use of the vehicle not in accordance with his answer will not prejudice the validity of the policy for the future (s), provided that there has been no failure by the proposer fully and accurately to disclose his intentions as to the use of the vehicle in the proposal form.

Where, however, the question and answer are read together as constituting a "warranty" (t) the position may be wholly different. There the use of the insured vehicle for purposes other than those disclosed in the answer may constitute a breach of a stipulation going to the root of the contract which, whether it has any bearing upon a loss or liability incurred or not, entitles the insurers to repudiate their liability (w). It may, on the other hand, amount only to a limitation of risk (u).

It is, therefore, a matter of importance to differentiate between the various classes of answers according to their effect in the event of non-disclosure or misstatement. In particular, it falls to be considered whether the statement of the proposer as to the user of the insured vehicle binds him not to use it thereafter for any other purpose, and what the effect of his use of the vehicle for such other purpose will be.

In practice this inquiry is simplified by the inclusion of a term in every motor insurance contract either that the answers of the insured shall be of a "promissory nature" (v), or otherwise importing them by way of "conditions precedent" or "bases" into the scope of the contract. The effect of the assured's answer as to the user becomes, in every case, a question of construction of the policy (w). The facts of those motor insurance cases in

(v) *Ante*, p. 397.

(p) *Piddington v. Co-operative Insurance Society* [1934] 2 K. B. 236; *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240.

(q) *Gray v. Blackmore*, [1934] 1 K. B. 95; *Jones v. Welsh Insurance Corporation, Ltd.* (*supra*). See cases cited in note (m), p. 433.

(r) See chapter VIII, *post*.

(s) *Morgan and Provincial Insurance Co., Re*, [1932] 2 K. B. 70, on appeal *sub nom. Provincial Insurance Co. v. Morgan*, [1933] A. C. 240.

(t) I.e. a stipulation "only" to use the vehicle for the described purposes. As in *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590.

(u) *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590; 27 Ll. L. R. 313.

(v) As to the meaning of this phrase, see *post*, pp. 467 *et seq.* and chapter IX.

(w) *Per* Viscount HALDANE in *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413, at p. 421; *per* Lord BUCKMASTER in *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240, at p. 246; *Herbert v. Railway Passengers Assurance Co.*, [1938] 1 All E. R. 650.

which these matters have been considered have already been fully set out. In *Farr v. Motor Traders Mutual Insurance Society* (x), the proposer, to the question "State whether driven in one or more shifts per twenty-four hours," had replied "just one." The insured vehicle was afterwards used for a short while for two shifts per twenty-four hours; later when the vehicle was back on one shift an accident occurred, and the insurers attempted to repudiate liability upon the ground that this question and answer constituted a term of the policy a breach whereof entitled the insurers to repudiate liability thereunder. It should be added that the policy contained a term incorporating the truth and accuracy of the proposal form into the policy as the basis thereof. The Court of Appeal held that the assured was entitled to be indemnified and that the use of the vehicle in several shifts per twenty-four hours for a short period, such use having ceased at the time when the liability accrued, did not entitle the insurers to repudiate the policy. BANKES, L.J., prefaced his judgment with the following statement of the law (y), which, as will be seen, was in effect rejected by SCRUTTON, L.J., in other cases (a), in so far as it construed the meaning of "warranty":

"The question in this appeal relates to the construction of a contract of insurance into which the parties have entered. . . . The only question for decision by the learned judge, and by us, is whether the answer to one of the questions constitutes a warranty by the assured. If, as a matter of construction, it can properly be held that the question and answer amount to a warranty, then, however absurd it may appear, the parties have made a bargain to that effect, and if the warranty is broken the policy comes to an end."

The learned judge then held that having regard to the way in which the question was framed, and to its nature (the answer being true when it was made and remaining true for the greater part of the time the vehicle was on risk), it was impossible to construe the answer as a warranty, but that it should be taken as descriptive of and limiting the risk insured (b).

The same type of question arose for consideration in *Roberts v. Anglo-Saxon Insurance Association* (c) where the assured had made the following answers in the proposal form: "State clearly the purposes for which the vehicles will be used?—Commercial. State nature of goods to be carried? Textile." The policy contained a term warranting the truth of the proposer's answers and declaring them to be the basis of the contract and "promissory in nature" (d), and a further term "warranted only to be used for commercial travelling." The insured vehicle was burned whilst being used for pleasure, and the insurers repudiated liability on the ground that the vehicle was being used in breach of a warranty under the policy. The Court of Appeal upheld the argument of the insurers that the answers referred to, coupled with the indorsement, constituted the purposes for which the vehicle was to be used a warranty, breach of which entitled the insurers to repudiate liability. The two following extracts from the judgments of BANKES, L.J., and SCRUTTON, L.J., indicate the reasons for the above decision:

"In the first place, I do not think we can get away from the words 'warranted only.' I do not attach undue importance to 'warranted,'

(x) [1920] 3 K. B. 669.

(y) [1920] 3 K. B. 669, at p. 673.

(a) In *Roberts v. Anglo-Saxon Insurance Association* (supra), and in *Provincial Insurance Co. v. Morgan* (supra).

(b) Distinguish the common case where the proposer's profession is stated in the Schedule to the policy and the cover is limited to use of the insured vehicle for, *inter alia*, private professional purposes. See chapter VIII, *post*, and *Jones v. Welsh Insurance Corporation, Ltd.*, [1937] 4 All E. R. 149.

(c) (1927), 96 L. J. K. B. 590; 27 Ll. L. R. 313.

(d) As to meaning of this, see *post*, pp. 467 *et seq.*

"but when I find 'warranted' used in conjunction with 'only' it seems to me impossible to get away from the conclusion that it is there definitely stated by the parties as a condition that the user of this vehicle shall be only for the purpose indicated" (e).

"Reading those two answers together with 'warranted used only for the following purposes,' I think that 'used' in the policy means 'to be used.' It is 'will be used' in question 4 and 'to be carried' in question 5, and 'used' is quite capable of being interpreted as 'to be used.' But it is 'to be used only.' What is the effect of that? Looking myself at the policy and the declaration, with such knowledge of insurance law as I possess after spending a good deal of time—with great advantage to myself—in unravelling policies, it seems to me that that is a promissory declaration as to the risk. 'I will insure you in certain circumstances, but only in certain circumstances'" (f).

The point again arose for decision in *Re Morgan and Provincial Insurance Co.* (g) where to the questions in the proposal form "State (a) the purposes in full for which the vehicles will be used; and (b) the nature of the goods to be carried," the proposer had answered, "(a) Delivery of coal; (b) coal." The proposal form contained a signed declaration that it should be deemed of a promissory nature and effect and should be the basis of the contract of insurance to be made; while the policy issued contained a term making both the faithful observance of its terms and the truth, completeness and accuracy of the statements in the proposal form conditions precedent to the insurers' liability thereunder. Subsequently the assured used a vehicle for transporting timber, which vehicle later in the same day, whilst delivering coal, was involved in a collision in which it was damaged and a third party sustained injuries. The insurers repudiated liability upon the ground that the answers as to user constituted a warranty admitted breach of which entitled them to repudiate. The Court of Appeal (h) unanimously held that the answers of the proposer constituted nothing more than a description of the risk, and that the liabilities in question having been incurred whilst coal and coal only was being carried, the vehicle was "on risk" during such period and the insurers were liable under the policy. The latter appealed, further, and the House of Lords affirmed the decision of the Court of Appeal. The following extracts from the judgments indicate the grounds of the decision:

Lord BUCKMASTER said:

"To state in full the purposes for which the vehicle is to be used is not the same thing as to state in full the purposes for which the vehicle will be exclusively used, and as a general description of the use of the vehicle it is not suggested that the answer was inaccurate.

"I am, therefore, of opinion that there was no bargain here so to confine the use of the vehicle to the cartage of coals as to make any occasional use that did not destroy the general purpose of its user a breach of the condition upon which the policy was based" (i).

(e) *Per* BANKES, L.J.

(f) *Per* SCRUTTON, L.J. Cf. *per* Lord BUCKMASTER in *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240, at p. 246, and *Jones v. Welsh Insurance Corporation, Ltd.*, [1937] 4 All E. R. 149; *Levinger v. Licenses and General Insurance Co.* (1936), 54 Ll. L. R. 68; *Passmore v. Vulcan Boiler and General Insurance Co.* (1936), 154 L. T. 258; *Stone v. Licenses and General Insurance Co.* (1942), 71 Ll. L. R. 256.

(g) [1932] 2 K. B. 70; on appeal *sub nom.* *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240.

(h) [1932] 2 K. B. 70. The instructive judgment of SCRUTTON, L.J., in this case should be studied for a comprehensive understanding of these cases.

(i) *Per* Lord BUCKMASTER, [1933] A. C. 240, at p. 247.

LORD RUSSELL OF KILLOWEN said :

" I cannot read the above statements in the proposal form as being more than statements by the proposers of their intentions as to the user of the vehicle and the goods to be carried in it, and so as descriptive of the risk. If it had really been the intention of the insurance company that the carrying of goods other than coal at any time should free them from liability in respect of an accident happening subsequently, it was incumbent on them to make that abundantly clear to the proposers " (k).

LORD WRIGHT said :

" The question turns entirely on the construction of the contract. . . .

" On the other hand, it is clear law that in insurance a warranty or condition (because these words are used as equivalent in insurance law, which in that respect differs in its use of the terms from the law of sale of goods), though it must be strictly complied with, must be strictly though reasonably construed. In the present case the appellants do not allege that there was any concealment or misrepresentation nor do they complain of any of the other answers. The relevant answer, which I have quoted above, does, I think, refer to the future and is, in my opinion, of a promissory nature and is apt to create a warranty or condition.

" That leaves the essential problem as to what is the exact scope of this condition. The breach of condition alleged is not that the normal use of the vehicle was other than delivery of coal in the course of the respondent's business, but its occasional use for hauling the timber as found by the arbitrator. There can, therefore, be no breach involved unless the relevant warranty or condition imports that the vehicle is to be used for delivery of coal and no other purpose, that is, that the vehicle during the currency of the policy is to be exclusively so used. In my judgment, on a fair construction of the material question and answer, this is not the true construction; accordingly, in my judgment the appellants fail in their contention that a condition was broken so that the policy was not in force at the time of the accident " (l).

The considerations discussed in the three cases noted must be carefully distinguished from those which arose in *Dawsons, Ltd. v. Bonnin* (m), where a false answer was inadvertently made to an unambiguous question, the truth of such answer being incorporated into the subsequent policy as a condition precedent to the insurer's liability. There, although the misstatement was immaterial, its falsity sufficed to enable the insurers to repudiate liability upon the ground of a breach of warranty going, by agreement, to the very root of the contract of insurance (n). This fact, together with the consideration referred to by SCRUTTON, L.J., that on the facts of *Dawsons, Ltd. v. Bonnin* it mattered little whether the assured's answers were warranties or description of the risk insured, suffices to differentiate the latter case basically from the three cases under discussion (o).

Subject to the principles discussed in the cases cited, it is impossible to lay down any general rules by which the classification of answers as to user should be governed. It is well established that such answers may have one of three consequences according to whether they are construed as purely representations of intention, as descriptions of risk or as continuous warranties (p). To determine within which class an answer falls is, as a general

(k) *Per* LORD RUSSELL OF KILLOWEN *ibid.*, at p. 249.

(l) *Per* LORD WRIGHT, *ibid.*, at pp. 251, 253, 254.

(m) [1922] 2 A. C. 413.

(n) See *per* LORD WRIGHT in *Provincial Insurance v. Morgan*, [1933] A. C. 240, at p. 255.

(o) *Re Morgan and Provincial Insurance Co.*, [1932] 2 K. B. 70, at p. 82.

(p) *Ante*, p. 433, and see *per* SCRUTTON, L.J., in *Re Morgan and Provincial Insurance Co.*, [1932] 2 K. B. 70, at p. 79.

rule, purely a question of the construction of the relevant policy (q). It is upon this basis, subject to the guidance to be obtained from the authorities referred to, that the true effect of answers as to user must be determined.

3. (a) Will the Car(s) be driven solely by one named } (a).....
 person? }
 (b) If so, state name. } (b).....

The main purpose of this inquiry is to fix the rate of premium at which the assured's proposal shall be accepted, it being the practice of insurance companies to offer a rebate where the insured vehicle is to be driven only by one specified person.

When an affirmative answer is given, then some difficulty arises in determining the limits of the disclosure required from the proposer concerning the "moral hazard" of persons other than the sole named driver. Let it be assumed, for example, that a father who has a careless son, of notorious road habits, living with him desires to effect a "named driver" insurance: is he bound to disclose the son's record of accidents and convictions because the son may happen to gain access to the vehicle? (r). It is submitted that he is not. Such circumstances would not be material to the risk, for the proposer only effects insurance of his car while it is being driven by the named driver. Should the car be driven by any other person it will not be "on risk," since the driving of the car by that other person is not a risk of which the insurers have undertaken liability (s).

If, however, the question is answered in the negative, then the proposer is bound fully and accurately to disclose material circumstances which bear upon the "moral hazard" of the risks to be incurred by other intended or potential drivers of the vehicle. These points are invariably covered in certain respects by other questions in the proposal form, such as those dealing with convictions (t) or insurances (a), but there is little doubt that disclosure, when the car is intended to be driven by persons other than the proposer, should relate to the "moral hazards" attaching to such persons for example, through their record of accidents (b), or through their

(q) See *Dawsons, Ltd. v. Bonnin*, [1922] A.C. 413; *Re Morgan and Provincial Insurance Co* (supra).

(r) Cf. *Bond v. Commercial Union* (1930), 36 Ll. L. R. 107; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K.B. 53; [1942] 1 All E. R. 529; *Broad v. Waland* (1942), 73 Ll. L. R. 263; *Zurich General Accident and Liability Insurance Co. v. Livingston*, [1940] S.C. 406; *General Accident Assurance Corporation v. Shuttleworth* (1938), 60 Ll. L. R. 301.

(s) *Herbert v. Railway Passengers Assurance Co.*, [1938] 1 All E. R. 650; *Ellis John T., Ltd. v. Hinds*, [1947] K.B. 475; [1947] 1 All E. R. 337.

(t) *Post*, pp. 445 et seq., and see *Jester-Barne v. Licenses and General Insurance Co., Ltd.* (1934), 49 Ll. L. R. 231; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K.B. 53; [1942] 1 All E. R. 529; *Cleland v. London General Insurance Co.* (1935), 51 Ll. L. R. 156; *Merchants and Manufacturers Insurance Co. v. Davies*, [1938] 1 K.B. 106; [1937] 2 All E. R. 767; *Locker and Woolf, Ltd. v. Western Australian Insurance Co., Ltd.*, [1936] 1 K.B. 408; *Evans v. Employers' Mutual Insurance Association* (1935), 52 Ll. L. R. 51.

(a) *Post*, pp. 451, 455 et seq. *Holl's Motors, Ltd. v. South East Lancashire Insurance Co. Ltd.* (1930), 37 Ll. L. R. 1; *Broad and Montagu v. South East Lancashire Insurance Co.* (1931), 40 Ll. L. R. 328; *Mundy's Trustees v. Blackmore* (1928), 32 Ll. L. R. 150; *Norman v. Gresham Insurance Co.* (1935), 52 Ll. L. R. 292; *Ewer v. National Employers' Mutual General Insurance Association, Ltd.*, [1937] 2 All E. R. 193; *Cornhill Insurance Corporation v. Assenheim* (1937), 58 Ll. L. R. 27.

(b) *Bond v. Commercial Union Assurance Co.* (1930), 36 Ll. L. R. 107; *Barnett v. Blackmore* (1926), 23 Ll. L. R. 137; *Zurich General Accident and Liability Insurance Co. v. Livingston*, [1940] S.C. 406.

nationality (c), infirmities (d), etc., where these are such as would influence insurers in accepting the risk to be insured.

V.—PARTICULARS OF INTEREST

4. *Are you the owner of the Car, and is it registered in your name? (If not, state the name and address of owner and of the person in whose name the Car is registered.)*

The subject-matter of motor insurance contracts is as a rule mixed in nature. As has been shown, such insurance contracts cover a collection of risks of various types, such as loss or damage to the insured vehicle, personal injury to the insurer, liability to third parties, liability to third parties in respect of personal injury only (e).

To some degree, therefore, the insurance is one of property, but to a greater degree it is an insurance of the risks accruing to other persons through the use of the insured vehicle by the assured, his servants, family and friends. The insurers' obligation consists in an agreement to indemnify the assured against his personal liabilities at law incurred in a particular manner (f).

As has been shown, in so far as motor car insurance consists in the insurance of the vehicle covered, it is necessary for the assured either himself to have an insurable interest in the vehicle or to act as agent on behalf of some other person having an insurable interest (g). Thus in *Coles v. Young (F.), Ltd.* (h) the insurers were held not liable under a policy covering a vehicle in which the assured had not yet acquired an interest. There are many other motor insurance cases to a like effect (i). To the extent, however, that a motor insurance contract consists of an agreement to indemnify the assured against legal liabilities to third parties in respect of death or bodily injury, the conception of insurable interest sinks into the background. An insured person has always an insurable interest in the risks attaching to his own or his servant's or agent's use of his motor vehicle, or indeed of any other motor vehicle, whether his property or not (k). Whilst the assured has no insurable interest in the potential liability of friends or relatives driving the insured vehicle otherwise than as his servants or agents (l), notwithstanding the absence of such interest, the terms of an insurance against third party liability are valid by the express provision of the 1930

(c) *Carlton v. Park* (1922), 12 Ll. L. R. 246; cp. *Horne v. Poland*, [1922] 2 K. B. 364, *ante*, pp. 430 *et seq.*

(d) *James v. British General Insurance Co.*, [1927] 2 K. B. 311, and see 27 Ll. L. R. 328, also *post*, pp. 442 *et seq.*

(e) Chapter II, *ante*, p. 78, and see Chapter VIII, *post*.

(f) And may extend to any person who under the terms of the policy is entitled to be treated as the assured; *Pailor v. Co-operative Insurance Society* (1930), 38 Ll. L. R. 237.

(g) Chapter II, *ante*, p. 79 *et seq.*; *Aked & Co. v. Wheel and Wings Assurance Association, Ltd., and Mountain* (1925), 21 Ll. L. R. 200; *Coles v. Young (F.), Ltd.* (1929), 33 Ll. L. R. 83; *Tattersall v. Drysdale*, [1935] 2 K. B. 174; *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1931), 146 L. T. 26; *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1938] 2 All E. R. 267; *Goodbarne v. Buck*, [1940] 1 K. B. 107; [1939] 4 All E. R. 107; *Guardian Assurance Co., Ltd v. Sutherland*, [1930] 2 All E. R. 246.

(h) (1929), 33 Ll. L. R. 83.

(i) See chapter II, *ante*, pp. 85 *et seq.*

(k) Chapter II, *ante*, pp. 84 *et seq.*

(l) Chapter II, *ante*, pp. 84 *et seq.*; chapter I, *ante*, p. 48. Cf. *Williams v. Baltic Insurance Association of London, Ltd.*, [1924] 2 K. B. 282. See also chapter IV, *ante*, pp. 211 *et seq.* Unless he permits them to drive uninsured, in which case he will be liable for breach of statutory duty. *Monk v. Warbey*, [1935] 1 K. B. 75.

Act (m). In addition, it has been decided by the case of *Austin v. Zurich General Accident and Liability Insurance Co.* (n) that obligations undertaken by insurers, in respect of other matters such as damage to property or personal injury to passengers (o), to authorised drivers of the assured vehicle are valid in law and are enforceable at the suit of those persons. Especially in this so if the authorised driver is described in the policy as one who will be treated "as the assured" (p).

1. **How far disclosure of interest necessary.**—However that may be, the questions now under consideration aim at two matters—the interest of the assured in the subject-matter, used in the concrete sense, of the insurance, and the liabilities against which the insurers may be called upon for indemnity. Ownership and registration are both matters which become of importance when an occasion for liability arises. The Road Traffic Act of 1930 (q) imposes obligations already dealt with upon an owner or driver when an accident has occurred (r). As a rule the owner, or the person in whose name the vehicle is registered, will primarily be called upon to meet any liabilities arising out of an accident (s). It is a matter of importance, therefore, to insurers to be able to identify these persons when they are other than the assured, as their position and conduct will have obvious bearing upon the liability of the insured person.

Ownership and registration are further material to the insurers in enabling them to determine the personal elements of the risk to be insured, and in assisting them to avoid being involved in collusive insurances. Although several of the other questions in the proposal form are directed to the discouragement of proposers who are brought forward to camouflage "bad risks" (t), the present questions strike at the root of the most specious of such collusive insurances. For the two reasons last referred to, as well as from the aspects of "insurable interest" in the subject-matter of the risks insured, the ownership of the vehicle to be covered by insurance is a circumstance obviously material and as to which failure by the assured to make complete and accurate disclosure would suffice to entitle the insurers, apart from express stipulations in the contract, to repudiate liability under the policy (u).

These questions present some difficulty in cases in which questions of vehicles, the subject of a firm's interest or of a hire-purchase agreement,

(m) Road Traffic Act, 1930, s. 36 (4), chapter IV, *ante*, pp. 211 *et seq.*; *Tattersall v. Drysdale*, [1935] 2 K. B. 174; *Austin v. Zurich General Accident and Liability Insurance Co.*, [1944] 2 All E. R. 243, affirmed, [1945] K. B. 250, [1945] 1 All E. R. 316.

(n) [1944] 2 All E. R. 243, affirmed, [1945] K. B. 250, [1945] 1 All E. R. 316.

(o) *I.e.* persons other than Road Traffic Act third parties.

(p) *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319.

(q) 27 Halsbury's Statute 534.

(r) *Ibid.*, ss. 22, 40, 113, see chapter IV, *ante*.

(s) But see *James v. British General Insurance Co.*, [1927] 2 K. B. 311, where the assured's car was registered in his father's name; and see dictum of ROCHIE, J., as to "ownership" quoted at p. 425, *ante*, note (e). See also *Coles v. Young (F.) Ltd.* (1929), 33 Ll. L. R. 83.

(t) *Zurich General Accident Insurance Co. v. Buch* (1939), 64 Ll. L. R. 115.

(u) Where the whole policy is based on the assumption that the assured person has a particular, specified interest in that vehicle, the policy comes to an end, as far as the assured is concerned, if he parts with that interest (*Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1931), 146 L. T. 26), and as far as everyone, including "Road Traffic Act third parties," are concerned, if he transfers that interest to another; see *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1938] 2 All E. R. 267, *Tattersall v. Drysdale*, [1935] 2 K. B. 174, and see the effect of the M.I.B. Agreements, chapter VI, *ante*, p. 359.

arise (v). An account has already been given of the authorities (a), and the previous observations fall in this context to be expanded.

2. Partnership.—Although partnership interests are more frequently involved in the insurance of commercial motor vehicles (b), cases are by no means rare in which private motor vehicles are owned by partnerships and used for the purposes of the partnership business (c). At the outset the fundamental principles of partnership law, viz. that a firm is not a person in law and cannot own or acquire property or enter into contracts as a firm, must be borne in mind. The "firm" is no more and no less in law than the total personalities of the individual partners who are the owners of its property, and the parties liable or entitled, respectively, under its contracts (d). There can be little doubt but that contracts of insurance of the firm's property should be entered into by all the partners, since each one of them has an insurable interest in the partnership property and also in the risks of liability to be incurred by any partner or servant or agent of the partnership whilst using the firm's property or engaged upon its business (e). Although an individual partner can validly effect insurance of the "firm's" property or potential liabilities, in so doing he is, it is submitted, bound to disclose the interest of the firm of which he is a member in the subject-matter of the insurance. The co-existence of parallel interests of other persons whose identity and "moral hazard" may change the whole complexion of the risk is a circumstance which, it is submitted, is clearly material. GODDARD, J., *obiter*, in *Jenkins v. Deane* (f), clearly regarded it as being so. That the obligation of full and accurate disclosure arises in such cases is, it is submitted, borne out by the undoubted obligations which, on the basis of authorities, fall to be performed in relation to the disclosure of present partners' past records of rejected insurances, accidents or convictions (g).

3. Hire-purchase.—The second further matter which falls for detailed consideration is the existence of a hiring or hire-purchase agreement affecting the vehicle to be insured. The authorities have already been examined (h). The practice of "hire purchase" has become so widespread, particularly in relation to the more popular types of vehicles, that some insurers have formulated specific questions upon the point, of which the following may be taken as typical:

"If you are acquiring the car under a hire-purchase agreement, state
"full name and address of company financially interested."

It is apprehended that the embodiment of such questions in the proposal form in no way renders more onerous the obligation of the assured. As has been submitted, the fact that the assured's interest is not proprietary but possessory in character (i) is a material circumstance which should be disclosed (k). Whatever doubts may have been reserved as to the materiality of these matters in the context in which they were first considered, they must, it is submitted, be clearly resolved at this juncture. Despite the

(v) See also *ante*, p. 427.

(a) *Ante*, p. 427.

(b) *Post*, pp. 446 *et seq.*; *Jenkins v. Deane* (1933), 103 L. J. K. B. 250; 47 Ll. L. R. 342.

(c) *E.g.* estate agents, surveyors, doctors, &c.

(d) 24 Halsbury's Laws, 2nd Edn. 306, 397, 454, 455.

(e) All partners are jointly and severally liable for the tortious acts of a partner committed in the firm's business (Partnership Act, 1890, ss. 10-11; 12 Halsbury's Statutes 534).

(f) (1933), 103 L. J. K. B. 250; 47 Ll. L. R. 342.

(g) See *post*, pp. 445-459.

(h) *Ante*, p. 427.

(i) Under the current types of hire-purchase agreement the ownership remains invariably in the "finance" company who hire out the vehicle.

(k) See *ante*, p. 427.

observations already quoted of SWIFT, J., in *Arlet v. Lancashire and General Insurance Co. (l)*, it is submitted that the existence of a hire-purchase agreement covering the vehicle involved is a material circumstance (m).

While the mere disclosure of the identity of the other party to the hire-purchase agreement would not give that party any interest in the insurance or rights thereunder as against the insurers (n) in practice, as far as the owners of vehicles the subject of hire-purchase agreements are concerned, their interests, having been disclosed, are recognised and rendered to some extent legally effective (o) by indorsement upon the policy effected by the hirer-purchaser (p). Anticipating somewhat upon the discussion of such indorsements in the succeeding chapter, it may be said that the effect of such indorsements is to give the owners of the vehicle rights against the insurers under the policy to which they are, by indorsement, made to some extent parties (q).

In conclusion of the observations upon ownership it may be said, therefore, that the precise interest of the proposer in the vehicle to be covered is material, not only as determining the validity of the policy from the aspect of "insurable interest" (r), but also in fixing the risk, in determining the *bona fides* of the insurer, and the extent to which other persons are interested in the subject-matter of the insurance to be effected.

VI.—PHYSICAL INFIRMITIES

5. *Do you, or any other person who to your knowledge will drive, suffer from defective vision or hearing or from any physical infirmity?*

This question is sometimes put in a slightly different form which, although adding, as is later submitted, nothing to the words above, is reproduced for convenience.

"Do you or does any other person who to your knowledge will drive suffer from loss or loss of use of limb or eye, defective vision or hearing, or from any physical infirmity?"

The matters alluded to in this question have an obvious primary importance in that the existence of the specified disabilities, other than that last specified, may prevent the sufferer from obtaining a driving licence in the usual or, indeed, any manner (s).

Beyond the bearing which disabilities and infirmities may have upon the right of the affected person to obtain or hold a licence, a circumstance which is so vital to the insurers that many policies contain a condition

(l) (1927), 27 Ll L. R. 454, *ante*, p. 427.

(m) Cf. *Honney v. Cornhill Insurance Co.* (1931), 40 Ll L. R. 39; *Allen v. Universal Automobile Insurance Co.* (1933), 45 Ll L. R. 55; *Banton v. Home and Colonial Insurance Co.* (1921), *Times*, 27th April, cited in *Welford on Accident Insurance*, 2nd Edn., at p. 313.

(n) Because the assured is not insuring their interests but his own, and because in any case the insurers are not bound to observe and are not affected by the interests of strangers to the contract of insurance, except where express provision is made.

(o) *I.e.* as between the assured and insurers. But not in such a way as to give the "hire-purchase company" rights by the mere fact of such indorsement.

(p) See chapter VIII, *post*.

(q) See more fully chapter VIII, *post*.

(r) *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1938] 2 All E. R. 267; *Goodbarnes v. Buck*, [1939] 4 All E. R. 107; *Guardian Assurance Co., Ltd. v. Sutherland*, [1939] 2 All E. R. 246.

(s) Road Traffic Act, 1930, ss. 4 and 5; 23 Halsbury's Statutes 611, 612. In *Austin v. Zurich General Accident and Liability Insurance Co.*, [1944] 2 All E. R. 243, it was held that the wearing of "thick" glasses did not by itself constitute defective vision.

specifically excluding liability in the event of the insured vehicle being driven by a driver unqualified or disqualified to obtain a licence (t), they are important as affecting the risks undertaken by the insurers in relation both to "personal accident liability" and, more generally, to third party liability. As a matter of insurance practice additional premiums are charged where the assured, or some other person intended to drive the car, suffers from one of the specified disabilities. Whilst it is uncommon to find restrictive clauses bearing upon these matters in the usual private vehicle insurance policy (u) (and as against third parties such restrictions are rendered ineffective by the terms of the M.I.B. Agreements (a), the failure fully and accurately to disclose physical disabilities would, even in the absence of the relevant question, entitle the insurers to avoid the policy (b). In practice, however, this point is fully covered in the proposal form, the scope of which in this connection calls for careful examination.

At the outset it is important to endeavour to establish the meaning of the words "physical infirmity." Can it be said that their meaning must be limited to such infirmities as may impede or prevent the proposer or other persons within the question in driving the vehicle to be insured? To give such a meaning to the expression would add nothing to the duty resting on the proposer, independently of the question and answer, to make a full and accurate disclosure of any circumstances which may materially affect the risk attaching to his driving of the vehicle. The existence of known physical infirmities of the character indicated would clearly fall within this category. The *ejusdem generis* rule of construction (c), which applies to written documents as much as to statutes (d), would require the meaning of physical infirmities to be construed *ejusdem generis* with defective vision or hearing, i.e. as meaning the absence of some faculty normally present in human beings. On the other hand, such a construction would exclude other physical conditions, e.g. of disease, or susceptibility to fits, which might be in every way material to the same degree as defective sight or hearing (e). The conflict of these rival constructions has the clear effect of making the question now under consideration ambiguous. It is submitted, however, that the way out of the difficulty can be found in considering the tests generally applicable to materiality. Whether or not any question appears in the proposal form, the obligations imposed on the proposer by his part in a contract of insurance require him to disclose every material circumstance of which he knows or ought to know; thus where he suffers from some morbid condition which in the view of insurers is likely to affect the risk of his insurance it must be disclosed either as a "physical infirmity" or otherwise (f).

The question must next be considered in relation to the scope of the proposer's duty of disclosure under it. This involves two different problems, firstly, as to what disabilities and infirmities he must disclose, and secondly, as to the persons in connection with whom the duty exists.

The proposer is asked to state from what infirmities he is suffering: the question is clearly directed to the present and does not therefore call for

(t) Chapter VIII, *post*.

(a) *Ante*, chapter VI, p. 359.

(c) See *post*, chapter VIII, p. 482.

(d) E.g. to policies; see chapter VIII, *post*, p. 482.

(e) As in the notorious "Buckingham Palace" accident of 7th October, 1933. See *Law Times* newspaper, vol. 178, pp. 232, 233.

(f) Cf. *Shilling v. Accidental Death Insurance Co.* (1858), 1 F. & F. 116; *Austin v. Zurich General Accident and Liability Insurance Co.*, [1944] 2 All E. R. 243; affirmed, [1945] K. B. 250; [1945] 1 All E. R. 310; 78 Ll. L. R. 185.

(u) Cf. "hire-drive" insurance policies.

(b) As far as the assured is concerned.

the disclosure of any past infirmities which have now been overcome. It is, of course, another matter as to whether such past infirmities should be disclosed by the prudent assured (g). The question, more particularly in its expanded form quoted at the head of these remarks, is aimed at elucidating permanent conditions such as the loss of limbs.

Assuming that the proposer having been blind for many years suddenly recovers his sight, should he disclose these facts to the insurers by way of an answer to this question? It is submitted that he need not. In the case of *James v. British General Insurance Co.* (h), one of the defences relied upon by the insurers was that the assured had suffered from certain disabilities—hernia, giddiness and heart trouble—which he had failed to disclose. It was found as a fact that at the time when he made his proposal he was not suffering from the alleged disability, and therefore that the defence on this ground failed. Despite the absence of authority upon this point it is submitted that the decision on the above ground in *James' Case* is good law, and that it follows therefrom that the proposer is not obliged to disclose to the insurers, either in answer to the question or otherwise, past defects and infirmities which have been overcome, as far as the proposer is aware, at the time of the proposal and entry into insurance (i). There are several grounds upon which this submission may validly be based. Such circumstances would not be existing at the time of the proposal, and it appears that the question upon physical condition bears almost solely upon existing facts; further, the question indicates that it is a comprehensive inquiry into the proposer's physical condition, by replying fully and accurately to which the proposer fulfils the duty which is required of him (j). The insurers who, in the face of these considerations, attempt to set up non-disclosure of past infirmities as a ground of repudiation are likely to be countered by the suggestion that such points are really immaterial, or that if material, then by reason of the form in which the question was posed to the proposer they cannot be heard to say that there is materiality in them. Similar defences in similar cases have been rejected on the ground of ambiguity (k), and it is suggested that such ground would be acceptable in the case in point, the essentials for it being that the wording of the question is equivocal, and that the proposer who understands it in one sense and makes true and complete answer to it in that sense cannot afterwards be defeated of his right to indemnity by the suggestion that he should have understood and answered it in the other sense (l). Further, the general principle that the terms of a policy (m) or of a proposal form (n) are to be construed *contra proferentem* is applicable in all such cases to defeat the contentions of insurers seeking to repudiate whenever considerations of ambiguities or inconsistencies arise.

It must further be stated that the answer to this question can never be in the nature of a strict warranty, unlike statements referable to the user of the insured vehicle. The question of physical defects and infirmities is not one which is susceptible of a decisive answer, save by a physician after

(g) The duty of disclosure always existing apart from express questions and answers.

(h) [1927] 2 K. B. 311; 27 Ll. L. R. 328; see *per* ROCH, J.

(i) *James v. British General Insurance Co.*, [1927] 2 K. B. 311; 27 Ll. L. R. 328.

(j) *Corcos v. de Rougemont* (1926), 23 Ll. L. R. 164.

(k) *Corcos v. de Rougemont* (*supra*); *Arlot v. Lancashire and General Insurance Co.* (1927), 27 Ll. L. R. 454; *Bremhall v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 166.

(l) As to ambiguity, see *post*, p. 448.

(m) *Thomson v. Wiggins* (1884), 9 App. Cas. 671.

(n) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; and see *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399.

a thorough examination of the individual concerned (o). No one can of certainty state that he does not suffer from physical defects or infirmities at any time. The most that a conscientious proposer can do is to reply according to his knowledge and belief. Since this is the case and is well known to be the case, all that is expected of the proposer, which is the utmost of his ability, is to reply according to his knowledge, and for this purpose he will be deemed to know what as a reasonable man he should know of his defects and infirmities (o). Although no medical examination of the proposer is customarily conducted in the case of motor insurances, unlike life insurance, it seems that on principle the duty of disclosure imposed upon him from the implied terms of his contract cannot be beyond the bounds of his knowledge or the knowledge of a reasonable man (p).

From the wording of the question it is apparent that the duty of disclosure extends beyond the proposer himself to any person whom the proposer intends to drive the vehicle to be insured. Although the wording is "to your knowledge will," this must be interpreted as referring generally to the intention of the proposer. No person can of certainty "know" what is actually going to happen at a future time. Thus it is submitted that the proposer is bound only to make disclosure of the matters specified in relation to such persons as he intends to drive the vehicle, assuming it to be his property, or whom he anticipates will drive the vehicle if it is the property of some other person. The duty of the proposer being a partner desirous of effecting insurance relating to the partnership property or his own vehicle used for partnership purposes is then clear on this score, however doubtful it may be in relation to some of the other matters covered in the proposal form (q).

It is submitted that the interpretation placed upon the words "physical infirmity" (r) and upon the implication of the use of the present tense in the question applies *mutatis mutandis* to the duty of the proposer in relation to such of his answer as can be referred to other persons who will drive the vehicle (s). The proposer makes proper answer by referring to such present infirmities and defects as he knows, or ought to know.

VII.—PREVIOUS CONVICTIONS

6. Have you, or any person who to your knowledge will drive, been convicted of any offence during the past five years in connection with the driving of any motor vehicle?

Altogether apart from the insertion of such a question as this in the proposal form the proposer is bound to make full and accurate disclosure to the insurers of previous convictions registered against him in relation to the user of motor vehicles (t). This question, however, serves in some manner to

(o) *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B. 431; on appeal, [1908] 2 K. B. 863.

(p) *Joel v. Law Union and Crown Insurance Co.* (supra); *Mutual Life Insurance Co. of New York v. Ontario Metal Products Co., Ltd.*, [1925] A. C. 344.

(q) *Post*, p. 448.

(r) *Ante*, p. 442.

(s) *Cp. Bond v. Commercial Assurance Co.* (1930), 36 Ll. L. R. 107.

(t) E.g. even such offences as omission to carry proper lights, or running with a noisy exhaust; see *post*, p. 447; *General Accident Insurance Co. v. Shuttleworth* (1938), 60 Ll. L. R. 301; *Cleland v. London General Insurance Co.* (1935), 51 Ll. L. R. 156; *Merchants and Manufacturers Insurance Co. v. Davies*, [1938] 1 K. B. 196; [1937] 2 All E. R. 767; *Taylor v. Eagle Star Insurance Co.* (1940), 67 Ll. L. R. 136; *Zurich General Accident and Liability Insurance Co. v. Livingston*, [1940] S. C. 406; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529; *Machay v. London General Insurance Co.* (1935), 51 Ll. L. R. 301; *Revell v. London General Insurance Co.* (1934), 50 Ll. L. R. 114.

modify the duty of disclosure, as will later appear. Failure to make full and accurate answer to this question, or apart from it to disclose previous convictions, has been one of the grounds most frequently urged with success by insurers as entitling them to repudiate liability to indemnify their assured. The case of *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (u), dealt with in another aspect (v), may be usefully treated as an illustration of this type of case. The proposer had there failed to disclose certain previous convictions of his chauffeur of which he, as was found, had full knowledge. The insurers on this, amongst other grounds, were held entitled to repudiate liability.

These prefatory remarks being borne in mind, it is necessary to examine the question in the form in which it appears above in some detail.

At the outset "convictions," unlike state of health, refers to matters capable of ascertainment by any person however lacking in specialised knowledge or experience. There can be no doubt, therefore, that the proposer must disclose every conviction of the specified types registered against him.

1. Convictions of others.

The judgment of MAC KINNON, J., in *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (x), suggests that the proposer is only under a duty to disclose such convictions as he knew or should have known. No case in which the allegation of non-disclosure of convictions unknown, in the wide sense (x), to the proposer has been relied upon as a ground of repudiation appears to have arisen, but it is submitted that the duty to reply to the question or to disclose the matters to which it relates cannot be interpreted against the proposer in a sense wider than his general duty of disclosure. He can only answer, as far as other persons are concerned, as a reasonable man to the best of his knowledge could answer, and it is submitted that his duty in replying does not extend beyond this (y). On the other hand, the assured may go beyond his duty by his answer to this question in the proposal form. Where the assured made an unqualified answer of "No" to the question, it was held that this answer was an assertion (1) that the assured had the knowledge which he purported to impart, and (2) that that knowledge was what he was imparting. The answer did not mean "No, to the best of my knowledge and belief" (a).

The proposer's duty of disclosure relates not only to his own convictions but to those registered against persons who to his knowledge will drive the vehicle to be insured. The scope of the proposer's duty in this connection is best illustrated by reference to *Bond v. Commercial Assurance Co.* (b), where the insurers successfully repudiated liability on the ground that the proposer had failed to disclose the previous motoring convictions of his son, who to the proposer's knowledge would drive the vehicle after the insurance had been effected. *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (c), contains an illustration of the same type of non-disclosure in relation to the

(u) (1934). 49 Ll. L. R. 231.

(v) *Ante*, p. 219, and see *post*, p. 450.

(w) (1934). 49 Ll. L. R. 231.

(x) *I.s.* unknown to him or his agent

(y) But where a reasonable man would make inquiries, as when engaging a new chauffeur, then such convictions as he would have discovered will, it is submitted, be deemed to be within his knowledge.

(a) *Zurich General Accident and Liability Insurance Co. v. Livingston*, [1940] S. C. 406; *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1940] 4 All E. R. 205, *per* STABLE, J., (C. A.); affirmed, [1941] 1 K. B. 295; [1941] 1 All E. R. 123

(b) (1930). 36 Ll. L. R. 107.

(c) (1934). 49 Ll. L. R. 231.

convictions of the proposer's chauffeur, and the same point arose in *Sievers v. Mainwaring* (d).

There arise further for discussion two points of special difficulty in relation to the answer to be made to the present question; these are, firstly, what convictions must be disclosed, and, secondly, what effect, if any, on the duty of disclosure has the insertion of the specified period relating to which answer is required to be made; does it, in other words, absolve the proposer from the duty of disclosing anything other than what is specifically referred to in the question?

2. Nature of convictions required to be disclosed.

While the formula "in connection with the driving of any motor vehicle" is most commonly found, there are a number of variations currently in use, such as "any motoring offence" or "any offence under the Road Traffic Act, 1930" (e). It is essential to determine exactly what matters fall for disclosure under each form of question employed. At the outset it is submitted that "motoring offence" is analogous with "offence in connection with the driving of a motor car." The meaning of the latter phrase has arisen for decision by the Courts in relation to offences under the repealed Motor Car Act, 1903. In this connection the Courts have consistently adopted the criterion that only offences connected with the handling and manipulation of motor vehicles are "offences in connection with the driving of a motor vehicle" so as to render the culprit liable to the indorsement of his driving licence under that Act (f). It is submitted that this interpretation would be followed by the Courts in giving effect to the words now under consideration and thus, for example, fines for obstruction need not be disclosed to the insurers in answer to this question or independently thereof (g). In *Revell v. London General Insurance Co.* (h), where the question "Have you or any of your drivers ever been convicted of any offence in connection with the driving of any motor vehicle?" was answered "No," and it was proved that the driver at the time of an accident had in fact been previously convicted (1) of driving without a suitable reflecting mirror and (2) of unlawfully using a car without third party insurance, it was held that the question might reasonably refer to the conviction of a driver in the handling and driving of a car, and that the answer was not untrue. On the other hand, fines for obstruction should clearly be disclosed where the words used in the question relate to "offences under the Road Traffic Act, 1930" (i). It is, however, apprehended that it is open for the proposer, in relation to such types of offence, whether questions are directed to them or not, to make a general disclosure such as "convictions for obstruction, lights, etc." or "minor convictions" (k). Of course, such disclosure would not be held sufficient in any case where the qualification of "minor" would not by a reasonable man be held fairly applicable to the offence in question, having regard to the circumstances in which it was committed.

(d) (1932), *Times*, 23rd March. Although in that case the insurers withdrew their defence, in view of the remarks of HORRIDGE, J., it may be taken as a useful guide.

(e) See cases cited *post*, p. 450.

(f) *R. v. Gill, Ex parte McKim* (1909), 100 L. T. 858; *R. v. Yorkshire (West Riding) J.J., Ex parte Shackleton*, [1910] 1 K. B. 439.

(g) See cases on next page and cf. *Carlton v. Park* (1922), 10 Ll. L. R. 776, 818; 12 Ll. L. R. 246.

(h) (1934) 50 Ll. L. R. 114.

(i) As obstruction is made an offence by the Motor Vehicles (Construction and Use) Regulation, 1947 (S.R. & O. 1947, No. 670), reg. 81, which was issued under the provisions of s. 30 of the Road Traffic Act, 1930.

(k) Cf. *Mundy's Trustees v. Blackmore* (1928), 32 Ll. L. R. 150; *Dent v. Blackmore* (1927), 29 Ll. L. R. 9.

In some proposal forms the question is framed in wider terms, such as "Have you or your driver ever been convicted or had a motor licence endorsed?" In *Mackay v. London General Insurance Co.* (l) the answer was "No." In fact, the proposer three years before, when aged 18, had been fined 10s. because a nut had come loose on the brakes and he was driving without efficient brakes. It was held that the answer was quite immaterial, but as the proposer had contracted that the proposal form and declaration should be the basis of the contract of insurance, the insurers were entitled to repudiate liability to the assured under the policy. In *Cleland v. London General Insurance Co.* (m) the same question was answered "No." The proposal contained the usual declaration that the proposer had withheld no information whatever which might tend in any way to increase the risk of the insurance company or influence the acceptance of the proposal. It was held that although the particular question in the proposal was concerned only with motoring offences, there was a duty cast upon the assured to disclose his convictions under the declaration and therefore the insurers were entitled to repudiate liability to assured under the policy, since the assured had been convicted of four offences which had nothing to do with motoring, namely garage breaking, forgery, breach of recognisances and stealing. He had no motoring convictions. This decision strongly suggests that the character and honesty of the proposer is a material fact (n). In *Taylor v. Eagle Star Insurance Co.* (o) an answer "No" to a question "Have you or any of your drivers ever been convicted in connection with the driving of any motor vehicle?" was held not untrue as regards convictions for permitting the use of an uninsured car and for driving without a road fund licence, but that as the proposer had not revealed that he had been imprisoned once and convicted several times for drunkenness and disorderly behaviour, the insurers could repudiate on the general grounds of non-disclosure of material facts (p).

3. Ambiguous questions (q).

Where, as is commonly the case, the proposer's attention is specifically directed to the disclosure of convictions within the period of five years the question arises as to whether he is bound, outside the question and answer, to disclose any convictions not included in that period. The treatment of this difficulty necessitates the formulation of the question in another manner, viz. whether the question serves in any way to qualify the general duty of disclosure of material facts (including in certain cases convictions sustained more than five years before the proposal) resting upon the proposer. There is no doubt that insurers, if they so desire, waive disclosure by apt words or conduct in relation to any material circumstances (r). The words of SCRUTTON, L.J., in *Newsholme Brothers v. Road Transport and General Insurance Co.* (s), previously quoted, are relevant in this respect, indicating as they do that the contention may be made, and may be made effectively, that the insurers by their formulation of the questions have waived disclosure concerning matters which would otherwise come within the scope of any particular question (f).

(l) (1933), 51 Ll. L. R. 201.

(m) (1935), 51 Ll. L. R. 156 (C. A.).

(n) Cf. *Locker and Woolf, Ltd. v. Western Australian Insurance Co.*, [1936] 1 K. B. 408 (C. A.).

(o) (1940), 67 Ll. L. R. 136.

(p) *Ante*, p. 390.

(q) On this topic see *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529; *Corcos v. De Rougemont* (1926), 23 Ll. L. R. 164.

(r) *Ante*, p. 394.

(s) [1929] 2 K. B. 356, cited *ante*, p. 305.

(f) Cf. SCRUTTON, L.J., in *Greenhill v. Federal Insurance Co.*, [1927] 1 K. B. 65.

There can, of course, be no question of ambiguity as affecting the matters under consideration, for the formulation of the question in its reference to definite matters can in no manner be considered ambiguous (g). Yet the proposer confronted with this question, on the one hand, and convictions before the five years therein mentioned, on the other, is set a difficult task. He really has no choice, for if, on a general view, he considers the old convictions relevant to the risk, he ought to disclose them, whatever the wording of the question (u). But he may, and often no doubt does, think that the insurers are not concerned with such old convictions. There are cases in which there is obvious materiality; assuming, for instance, that five years before the proposer was convicted of a driving offence (e.g. for manslaughter) and sent to prison or subjected to a suspension of licence for five years, it would be impossible to say that in such case the conviction was immaterial to the risk. But as a general rule the non-disclosure of old convictions would be honest, the proposer doubtless thinking that the insurers did not require information about them. Whilst a case is yet to arise of an insurer repudiating upon the grounds of such "innocent" non-disclosure, it is nevertheless necessary, because of cases of the type indicated, to determine what in law is the effect of the non-disclosure of "obsolete" convictions (v). On the one hand, it might be argued with some force that whenever they are material in the sense generally understood in the law of insurance (a) they should be disclosed; on the other, it may be equally strongly urged that the insurers by setting limits to the disclosure of convictions which the proposer is required to make are deemed to waive anything beyond them. The latter view is preferred by the author with some hesitation, since in addition to the argument referred to the question in the proposal form must be construed *contra proferentem* (b), and the proposer, as a general rule, is led by the form of the question into assuming that by answering it fully and accurately he has done all that is required of him (c).

4. Reported cases.

It remains to conclude the observations upon this matter with some brief reference to the cases other than those already dealt with in which the question of non-disclosure of convictions has been raised. One of the earliest and most interesting of these cases is *Carlton v. Park* (d), in which it was alleged, *inter alia*, by the insurers that the proposer should have disclosed the fact that he had been convicted of obstruction for leaving his car standing in the road, it being suggested that this was a circumstance which he should have disclosed as it indicated that he was a person likely to be careless with his cars. SANKEY, J. (as he then was), accepted this suggestion and judgment went against the assured on this and other grounds. It is submitted that this decision would not be followed to-day, the circumstances and conditions concerning motor cars having changed so greatly in the intervening time. Whilst convictions for obstruction need not, it is

(u) *I.e.* any facts which, according to the Court, a reasonable man would regard as relevant ought to be disclosed. *Ante*, pp. 390, 391.

(v) *I.e.* convictions more than five years old.

(a) *Ante*, p. 391.

(b) *Thomson v. Wams* (1884), 9 App. Cas. 671, approved in *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399, and see *post*, chapter VIII.

(c) In such exceptional instances as are discussed above the assured would not easily be heard to say that the insurers had "misled him" or that he interpreted the language of the clause as constituting a "waiver." In *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (1934), 49 Ll. L. R. 231, MACKINNON, J., indicated a strong leaning in favour of the latter view mentioned in the text.

(d) (1922), 10 Ll. L. R. 776; 12 Ll. L. R. 246.

submitted, be disclosed as within the general wording "any offence in connection with the driving of any motor vehicle" (e) other offences such as driving without lights (f) or having a noisy exhaust, which are both, it is submitted, offences connected with the handling or manipulation of the vehicle (g), must be disclosed as falling within the wording of the question. The latter point was taken in *Sievers v. Mainwaring* (h) by the insurers, but abandoned after the learned judge had made some observations upon the defence.

Whereas the cases cited in the above remarks raise unusual matters for consideration, the type of case in which the defence of repudiation based on non-disclosure or misstatement of convictions has little of subtlety in it. Such cases as *Jester-Barnes v. Licenses and General Insurance Co., Ltd.*, (i); *Adams v. London General Insurance Co.* (k); and *McCormick v. National Motor and Accident Insurance Union, Ltd.* (l), although involving other points of interest to which reference has been and will be made, illustrate the effect of simple non-disclosure of convictions either in reply to questions in the proposal form or apart from it.

The facts in *Jester-Barnes v. Licenses and General Insurance Co., Ltd.*, are of some interest. As far as they are relevant in the present context, it appeared that the assured made a proposal in July 1932, which the insurers accepted. Subsequently, an accident having occurred, they repudiated liability under the policy upon the grounds that the assured had failed to disclose:

(i) his own conviction in 1924 for being drunk in charge of a car and for dangerous driving, and other convictions in 1931 and 1932 for driving an unlicensed car;

(ii) his chauffeur's conviction in 1925 for dangerous driving and other more recent fines for driving an unlicensed car (m);

and that he had misrepresented himself as being or having been insured with other insurers, which was untrue. The proposal form contained a warranty of truth and disclosure. It was held, inferentially, that the insurers were entitled to repudiate both for breach of warranty and for non-disclosure.

To sum up, the answer to the question as to previous convictions for motoring offences affects the liability of the insurers to assured or to any other person covered by the policy in five ways.

(i) Motoring offences may refer only to offences in connection with the driving and handling of a motor vehicle (*Revell v. London General Insurance Co.* (n)).

(ii) Where a warranty of truth is contained by way of a declaration in the proposal form, which is itself made the basis of the contract of insurance, a conviction, however minor, for driving a car in a defective condition should be disclosed (*Mackay v. London General Insurance Co.* (o)). *Seem*, a conviction for obstruction need not be disclosed.

(e) See *ante*, p. 445.

(f) *Brown v. Crossley*, [1911] 1 K. B. 603.

(g) See *ante*, p. 446; but see *Revell v. London General Insurance Co.* (1934), 50 Ll. L. R. 114.

(h) (1932), *Times*, 23rd March.

(i) (1934), 49 Ll. L. R. 231.

(k) (1932), 42 Ll. L. R. 56.

(l) (1934), 49 Ll. L. R. 362; 50 T. L. R. 528.

(m) This proposal form did not require the statement of convictions "during the preceding five years."

(n) (1934), 50 Ll. L. R. 114.

(o) (1935), 51 Ll. L. R. 201.

(iii) Where a declaration such as was contained in *Mackay's Case* and *Cleland v. London General Insurance Co.* (p) appears in the proposal form, all convictions, whether connected with motoring or not, must be disclosed if thereby the character and honesty of the proposer is affected (*Taylor v. Eagle Star Insurance Co.* (q)).

(iv) In any event it is suggested that the general duty of disclosure resting on a proposer for motor insurance requires disclosure of all such convictions as are referred to in (iii) above, whether or not there is any question asked as to them, or a declaration in the proposal form (*Locker and Woolf, Ltd. v. Western Australian Insurance Co.* (r)).

(v) The manner in which the question is answered for himself or for his drivers may be taken as going beyond the proposer's knowledge and belief (s).

VIII.—OTHER CARS OR OTHER POLICIES

7. *Do you own any other Car(s) ?*

Whether or not the proposer owns other vehicles is not, as a general rule, it is submitted, a material circumstance, which apart from any question such as the above specifically directed to the point would be required to be disclosed by the proposer. It is to be assumed that this inquiry is directed to ascertain whether the assured is likely to put the insurers "on risk" for two cars at once, as he may do under the "driving other cars" clause if his other car is not insured (t).

Another possible reason for the insertion of the question is that the ownership of more cars than one is relevant to the reduction of the risks of insurance, as it may be assumed that where a private owner has more than one car at his disposal each individual vehicle is liable to be used less than would otherwise be the case. Furthermore, it appears to be the practice with most insurers to effect a reduction of premium where an insured person insures the risks arising from two vehicles with the same insurers.

8. *Are you now or have you been insured in respect of any motor vehicle ? If so, please state name of Company or Underwriter.*

This question must be considered separately from and on a basis different from the common inquiry in motor insurance concerning rejections by other insurers which will be later considered (u), although certain observations are common to both points.

The bearing of the question now under discussion upon the risk submitted to the insurers for their acceptance may be considered from several aspects. Some of these are more, others less, obvious. Amongst the more obvious of the reasons for the materiality of other insurances of the same risk past or subsisting is the fact that other insurers are or have been prepared to take the same risk. This may have practical importance where a transfer of insurance is affected, as is sometimes the case, in addition to the weight which it brings to bear on the acceptance and terms of acceptance of the proposer's risk. The width of the wording of the question is important,

(p) (1935), 51 Ll. L. R. 156.

(q) (1940), 67 Ll. L. R. 136.

(r) (1936) 1 K. B. 408

(s) *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1940] 4 All E. R. 305; affirmed, [1941] 1 K. B. 295; [1941] 1 All E. R. 123; *Zurich General Accident and Liability Insurance Co. v. Livingston*, [1940] S. C. 406.

(t) See *post*, chapters VIII and IX, as to whether the insurers are liable when two cars are in use at the same time.

(u) *Post*, pp. 455 *et seq.*

showing as it does that the proposer must make complete and accurate answer to the question with reference to any motor vehicle, not only that proposed for the present insurance, with respect to which he has been or is insured.

It is obvious that, save in exceptional cases, where the question is fully and accurately answered the insurer will be able to gauge the extent and length of the proposer's driving experience, for in almost every case where the proposer is not a new driver he will have or have had a subsisting insurance in relation to a motor vehicle (v). It is doubtful whether the names of all previous insurers must be disclosed (w), but it seems that as a rule they must if the question is specifically asked (x). Where it is not asked, it is not apparently necessary to disclose all previous insurances. In *Ever v. National Employers' Mutual General Insurance Association, Ltd.* (y), the plaintiff claimed a declaration concerning a fire insurance policy which covered the premises, fixtures and contents of a garage, that the policy was valid. The defendant insurance companies put forward the proposition that whenever a proposal is made for a fire insurance policy the proposer is bound to disclose, without being asked, the fact of his ever having had a claim on any other insurance policy of any sort, and also the fact, if it be so, of his having been refused insurance. Further, that such a general duty extended to claims made by a former partner, whose insurance record was not good, and who still kept some interest in the plaintiff's business. *MAC-KINNON, J.*, held that the proposition was far too wide, and that there had in the circumstances been no concealment of material facts.

The less obvious importance of the question is the diminution of the risk from the point of view of the insurers when another insurance of the same vehicle or effective in the same conditions is subsisting. This diminution may take effect by virtue of the clause usually to be found in motor insurance policies excepting indemnity when the assured is entitled to indemnity by virtue of another policy of insurance (z). Such clause will not be effective, however, when other existing policies contain similarly worded clauses, for in that case the two clauses "cancel out" and the rights of insurers are the same as they would have been had no such clauses been inserted and the Common Law right of contribution between insurers been applicable (a).

Whether or not co-existing insurance of the same risk is a material circumstance may be left to insurance experts to answer. In so far as it is relevant to the diminution of the risk, however, it is submitted that upon the general principles which have been discussed no disclosure is necessary (b). But to the extent that the past or present existence of other insurance (not falling within the category of rejections, etc.) is a material circumstance affecting the insurers in their acceptance of the proposed risk disclosure must be made of it (c).

(v) By the operation of Part II of the Road Traffic Act, 1930.

(w) *Broad and Montagu v. South East Lancashire Insurance Co.* (1931), 40 Ll. L. R. 328.

(x) *Dent v. Blackmore* (1927), 29 Ll. L. R. 9.

(y) [1937] 2 All E. R. 193.

(z) See chapter VIII, *post*.

(a) *Gale v. Motor Union Insurance Co.* [1928] 1 K. B. 359; *Widdell v. Road Transport and General Insurance Co.* [1932] 2 K. B. 563.

(b) See *ante*, p. 390. But this would not apply in face of a "warranty of truth and disclosure."

(c) Thus in *Parman v. Motor Union Assurance Society, Ltd.* (1923), 15 Ll. L. R. 206, the assured's agent had wrongly stated that an existing insurance was comprehensive, whereas in fact it was in respect of third party risks only. For this case, see further, p. 403, *ante*.

IX.—PREVIOUS ACCIDENTS

9. How many accidents or losses have arisen during the past THREE YEARS in connection with this or any other motor vehicle owned or driven by you?

Year.	Total number of motor vehicles owned by proposer.	Total number of accidents and losses.	Damage to motor vehicles.		Third Party.		Others.	
			No.	Amt.	No.	Amt.	No.	Amt.
19			Paid					
			Outstanding					
19			Paid					
			Outstanding					
19			Paid					
			Outstanding					

To the end of this question are sometimes added the words "whether insured or uninsured"; these words do not, however, indicate that the common formula is defective or ambiguous in this respect, for in its reference to losses which "have arisen" and in the absence of any mention of insurance or indication of by whom the losses to be disclosed have been borne it is clear that all losses and accidents, whether insured against or uninsured, should be referred to in the answer.

The question is invariably followed by a Schedule, to be completed by the proposer or his agent, referring to totals of losses and accidents, of vehicles owned by the proposer, and of claims with their amounts and dates.

The most important matter to be referred to at the outset is the effect of the insertion in the question of the period of "three years" (*d*) upon the duty of the proposer. It is clear, in the first place, that if he makes full and accurate disclosure of his accidents and losses within three years of the proposal he gives a satisfactory and unimpeachable answer to the question. But the question arises, as in connection with the disclosure of convictions (*e*), does this fact relieve him of his obligation to disclose any accidents or losses sustained or incurred before the three years, which, their being material to the insurance, he would be under a duty at Common Law to disclose to the insurers? Since this difficulty has already been closely considered, it is unnecessary again to discuss the rival contentions. The view of the author in relation to the previous question is reiterated in this context (*f*). If the proposer has had accidents before the specified period and knows or ought as a reasonable man to know that they are material to the risk to be undertaken by the insurers (*e.g.* a bad accident more than three years ago, since when the proposer has not driven), then notwithstanding the limitation of the question he is bound by the duty of disclosure to furnish particulars of that instance (*g*). If, on the other hand, the insured does not or ought not to know that the incidents complained of are material, then the insurers cannot be heard to say that they are such as should have been disclosed having regard to the mental doubt which their formulation of the question

(*d*) Almost always found.

(*e*) *Ante*, p. 445.

(*f*) See *ante*, pp. 445 *et seq.*

(*g*) *I.e.* he knows, or ought as a reasonable man to know, that they are material.

must have produced in the proposer's mind and the implied waiver which in those circumstances they must have been taken to signify in relation to the old undisclosed matters (h).

The Schedule to which reference has been made has the advantage of preventing for the future such disputes as arose in *Mundy's Trustees v. Blackmore* (i) by requiring the total amounts of losses or claims to be accurately and fully stated. In that case, to which reference has previously been made, the designation of "minor accident" was held to be inapplicable to a collision involving serious damage to a £1,200 car which cost some £150 to repair. Similarly, the insertion of the Schedule avoids such circumstances as arose in *Dent v. Blackmore* (j), where several accidents, one of them involving serious personal injuries to a third party, were disclosed as "damaged wings," and the insurers were held entitled to repudiate.

Some discussion is necessary as to what is comprised in the terms "accidents and losses." The meaning of accident has been adverted to in another connection (k). It is submitted that its meaning in this context is similar and that any mishap arising through or in connection with a vehicle or its use is comprised within its scope (l). "Loss" signifies any financial or pecuniary liability or burden which has become imposed through any event in connection with a vehicle by whomsoever it has been borne. The accidents and losses of which details must be furnished are not confined to vehicles owned by the proposer (m), they extend to vehicles owned by him and driven by another person, or vehicles which he has driven which were the property of others. It has been submitted that in the latter case the losses and accidents which should be disclosed are limited to such as arise or were incurred at the time or in connection with the driving thereof by the proposer, and that neither the duty of disclosure in general nor the specific wording of the question under review obliges the proposer to disclose accidents and losses to vehicles the property of others unconnected with his driving thereof or which happened at a time when he was not driving them (n).

It is not so clear as to whether the proposer is bound to disclose accidents or losses of which he knows or ought to know incurred in relation to the insured vehicle now owned by him at a time before his ownership of it commenced. From this aspect the question may fairly be said to be ambiguous, as it is impossible to say from its wording whether the insurers require the proposer to furnish particulars of all losses and accidents to the car to be insured at any time within the specified period or whether the disclosure to be made in answer to the question is relevant only to accidents and losses sustained at such time as the vehicle was the proposer's property (o). In this respect it is submitted that where the proposer knows that such accidents or losses would be regarded by insurers as material, or ought as a reasonable man to know that they would be so regarded, he is obliged to disclose them, but that where he does not know this he is not obliged to make such disclosure, either within or independently of the scope of the question. This submission may be aptly illustrated by the case of *Dunn v. Ocean Accident and Guarantee Corporation, Ltd.* (p), previously quoted in another context,

(h) Cf. ante, p. 445.

(i) (1924) 32 Ll. L. R. 130, ante, p. 447.

(j) (1927) 29 Ll. L. R. 9.

(k) Ante, p. 253.

(l) See also chapter VIII, post.

(m) In some proposal forms the question is so limited, but without, it is submitted limiting the duty of disclosure.

(n) It is submitted that these would be immaterial.

(o) This might become of great importance where the property in a car is transferred collusively by a "bad risk" to a good one. But in other cases, e.g. a newly acquired "second hand" car, would be of little or no moment.

(p) (1933) 50 T. L. R. 32; 47 Ll. L. R. 129.

where the proposer failed to disclose the previous owner her husband's long record of accidents, intending that he should be the driver of the vehicle after insurance. The insurers were held entitled to repudiate upon this and other failures to disclose material circumstances (q).

In some forms of proposal for insurance the words "owned and driven" are expanded by reference to vehicles hired by the proposer under a hire-purchase or hiring agreement. Beyond making specific provision by way of a question directing attention to the point, it is apprehended that such additional words do not increase the duty of the proposer at Common Law, whatever their effect as widening his duties under the specific questions of the proposal form. The proposer's attention having been drawn by the question under discussion to the materiality of his accidents and losses during the three preceding years, it is submitted that he clearly becomes obliged apart from the question to disclose accidents and losses incurred in relation to vehicles hired by him under a hire-purchase agreement during the same period, although, strictly speaking, such vehicles would not be "owned" by him (r).

It remains in concluding the observations upon this section to refer to two further motor insurance cases in which the question of losses and accidents has been discussed. In *Carlton v. Park* (s) the insurers successfully repudiated the policy on the grounds, *inter alia*, that the proposer had failed to disclose both that a car he had owned had been stolen whilst left unattended in the street and that he had been fined for obstruction on another occasion for having left his car standing in the street. Both these facts were held material, as tending, as the proposer should have known, to show that he was a person careless of his own property. Similar points arose in *Farra v. Hetherington* (t), in which the proposer had omitted to disclose that other motor cars he had owned had on various occasions been temporarily abstracted or stolen from him and subsequently found abandoned. The insurers on these grounds were held entitled to repudiate. These two cases serve to illustrate the width of the disclosure required whether under the interpretation of "accidents or losses" or under the general duty of disclosure resting upon the assured.

X.—REFUSAL BY OTHER INSURERS

10. *Has any Company or Underwriter ever :*

- (A) *Declined your proposal for motor vehicle insurance? . . . or*
- (B) *Required you to carry the first portion of any loss? . . . or*
- (C) *Required an increased premium or imposed special conditions? . . . or*
- (D) *Refused to renew your policy? . . . or*
- (E) *Cancelled your policy? . . .*

Whilst in marine insurance the fact that other insurers had refused or declined to accept a risk at any premium has never been regarded as a material fact (u), the contrary is the case in all other types of insurance. Apart, then, from the formulation and submission of specific questions such as those reproduced above, the proposer in a contract of motor insurance is obliged to make full and accurate disclosure of unfavourable experiences at the hands of other insurers (u). The detailed formulation of the points dealt with in

(q) As to this case, see *ante*, pp. 390, 425.

(r) But see *ante*, p. 427, on this point.

(s) (1922), 10 Ll. L. R. 776; 12 Ll. L. R. 246. See also *ante*, pp. 431, 449.

(t) (1931), 47 T. L. R. 465; 40 Ll. L. R. 132.

(u) SCRUTTON, L. J. in *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356, at p. 362.

the question now under review appears to be due to a desire on the part of insurers to avoid disputes with their policy-holders and to make plain to every proposer what exactly is required of him. While to some extent the points detailed in the question would be covered by a complete and accurate reply to an earlier question in the proposal form (v), others, for example the first, would not be so touched upon. It is, therefore, necessary to deal *seriatim* with the specific points of the question.

(A) The words "your proposal" refer, it is submitted, to any proposal made by the present proposer or his agent (w) to any insurer with respect to any motor vehicle insurance, whether or not in connection with the vehicle which is the subject of the present proposal. This aspect of the question is discussed fully below (a). In reply the proposer is bound to furnish particulars of every instance in which he has suffered rejection of any motor insurance proposal by any insurer (b). Further, as far as furnishing a true and complete answer to this question is concerned, the proposer is obliged, it is submitted, to give details of rejections from whatever reason; thus where, as in *Broad and Montagu v. South East Lancashire Insurance Co.* (c), insurers had rejected because they were ceasing to cover the type of risk the subject of the proposal, this should be disclosed by the proposer; or where, as in *Holt's Motors, Ltd. v. South East Lancashire Insurance Co. Ltd.* (d), the rejection had been communicated by agents on the ground that "commercial risks" were not covered by their arrangements with the insurer who had declined. The question is clearly unambiguous to the extent that the reason of the rejection is immaterial in determining whether or not details should be furnished respecting it.

The expression "declined your proposal" does not refer only to cases in which insurers have rejected a proposal *in toto*, but includes cases in which the acceptance of the proposal has been made subject to conditions or qualifications. Declined must, therefore, be interpreted as meaning "refused to accept," and a refusal of acceptance is none the less a refusal because it indicates to the proposer other terms upon which the insurers would be willing to accept the risk offered (e). The extent of the phrase "your proposal" was fully discussed by SWIFT, J., and by the Court of Appeal in *Locker and Woolf, Ltd. v. Western Australian Insurance Co.* (f), and was held to cover the proposal of a partner in a firm when applying for both motor and fire insurance on behalf of the partnership.

That such circumstances would, in practice, fall within point (C) of the question cannot, it is thought, be a reason for denying its clear grammatical

(v) *Ante*, pp. 451 et seq.

(w) E.g. *Holt's Motors, Ltd. v. South East Lancashire Insurance Co., Ltd.* (1930), 37 Ll. L. R. 1.

(a) *Post*, p. 461.

(b) *Holt's Motors, Ltd. v. South East Lancashire Insurance Co., Ltd.* (*supra*); *Broad and Montagu v. South East Lancashire Insurance Co.* (1931), 40 Ll. L. R. 328; *Norman v. Gresham Insurance Co.* (1935), 52 Ll. L. R. 292; *Cornhill Insurance Corporation v. Attenheim* (1937), 58 Ll. L. R. 27; *Ever v. National Employers' Mutual General Insurance Association, Ltd.*, [1937] 2 All E. R. 193; *Locker and Woolf, Ltd. v. Western Australian Insurance Co.*, [1936] 1 K. B. 408.

(c) (1931), 40 Ll. L. R. 328.

(d) (1930), 37 Ll. L. R. 1.

(e) *Dent v. Blackmore* (1927), 29 Ll. L. R. 9. Upon analysis such circumstances resolve into the rejection of the proposer's offer and the making of a counter-offer to him by the insurers.

(f) (1935), 52 Ll. L. R. 325; on appeal, [1936] 1 K. B. 408. See also *Davies v. National Fire and Marine Insurance Co. of New Zealand*, [1891] A. C. 485; *Bocher v. Marshall* (1922), 11 Ll. L. R. 114; 12 Ll. L. R. 413; *Glucksmann v. Lancashire and General Assurance Co.*, [1925] 2 K. B. 593; affirmed, [1927] A. C. 139; *Arthurs Press, Ltd. v. Eagle, Star and British Dominions Insurance Co.* (1924), 18 Ll. L. R. 382.

meaning to the word "decline," although this interpretation may in the majority of cases render the contents of point (C) superfluous and unnecessary.

Failure to disclose rejection of previous proposals by other insurers is one of the grounds most frequently relied upon by insurers as entitling them to repudiate liability, whether such non-disclosure is committed in breach of a specific term of the proposal and policy or of the general duty of disclosure implied therefrom. The cases of *Barnett v. Blackmore* (g), *Paxman v. Motor Union Insurance Society* (h), *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.* (i), and *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (k), to all of which reference has been made, are further illustrative of such grounds of repudiation. The question whether there has been a breach of the general duty of disclosure of material facts depends upon the circumstances of each case (l).

(B) It is the practice of motor insurers, in acceptance of new drivers' risks or the risks of drivers with unfortunate records, sometimes to require them to bear the first portion of any loss which they may sustain under the policy (m). This requirement is frequently made a term of the insurer's acceptance, which thereby imposes an additional burden upon the proposer not contemplated by him in his offer. Whenever and by whomsoever such terms have been submitted to an assured as a condition of acceptance of his proposal, such circumstances must be disclosed in answer to the question asked (n). This type of case must be distinguished from the common case of experienced drivers obtaining a rebate of premium in return for an offer to bear a specified portion of any loss, or to bear the whole of any loss up to a specified amount (o). In the latter case the initiative proceeds from the proposer himself, whereas in the former the insurers impose the requirement that the proposer should bear a portion of the risk as a condition of their acceptance of his proposal. It is submitted, with some hesitation, that a proposer is not obliged to disclose, either in reply to point (B) of the present question or under his general duty, the fact that he has made proposals of insurance to other insurers on his own voluntary undertaking to bear a first portion of a loss. Such a circumstance would not constitute an instance of an insurer requiring the proposer to bear a loss, since the offer to bear it proceeds voluntarily from the proposer himself. Nor, it is submitted, would such circumstances in themselves be material, so that the proposer, apart from the specified question, would be obliged to disclose them to the insurers (p).

(C) This section of the question under consideration is aimed at discovering those proposers whose claims and losses experience has been found so onerous by previous insurers as to remove them to a greater or lesser degree from the category of ordinary risks. In such cases insurers habitually decline to accept proposals unless the proposer agrees to pay an increased premium or, alternatively, to accept the imposition upon him of special conditions restricting in some or other manner his rights to indemnity

(g) (1926), 23 Ll. L. R. 137.

(i) [1929] 2 K. B. 356.

(l) *Per* MACKINNON, J., in *Ever v. National Employers' Mutual General Insurance Association, Ltd.*, [1937] 2 All E. R. 193.

(m) So-called "compulsory excess."

(n) *Mackay v. London General Insurance Co.* (1935), 51 Ll. L. R. 201. Even though the fact is quite immaterial, and especially so if the truth of the answer in the proposal form is warranted.

(o) So-called "voluntary excess."

(p) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139.

(h) (1923), 15 Ll. L. R. 206.

(k) (1934), 49 Ll. L. R. 231.

against the insurers (g). This being the case, the imposition of such conditions by other insurers in the past upon acceptance of the proposer's risks is a material circumstance; bearing, as it does, upon the moral hazard attached to the proposer from the insurers' point of view. An instance in which the failure to disclose such past requirements of insurers was successfully relied upon by insurers as entitling them to repudiate was *Mundy's Trustees v. Blackmore* (r). It is submitted that both the requirement of an increased premium and the imposition of special conditions by past insurers are material circumstances to be disclosed apart from any specific question in the proposal form.

One point requires elucidation in relation to this part of the question. Does it refer only to renewals of policies previously held by the proposer, or does it extend to cover cases where a previously uninsured proposer's offer is declined by insurers or met by the offer of terms subjecting the proposer to an unusually high premium or to onerous conditions?

The expressions "increased premiums" and "imposed special conditions" suggest a comparison, which lends colour to the view that renewal is necessarily involved. In practice, the fact that a proposer's offer was met by the insurer's putting forward higher premiums or special conditions would, if the submission made previously as to the meaning of "declined" is accurate, have to be disclosed under point (A) of the present question. It is, therefore, submitted that point (C) does, in fact, cover only renewals of insurance and that the proposer's attention thereunder is directed specially to his renewals experience. It is not thereby to be understood, however, that the fact of an insurer having refused to accept a proposal save at an unusual premium or on onerous conditions is immaterial and does not require disclosure. On the contrary, such circumstance, even if not within the purview of points (A) and (B) of the present question, is clearly material in the effect which it would have upon the prudent insurer's judgment as to his acceptance of the risk proposed and the terms thereof.

(D) The types of circumstance which are included within the expression "refusal to renew" can best be considered in connection with the decision in *Holt's Motors, Ltd. v. South East Lancashire Insurance Co. Ltd.* (s), the material fact in which, as far as is at present relevant, was the failure of the proposers to disclose the fact that certain insurers with whom they were then insured had sent a letter indicating their inability to invite renewal of the risk, although no such renewal had been asked for or even suggested. It was held that the insurers were entitled to repudiate upon the ground, *inter alia*, that the indication of unwillingness to renew was a declining of the risk, or in any case a matter which should have been disclosed by the proposers. The proposal form in that case does not appear to have contained a question in the form now under consideration; where, therefore, such a question as this is included, the reasoning of *Holt's Case* appears, *a fortiori*, applicable.

The effect of renewals is dealt with elsewhere in the present chapter (t); it is therefore unnecessary to say more than that inasmuch as a renewal is in law tantamount to a new contract of insurance upon general principles full disclosure should be made of a proposer's renewals experience. It is

(g) Or insurers may and often do decline to accept them at all. *Holt's Motors, Ltd. v. South East Lancashire Insurance Co., Ltd.* (1930), 37 Ll L. R. 1.

(r) (1928), 32 Ll L. R. 150.

(s) (1930), 37 Ll L. R. 1. But see also *Euer v. National Employers' Mutual General Insurance Association, Ltd.*, 1937 2 All E. R. 103, where, although there was evidence of a previous refusal of an underwriter to continue with a policy of fire insurance, such refusal was held to be immaterial as far as the general duty of disclosure was concerned.

(t) *Post*, p. 468.

clear, therefore, that where renewal is declined (u) such circumstances should be disclosed. Similarly where renewal is only effected at a higher premium or upon more onerous conditions (v).

(E) The meaning of "cancellation" has been fully discussed in relation to the Road Traffic Act, 1934 (w). In the present context it is apprehended that it comprises any act of cancellation by the unilateral act of the insurers such as may take place either by virtue of a cancellation clause in the policy itself (x) or under the right of the insurers to cancel the policy on the grounds of non-disclosure or misrepresentation (y). Such cancellation as occasionally takes place by mutual agreement between the insurers and assured to discharge their respective rights and obligations under the policy is, it is submitted, excluded from the purview of the present question as not being susceptible of description as "cancellation by insurers." There remains, however, the important question as to how far an improper or invalid cancellation by insurers should be disclosed or particularised by the proposer under this question. Without a doubt the prudent proposer would inform the prospective insurers of such circumstances, adding his explanation of them, and it is submitted that he would be bound to do so, as it is the fact of cancellation by other insurers, and not its cause or validity, of which the insurers desire to be informed (z).

XI.—FURTHER MATTERS WHICH SHOULD BE DISCLOSED

To the observations upon the separate sections of the above question certain other points must be added. The language of the question deliberately stresses the absence of any time limit upon the answers which the insured is required to make. The word "ever" indicates beyond all doubt that the proposer must disclose and furnish the requisite particulars bearing upon the whole of his insurance experience. The difficulties which may in such case arise in relation to companies whose existence may extend many years beyond the span of human life have been alluded to by ROWLATT, J., in his judgment in the case of *Broad and Montague v. South East Lancashire Insurance Co.* (a). The author does not see any way in which the duty accurately to answer resting upon a company can be qualified when such a question is asked. Materiality is irrelevant in such case, the parties agreeing that certain questions shall be fully and accurately answered independently of their materiality to the insurers. It thus becomes incumbent upon companies as proposers fully to disclose every rejection of their risks of motor vehicle insurance which they have ever sustained, unless that duty is somehow restricted by contemporaneous agreement in writing between them and the insurers.

1. Is disclosure of other insurance necessary?—Although the point has not been raised in any English reported motor insurance case, the question as to whether the assured is under a duty to make disclosure of facts relating

(u) See *Broad and Montagu v. South East Lancashire Insurance Co.* (1931), 40 Ll. L. R. 328.

(v) Cf. *Mundy's Trustees v. Blackmore*, (1928), 32 Ll. L. R. 150.

(w) S. 10 (27 Halsbury's Statutes 544), chapter V, *ante*, pp. 301 *et seq.*

(x) *Post*, chapter VIII.

(y) See chapter V, *ante*, pp. 303 *et seq.* But not, it is submitted, where the assured disputes the insurers' contention and cancellation is only effected as the result of a compromise. See further, chapter IX, *post*.

(z) *Norman v. Gresham Fire and Accident Insurance Society*, [1930] K. B. 253; [1936] 1 All E. R. 151. Lewis, J., held that although it was not necessary for the decision, failure to disclose a refusal to renew for non-repayment of premium was material to the risk. See also *Re Wilson and Scottish Insurance Corporation*, [1920] 2 Ch. 28.

(a) (1931), 40 Ll. L. R. 328.

to different types of insurance into which he has entered or attempted to enter is one of wide importance. In *Golding v. Royal London Auxiliary Insurance Co.* (b) it was held that the assured was not bound to disclose a subsisting insurance upon a private house some distance away, when making a proposal to insure a shop against fire risks. Although at first sight this case appears to indicate that disclosure of other types of risk need not be made, it is submitted that a clear distinction can be drawn between that case and the usual motor insurance contract. The subject-matter of motor insurance is, as a rule, complex, and most insurances are effected against comprehensive risks. It is submitted that where such risks are made the subject of motor insurance, previous rejections of any part of such risks (e.g. of the assured's life against accident) are material and should be disclosed. Again it may be asked, should an assured disclose that he has had a policy relating to risks not proposed to be covered in a motor insurance policy avoided on the ground of non-disclosure or fraud, or fraudulent claims against previous insurers where such is the case? It might be said to be clearly material that the proposer is the type of man who has been guilty of fraudulent statement or claim, an assured with whom no reputable insurer would desire to be concerned (c).

2. Financial position.—The financial position of the assured might well be regarded as material in view of the provisions of the M.I.B. Agreements (d). There is an obvious difficulty in meeting all these problems. Common sense seems to dictate that the line between materiality and immateriality must be drawn somewhere. Are a man's political views or his ill-temper material facts in motor insurance? Any one of these may appreciably increase the risks which may arise from the driving of an assured person, yet it is not anticipated that insurers would regard them as "material" in the defined sense.

3. Insurable interest.—Although in certain cases insurable interest is no longer necessary in motor insurance (e) it is submitted that the lack of it must always be disclosed, since, it is submitted, that would be regarded as material by insurers (f).

The answers furnished to the various points of the present question must be accurate in fact. The knowledge of the proposer himself is thus immaterial in considering the adequacy of the answers furnished (g), but

(b) (1914), 30 T. L. R. 350.

(c) Nevertheless in *Luce v. National Employers' Mutual General Insurance Association, Ltd.*, [1937] 2 All E. R. 193, it was decided that an assured need not as a general duty disclose all his previous insurance history, where such failure to disclose was not in the circumstances material to the risk. But cf. *Locker's Case*, [1936] 1 K. B. 408 (C. A.), where the failure to disclose a previous refusal of insurance to a partner was held to be material. The judgments of the Court of Appeal and especially that of SLESSER, L. J., at p. 412, indicate that the character and record for honesty of a proposer are material facts. See also *Cleland's Case* (1935), 51 Ll. L. R. 156.

(d) By the terms of the Domestic Agreement (*ante*, chapter VI, p. 377), insurers are obliged to pay large sums in certain circumstances which they are not obliged by contract to pay, and which they must recover from the assured. In these circumstances insurers might well charge lower premiums to persons of wealth, or higher to men of straw, although such a practice has not yet come into being. But cf. *Norman v. Gregham, etc., Insurance Society*, [1936] 2 K. B. 253, [1936] 1 All E. R. 151, where the non-disclosure of cancellation of policies by other insurers on the ground of non-payment of premiums was held by LEWIS, J., to be material to the risk.

(e) See *ante*, pp. 88 and 211 *et seq*.

(f) See *ante*, pp. 439 *et seq* and cf. the effect of termination of insurable interest, *post*, chapter VIII.

(g) E.g. *Broad and Montagu v. South East Lancashire Insurance Co.* (1931), 40 Ll. L. R. 328.

their accuracy and fulness is determined as at the time when the proposal is made (h).

4. **Meaning of "your."**—The discussion of the present question may be aptly concluded by a consideration of the meaning of the term "your" as applied here and in other parts of the proposal form which was fully discussed in the case of *Locker and Woolf v. Western Australian Insurance Co.* (i). The main difficulty is that which arises in considering the position of partnerships to which reference has been made at various points in this section of the chapter (k). Where the proposal form itself contains specific instructions as to the scope of the disclosure to be made in a firm's proposal, as is often the case in commercial vehicle insurance, the difficulty is, of course, minimised to the extent that the proposers become obliged under the terms of the contract to make full and accurate disclosure concerning the precedents of their individual partners. In the majority of cases when a firm effects insurance, however, no guidance is available in the proposal form, and the duty of the proposers is measured by the general law. Unfortunately, the authorities are by no means clear. In *Davies v. National Fire and Marine Insurance Co. of New Zealand* (l) the Privy Council held that the negative answers furnished to the two questions—"Has risk been declined by any other office?" "Has proponent ever been a claimant on any other office?" on a partnership's proposal were not untrue by reason of the fact that one of the partners prior to the formation of the partnership had been both a claimant upon and declined by other insurers, upon the ground that the claims made by the individual partner when not a member of the firm were not covered by the question.

The question arose in two other cases concerning burglary insurance, *Becker v. Marshall* (m) and *Glicksman v. Lancashire and General Assurance Co.* (n). In the former case the proposal of a firm failed to disclose that some years before the firm was formed one of the partners had several times sustained losses by burglary. The insurers relied upon this omission, *inter alia*, as entitling them to repudiate, and their right to do so was upheld in the Court of Appeal on the ground that the circumstances were clearly material. In *Glicksman v. Lancashire and General Assurance Co.* (o) the proposers, who were a firm, omitted to give particulars of material facts concerning the experience of one of the partners before the formation of the firm. The questions in the proposal form were all addressed to "you" and "your," and some of these had been taken by the proposers as referring to the partners separately, whilst others had been answered in a sense relating to the partnership alone, amongst the latter being questions as to previous losses and as to the rejection of proposals by other insurers. The Court of Appeal held that the insurers were entitled to repudiate on the ground of non-disclosure of material facts, the majority of the Court taking the view that having regard to the circumstance that the partners had answered some of the questions with reference to their individual records and experience, the non-disclosure of the circumstances in question was wilful. On appeal to the House of Lords the insurers' right to repudiate was maintained, but upon different grounds, it being held that the negative answers to the relevant questions concerning rejections of insurance, etc., were not complete and accurate, having regard to the facts, and that for these reasons the insurers were entitled to repudiate on the strength of the warranty of

(h) *Whitwell v. Autocar Fire Insurance Co.* (1927), 27 Ll. L. R. 418.

(i) (1935), 52 Ll. L. R. 325; affirmed, [1936] 1 K. B. 408 (C. A.).

(k) *Ante*, pp. 426, 441.

(l) [1891] A. C. 485.

(m) (1922), 11 Ll. L. R. 114; 12 Ll. L. R. 413.

(n) [1925] 2 K. B. 593; affirmed, [1927] A. C. 139.

(o) [1925] 2 K. B. 593; affirmed, [1927] A. C. 139.

"truth and disclosure" contained in the policy, although the Court found that the facts not disclosed were immaterial to the risk to be insured.

It would appear that the specific directions covering the case of partnerships which are commonly found in commercial vehicle insurance policies are designed to meet the strictures passed on insurers who word the questions in their proposal forms ambiguously, as in the *Glicksman Case* (p). Where such directions are present, partnership gives rise to no difficulties in the complete and accurate disclosure which the proposer must make. But in the absence of such directions it is apprehended that where a partnership is a proposer the word "you" must be interpreted as meaning the partnership and its individual members, and that all the questions of the proposal form must be accordingly answered. If the partners, misinterpreting the questions, fail to disclose circumstances concerning themselves as individuals, they risk repudiation both on the ground that completely accurate answers have not been furnished and, where the non-disclosure circumstance is material to the risk, upon the general ground of "non-disclosure."

This wide interpretation of the expression "your" has been carried to somewhat questionable lengths in the case of the proposals of companies. Although it is well settled law that a company is a legal person entirely distinct and separate from its members, however predominant in fact their interests may be (q), and that a company cannot do any act of legal consequence either itself or by its agents before incorporation (r), yet in the case of *Arthrudd Press, Ltd v Eagle Star and British Dominions Insurance Co.(s)* it was held that the insurers were entitled to repudiate liability where the proposer, the company, had failed to disclose that the proposal of its chief shareholder for the insurance of the company before incorporation had been rejected by other insurers. It is submitted that this decision cannot be taken as authoritative in all cases. The principle upon which it is based would appear to be susceptible of extremely wide application, and whilst necessary and equitable in the facts of cases similar to that cited, would work considerable injustice if applied to facts having nothing in common with them. In *Ever's Case* (t) the general duty of disclosure of previous insurances was fully discussed and the proposition that all previous claims, refusals and declinations must be disclosed was considered far too wide, the only test of a concealment being that of materiality, and that test of materiality being one of fact in each particular case. Thus in *Ever's Case* (t) the disclosure of the default of a previous partner in the firm, who still retained an interest in the business, was not considered necessary; but in *Locker's Case* (u) it was held that in a proposal for fire insurance, the failure to disclose a previous refusal of motor insurance on the ground of non-disclosure of material facts in his proposal form by one of two partners (who made both the motor and the fire proposals) was a material fact which should be disclosed, not only in answer to the question "Has this or any other insurance of yours been declined by any other company?" but also under the general duty to disclose (u).

11. Are you entitled to a "No Claim Bonus" from your previous insurers in respect of any of the cars described in this proposal? If so, please attach renewal notice.

(p) [1927] A.C. 139, at pp. 143, 144.

(q) *Salomon v Salomon & Co.*, [1897] A.C. 22.

(r) *Kelner v Baxter* (1866), L.R. 2 C.P. 174.

(s) (1924), 18 Ll. L. R. 382.

(t) [1937, 2 All E. R. 193.

(u) (1935), 52 Ll. L. R. 325, affirmed, [1936] 1 K.B. 408 (C.A.). The judgments of SWIFT, J., and of the Court of Appeal have important observations on the extent of the disclosure required by the words "you" or "your" in questions in the proposal form.

The purpose of this question is twofold. Firstly, the practice of most motor vehicle insurers is to allow "no claim bonus" when an insurance is transferred from one to another insurance office. Secondly the fact that an assured is or is not entitled to "no claim bonus," a rebate on his premium to reward him for the lightness of the burden of his risks, bears upon the risk which will be incurred by new insurers in insuring him. Where a negative answer is returned to this question and no record of accidents and losses is furnished, it is submitted that the insurers are put on inquiry (a) as to the proposer's past record, although such fact would not prevent the non-disclosure of such losses and accidents as are material from entitling the insurers to repudiate the policy. Where an affirmative answer is supplied to the question then the insurers secure themselves as to its accuracy and as to the other facts relating to the matter by requiring the renewal notice covering the "no claims" bonus to be produced to them. In the absence of such production the no claims rebate will not as a rule be allowed (b). Where a negative answer is returned to the question, that alone will merely have the consequence that the proposer will be accepted at the normal rate of premium without rebate (c).

XII.—OTHER QUESTIONS

A word must be added concerning some other questions which are commonly to be found in proposal forms :

"How many other insurances have you in existence with this office?"

This question requires comment from two aspects. Firstly, the practice of most insurers is to allow rebates on premiums where the proposer's risks of a similar character are borne by the insurers under another subsisting policy. This is more a matter of practice which need not be developed in this work. Secondly, where a proposer is already insured, the question arises as to how far, if at all, his duty to make full and accurate disclosure to the insurers is qualified. It is submitted in this connection that his duty to reply fully and accurately to the questions in the proposal form is not qualified by the mere fact that he is already insured with the same insurers and may, therefore, have answered the same questions in another proposal form (d). The obligation which the proposal form invariably imposes upon the prospective assured to make complete and accurate answers is not qualified by the fact that he has furnished the same information on a previous occasion with reference to another risk, nor is it affected by the knowledge of the insurers. On the other hand, the general duty of disclosure, outside the terms of the proposal form, is necessarily qualified by the fact that full and correct information has already been supplied to the insurers (e). It is settled law that, apart from the special terms of any contract of insurance the proposer is not obliged to disclose facts of which the insurers know or ought reasonably in the course of their business to know. Where disclosure has been made by the proposer on some previous occasion to the insurers or their authorised agent the facts so disclosed will be in the knowledge of the insurers so as to relieve the assured from making a double disclosure

(a) *Sed quare* : it may be that the proposer was previously insured with a company which had no such "rebate" scheme in force.

(b) In practice, however, this is not strictly adhered to.

(c) But when an untrue negative answer is given and the proposal form contains a warranty of truth and disclosure, *semble*, the insurers would be entitled to avoid the policy. Cf. *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(d) *Jester-Barnes v. Licenses and General Insurance Co.* (1934), 49 Ll. L. R. 231.

(e) Cf. *Holt's Motors, Ltd. v. South East Lancashire Insurance Co.* (1930), 37 Ll. L. R. 1.

of the same matters, provided that in every case the circumstances are such that the insurers when the second proposal is made either know in fact, or ought to know (e.g. where too great an interval has not elapsed between the two dates) of the first disclosure (f). But where, as is the general rule, every proposal by its terms must be complete and accurate, the proposer is not relieved of his liability to make a double disclosure to the insurers.

The question refers to all forms of insurance, and not only to motor insurance (g).

"If an individual owner, how long have you been driving?"

This inquiry is frequently found either in this form or else qualified by the adverb "regularly." The reason for the importation of this qualification may be straightway explained. In the case of *Corcos v. De Rougemont* (h), the proposer in answer to an unqualified question on this point replied "several years." The answer was true to the extent that the proposer had had several years' driving experience, none of it recent, spread over a considerable period. The insurers, after a loss, endeavoured to repudiate on the ground that the proposer had not made a complete and accurate answer to the question. McCARDIE, J., however, held that the question in its then form was ambiguous, and that the proposer's answer, having regard to the ambiguity, was an accurate one. The decision in this case may therefore be considered as responsible for the more careful formulation of the above question in many proposal forms. Where the question remains in its unqualified form it is still open to ambiguity, and the proposer in such cases as *Corcos v. De Rougemont* can safely make a similar reply.

In *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison* (i) the insurance company was endeavouring to obtain a declaration under section 10 (3) of the Road Traffic Act, 1934 (k), against an injured third party and the assured on the grounds of misrepresentation and non-disclosure by the latter in the proposal form. The questions were asked and answered as follows in that document: (1) "Have you driven regularly and continuously in the United Kingdom during the past 12 months?"—"Yes." (2) "How long have you driven motor cars?"—"3 years." In fact, Morrison had driven cars for two years and three months only, and for the last six months of the previous year, having been disqualified from holding a licence, he had only driven a car within the bounds of a large works area, which was private ground. The insurance company failed to obtain their declaration against the third party, and they were refused one, in the discretion of the Court, against the assured. GODDARD and MACKINNON, L.JJ., stigmatised the first question as extremely vague and embarrassing. The insurers wished to make sure that the assured was keeping his hand in, and that was all. As to the second question, the answer was not untrue. If the insurers wished to know how long a man had driven on the road or for how long he had held a licence, they should ask the question in plain terms. There were many racing drivers and testers of motor cars who drove cars on tracks very frequently, but who did not take out a licence to drive a car on the road. This case was, of course, before the days of the M.L.B. Agreements, and it may be that had the insurers been proceeding against the assured for

(f) More usually, when the proposer inserts in his form a reference to some previous proposal made by him. See cases cited in notes (d) and (e), *supra*.

(g) *Cleland v. London General Insurance Co.* (1935), 51 Ll. L. R. 156; *Locker's Case*, [1930] 1 K. B. 408 (C. A.).

(h) (1926), 23 Ll. L. R. 164. See also *Evans v. Employers' Mutual Insurance Association* (1935), 51 Ll. L. R. 13.

(i) [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

(k) See chapter V, *ante*, p. 303.

untrue answers in the proposal form, whereby they would be entitled to recover from him monies already paid by them under the M.I.B. Agreements to the third party, they would have succeeded (l).

The effect of this question, although differently worded, arose for decision in the case of *Adams v. London General Insurance Co. (m)*, where the proposer had stated that he had four years' driving experience (there was non-disclosure in other respects). The insurers, on discovering, after a claim had been made, that the proposer had applied as lately as the preceding year for a driving licence, stating in his application that it was his first, sought to repudiate. In support of their contention they merely proved the facts stated above, but failed to adduce any evidence that the statements in the application for a licence were true or that the answer to the question concerning driving experience was untrue. It was held by SWIFT, J., in these circumstances that they had failed to discharge the burden of proof resting upon them that the proposer had been guilty of misstatements of fact.

Before passing to the concluding term of the proposal form, the warranty of truth and disclosure, it is thought opportune briefly to refer to some questions not already touched upon and commonly to be found in proposal forms relating to the insurance of (i) motor bicycles, and (ii) commercial vehicles.

XIII.—PROPOSALS IN MOTOR CYCLE INSURANCE

The questions which are asked in the proposal form in motor bicycle insurance are in general, *mutatis mutandis*, analogous to those found in the private motor car proposal form. The insurers, however, invariably inquire whether the vehicle to be covered is new or secondhand and concerning the driving experience of the assured. The most important difference relates to the limitations of the insurers' risk under the policy. This arises through the question :

" Will pillion passengers be carried when the cycle is driven solo ? "

or some other inquiry to the same effect (n). It should be borne in mind that provided the vehicle is properly adapted for the purpose the carriage of pillion passengers is perfectly lawful (o). Owing to what is a doubtful interpretation of section 12 of the Road Traffic Act, 1934 (p), insurers have now decided to charge a higher and uniform premium even if the proposer is willing to agree not to carry passengers. But formerly insurers charged different rates of premium for insurance of cycles to be driven " solo " and without passengers and those to be driven with passengers. The proposer who replied to the effect that no pillion passengers " will be " (q) carried when the cycle is being driven solo thereby entered into a warranty with the insurers that he would not carry pillion passengers in such circumstances (r).

(l) As to the methods open to insurers or M.I.B. to recover from the assured or other persons such sums paid by them only by virtue of the M.I.B. Agreements, see chapter VI, *ante*, p. 374.

(m) (1932), 42 Ll. L. R. 56.

(n) The effect of a resulting term in the policy restricting the driving of the vehicle to the assured alone is shown in *Herbert v. Railway Passengers Assurance Co.*, [1938] 1 All E. R. 650. The assured fell ill and changed places with a friend in the sidecar. The friend had an accident, but the company was not liable under the policy to him.

(o) Road Traffic Act, 1930, s. 16 (23 Halsbury's Statutes 623).

(p) See *ante*, chapter V, pp. 316 *et seq.*

(q) As to the importance of the expression " will be," see dicta of SCRUTTON and BANKES, L.J.J., in *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590, quoted at p. 435, *ante*.

(r) Cf. *Roberts v. Anglo-Saxon Insurance Association* (*supra*); *Jenkins v. Deane* (1933), 47 Ll. L. R. 342; *Gray v. Blackmore*, [1934] 1 K. B. 95.

Should, therefore, he do so it is submitted that the insurers were entitled to repudiate liability whenever a loss arose whether the cycle was being driven solo or not, or whether a passenger was being carried or not. One breach of the warranty would suffice to deprive the proposer of his right of indemnity where the question was couched in the terms produced above. But where the question was framed differently, for example,

"Do you desire the policy to be restricted to use when the motor cycle is being ridden solo and without passengers?"

it had a different effect on the liability of the insurers.

Such a term entails no warranty by the proposer. He may use the cycle for the carriage of pillion passengers and will not thereby enable the insurers to avoid the policy thereafter (s).

The effect of such a term is to limit the risk accepted by the insurers to losses and liabilities arising whilst the bicycle is being driven solo; the proposer who is covered subject to such restriction takes upon himself the risk of prosecution under section 35 of the Road Traffic Act, 1930 (t), but does not thereby jeopardise the future validity of his policy (u). The effect of these clauses restricting and governing the insurers' liability may be usefully adopted to illustrate the difficulties arising from the "limitations of use" clauses appearing in most motor vehicle insurance policies which have already been discussed (v). According to the wording of the proposal the restriction of insurance of a motor bicycle may be either a warranty binding the proposer to future observance of its terms at risk of his policy, or a mere restriction of risk disregard of which while exposing the assured to the possibility of criminal proceedings will not prejudice the continuance of his policy (w).

XIV.—PROPOSALS FOR COMMERCIAL VEHICLES

Proposal forms relating to the insurance of commercial vehicles are necessarily more elaborate, particularly in relation to the questions bearing upon the mechanical characteristics of the vehicle to be insured and upon the use to which the vehicle is to be put. The proposer is usually asked whether the vehicle to be covered is new or secondhand, what its maximum speed, and its laden and unladen weight may be. He is asked to give details of such matters as tyres, whether a spark arrestor is carried, whether the motive power of the vehicle is steam, electricity (x) or petrol. Whether or not the vehicle has a steam boiler, and if so whether the boiler is covered by a proper boiler insurance, is invariably asked, as it is also designed to elucidate whether or not the insured vehicle will be used with a trailer (y). The garaging of the insured vehicle also forms the subject of questions such as "Where is the vehicle garaged?" (b) "How many other vehicles are usually garaged in the same place?" "How much petrol is stored in the garage?"

It is in relation to commercial vehicle insurance that "limitations of use" clauses are of particular importance. The proposer is required, by means

(t) *Cp. Provincial Insurance Co. v. Morgan*, [1933] A. C. 240.

(s) 23 Halsbury's Statutes 607; chapter IV, *ante*, pp. 163, 242.

(u) *Bright v. Ashfold*, [1932] 2 K. B. 153. See this case discussed fully, chapter IV, *ante*, p. 182.

(v) *Ante*, pp. 431 *et seq.*, and see chapter VIII, *post*.

(w) *Cf. Knowler v. Rennison*, [1947] K. B. 488; [1947] 1 All E. R. 302.

(x) The case of *Tilling-Stevens Motors v. Kent County Council*, [1929] A. C. 354, shows that this question may be one of extreme difficulty.

(a) *Jenkins v. Deane* (1933), 47 Ll. L. R. 342.

(b) *Cf. Dawson, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

of questions directed to these specific points (c), to furnish accurate information as to the purposes for which the vehicle is to be used (d), as to the goods for the carriage of which it is to be used (e), as to whether or not it is to be used for the purpose of haulage or towage (f), as to the precise locality within which it is to be used (g), and in the case of a public service vehicle as to its seating accommodation and whether it is to be used as a stage, express or contract carriage (h). The answers to these questions will all affect the subsequent policy which is issued, either as representations, or as limitations of risk, or as warranties (i). The choice between these effects is made in accordance with the results of the previous discussion of this problem upon the construction of the terms of each relevant clause in the policy (k). It should, of course, be noted that as far as death and bodily injury to third parties are concerned, section 12 of the Road Traffic Act, 1934 (l), and the M.I.B. Agreements (m) will limit the effectiveness of all the common types of restrictions of risk contained in commercial vehicle insurance policies, but as far as other liabilities are covered and as between the insurers and their assured, section 12 of the 1934 Act and the Domestic Agreement make no change in the law (n).

XV.—DECLARATION AND WARRANTY OF TRUTH

"I/We, the undersigned, declare and warrant that all the above particulars and answers are true and complete in every respect and that I/we have not withheld any material information. I/we hereby agree that this declaration and warranty shall be held to be promissory and to be the basis of the contract between me/us and the insurers, and I/we agree to abide by the terms and conditions of the Policy issued in answer to this proposal."

The above declaration, with which the common form of motor insurance policy concludes, will be seen to embody several separate terms, all of which have been previously alluded to and fully discussed (o). Summarising them briefly with their consequences, they are:

A. Warranty of truth and disclosure, which renders any question of materiality or "substantial misstatement" irrelevant as far as the terms of the proposal form are concerned (p).

B. Warranty that the declaration shall be promissory, which as far as it has any effect will bind the assured to continue to observe the limits and duties laid upon him in the proposal form as completed, particularly as to the user of the insured vehicle (q). This may give to statements the force of continuous warranties (q) so that if, for example, the assured has said

(c) Now in practice the proposer of a goods vehicle is asked what type of Road and Rail Traffic Act (1933) licence has been granted with respect to the insured vehicle.

(d) *Provincial Insurance Co. v. Morgan*, [1933] A.C. 240; *Passmore's Case* (1936), 54 Ll. L. R. 92; *Levinger's Case* (1936), 54 Ll. L. R. 68; *Stone v. Licenses and General Insurance Co., Ltd.* (1942), 71 Ll. L. R. 250.

(e) *Ibid.*; *Jenkins v. Deane* (*supra*).

(f) *Jenkins v. Deane* (*supra*); *Gray v. Blackmore*, [1934] 1 K. B. 95.

(g) *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39; *Provincial Insurance Co. v. Morgan* (*supra*).

(h) *Ante*, pp. 209 *et seq*.

(i) *Ante*, pp. 433 *et seq*; *Provincial Insurance Co. v. Morgan* (*supra*).

(k) Chapter VIII, *post*.

(l) S. 12 (27 Halsbury's Statutes 546); see chapter V, *ante*, p. 316.

(m) Chapter VI, *ante*, p. 359.

(n) See *ante*, p. 316, and chapter VI, *ante*.

(o) *Ante*, pp. 385, 413.

(p) *Ante*, p. 413; *Mackay v. London General Insurance Co.* (1935), 51 Ll. L. R. 201.

(q) *Ante*, pp. 413, 433, and see *post*, chapter VIII.

that his vehicle is only used for private pleasure, its use at any time for business may vitiate the whole policy. (r). It may also make any alteration of the risk a ground of avoidance (s);¹

C. Warranty that the proposal form shall be the basis of the contract between the assured and the insurer, which, again, entitles the insurer to repudiate liability under the terms of the policy itself without relying upon the Common Law grounds of non-disclosure or misrepresentation, both of which impose upon him a heavier burden of proof than is required by mere proof of a breach of an essential stipulation of the contract (t).

Whilst all the above terms add to the duty of disclosure resting on the assured, neither they nor anything in the proposal form subtract from it, the assured remaining bound, as in fact he agrees, either expressly or impliedly, to do, to make full and complete and accurate disclosure of every material fact (u). The fuller consideration of the most important features of the above declaration is postponed to the following chapter (v).

PART 9.—RENEWAL OF INSURANCE

Unless some later agreement is come to between the parties, when the period for which the policy of insurance has been effected comes to an end the rights and liabilities of the parties thereto cease and are determined (a), saving, however, the accrued rights and liabilities of either party, as, for example, in respect of losses accrued during the currency of the policy (b). Since motor vehicle insurance policies are generally annual in duration, the subject of renewal requires some detailed consideration.

Renewal of a contract of insurance may take place either by virtue of or apart from the terms of the existing contract. Whilst the parties may by mutual agreement, either express (c) or implied, as by payment and acceptance of a further premium (d), effect a renewal of the policy otherwise than under its express terms, the latter method is the more common. Renewals are usually effected by the issue of a renewal receipt by the insurers or their authorised agent (e), but may take place by the issue of a new policy (f). In order that a contract of insurance may be validly renewed, the renewal must relate to the same subject-matter (g), and must be between the same parties (h).

The subject of renewal under stipulations in the policy necessitates the drawing of distinctions between the various types of clause under which it may be effected. There are terms under which the renewal of the policy

(r) And entitle the insurers to repudiate not only a claim arising during use for business purposes, but any claim arising thereafter (see *ante*, p. 433 and *post*, chapter VIII).

(s) See further *post*, pp. 639 *et seq.*

(t) *Ante*, pp. 405, 413; *Jester-Barnes v. Licenses and General Insurance Co* (1934), 49 Ll. L. R. 231.

(u) *Ante*, pp. 384 *et seq.*

(v) Chapter VIII, *post*.

(a) *Stohell v. Heywood*, [1897] 1 Ch. 459; *Re Wilson and Scottish Insurance Corporation*, [1920] 2 Ch. 28.

(b) *Tarleton v. Stamford* (1796), 1 Bos. & P. 471; *Simpson v. Accidental Death Insurance Co.* (1857), 2 C. B. (N. S.) 257.

(c) *Royal Exchange Assurance v. Hope*, [1928] Ch. 179.

(d) *Solvency Mutual Guarantees Co. v. Froane* (1861), 7 H. & N. 3.

(e) *Wing v. Harvey* (1854), 5 De G. M. & G. 265; *Kelly v. London and Staffordshire Fire Insurance Co.* (1883), 1 Cab. & El. 47; *Towle v. National Guardian Assurance Society* (1861), 30 L. J. Ch. 900.

(f) *Parrs Bank v. Alberi Mines Syndicate* (1900), 5 Com. Cas. 116.

(g) *Law Guarantee Trust and Accident Society, Ltd. v. Munich Reinsurance Co.* (1915), 31 T. L. R. 572.

(h) *Grover and Grover, Ltd. v. Mathews*, [1910] 2 K. B. 401; *Solvency Mutual Guarantees Co. v. Freeman* (1861), 7 H. & N. 17.

is imperative, unless one of the parties gives notice before expiration of the original term that he will decline to renew (*i*), in which case, unless such notice is given, the policy continues in operation for a further period. There are, further, policies under the terms of which the insurers are bound to effect renewal should the assured call upon them to do so. Such stipulation may be absolute, or may be qualified in that it permits the insurers, by specified notice before expiration, to avoid the necessity of renewal at the assured's behest (*k*). The third, and in motor insurance contracts the most common, type of renewal clause is that which binds neither the insurer nor the assured to renew their contract but which makes the policy renewable if both parties so desire (*l*). Under such stipulations the renewal can only be effected by means of a new contract between the same parties, constituted by offer on the one hand, which may consist in the tender of a further premium or the issue of a renewal notice (*m*), and by acceptance, the acceptance of the further premium tendered, or the acting upon the renewal notice, on the other (*n*).

A renewable insurance policy must as a general rule be renewed before the subsisting policy has expired (*o*). If the policy expires without renewal, the assured ceases to be entitled to its benefits and the insurers to be subject to its liabilities. But policies in some cases, particularly in life insurance (*a*), contain clauses providing for days of grace during which the policy is susceptible of renewal although its original term has expired. As far as third party liability is concerned the validity of stipulations providing for "days of grace" in motor insurance contracts would be doubtful, inasmuch as the Road Traffic Act, 1930 (*b*), requires a valid, subsisting and enforceable contract of insurance to comply with its provisions, and an expired policy, even though subject to renewal during "days of grace," would not, it is submitted, fall within the requirements of that Act (*c*).

To the extent that such clauses are valid in motor insurance contracts and in other types of insurance, the importance of days of grace lies in their effect when a loss or liability accrues during their currency. This is a question which is almost invariably covered by express provisions in the policy. Such provisions fall broadly into two categories, those under which the insurers are liable for a loss during the days of grace and those under which they are under no such liability. The latter effect will be consequent upon a provision entitling the insurers to decline renewal at their option (*d*), whilst the provision of days of grace in such words as to extend the original period of insurance will render the insurers liable in the event of loss (*e*).

In relation to motor vehicle insurance contracts a necessary consideration bearing upon renewals is their legal effect and consequences. The question as to whether renewal constitutes a mere continuance of an existing insurance, on the one hand, or the formation of a new contract, on the other, is of vital importance, particularly having regard to the effect of the condi-

(i) *Solvency Mutual Guarantee Co. v. Froane* (1861), 7 H. & N. 5; *Solvency Mutual Guarantee Co. v. York* (1858), 3 H. & N. 588.

(k) *Salvin v. James* (1805), 6 East, 571.

(l) *Tarleton v. Staniforth* (1796), 1 Bos. & P. 471.

(m) *Salvin v. James* (*supra*); *Simpson v. Accidental Death Insurance Co.* (1857), 2 C. B. (N.S.) 257; *Towle v. National Guardian Assurance Society* (1861), 30 L. J. Ch. 900.

(n) *Re Wilson and Scottish Insurance Corporation*, [1920] 2 Ch. 28.

(o) *Doe d. Pitt v. Shewin* (1811), 3 Camp. 134; *Accey v. Fernie* (1840), 7 M. & W. 151.

(a) *Stohell v. Heywood*, [1897] 1 Ch. 459.

(b) S. 36 (23 Halsbury's Statutes 637). See fully chapter IV, *ante*, pp. 188 *et seq.*

(c) Chapter IV, *ante*, pp. 177 *et seq.* The matter is perhaps academic, for insurers invariably honour a renewable policy during the days of grace.

(d) *Tarleton v. Staniforth* (1796), 1 Bos. & P. 471.

(e) *Simpson v. Accidental Death Insurance Co.* (1857), 2 C. B. (N.S.) 257; *Filton v. Accidental Death Insurance Co.* (1864), 17 C. B. (N.S.) 122.

tions of the policy and to the duty of disclosure. In this respect, renewals must be separately considered according to the manner of their creation (f).

Where the policy makes express provision for renewal unless it is previously determined by some express act of either party, it is settled that renewal is a continuation and extension of the original contract (g). The duty of disclosure applies only to material circumstances existing at the date of the original insurance (h) and the insurers are not entitled to refuse to renew on the ground that a change in circumstances has increased the insured risk (i). The policy in such cases is treated in effect as one continuing contract, the renewal dates being regarded merely as constituting terms regulating the duty of the insured to make payments of premium.

In motor insurance contracts where renewal is provided for the term dealing with it invariably makes renewal dependent upon the mutual consent of the insurers and assured, and enables either of them, without the assignment of reason or justification, to decline to renew the policy (j). Frequently, however, no express provision is made for renewal, but the policy contains a "no-claims" rebate clause. It is submitted that the legal effect of renewal where the original contract is silent is analogous to the consequences of renewal by mutual consent where, through the formation of a new agreement to renew, strictly without the terms of the original contract, its operation is continued (k). In both such cases, if this view be correct, renewal is equivalent to the making of a new contract of insurance (l). It follows, therefore, that the insurers may, if they choose, decline renewal unless the assured is entitled to a "no-claims" rebate (m) or agrees to an onerous variation of terms (n). On the other hand, the assured's duty of disclosure is reattached to the negotiations and terms of renewal, and he thereby becomes obliged to disclose fully and accurately not only any facts which he has failed to reveal in the original contract (o), but also further material circumstances which have arisen and affect the risk to be renewed during the currency of the original contract (p). The representations made upon the formation of the original contract are further deemed to be repeated upon the renewal unless they are subject to correction or variation (q). Whether the "no-claims" rebate clause gives a right of renewal, is considered later (m).

Strictly speaking, only an existing policy can be renewed, therefore once a policy has been allowed to expire it is not susceptible of renewal, although by a new agreement, express or implied, it may be revived so as to become effective after its lapse (r). Such revival, in practice, is similar to renewal by mutual consent, and the above considerations are thus, *mutatis mutandis*, mainly applicable to it (s).

(f) See *ante*, p. 468. (g) *Re Anchor Assurance Co.* (1870), 5 Ch. App. 632.

(h) *Ibid.*; *Joel v. Law Union, &c.* [1908] 2 K. B. 863.

(i) *Pritchard v. Merchants' and Tradesmen's Mutual Life Assurance Society* (1858), 3 C. B. (N.S.) 622. Such renewals are never met with in motor insurance, for obvious reasons.

(j) E.g. *Re Wilson and Scottish Insurance Corporation*, [1920] 2 Ch. 28.

(k) *Royal Exchange Assurance v. Hope*, [1928] Ch. 179.

(l) *Pim v. Reid* (1843), 6 Man. & G. 1.

(m) See chapter VIII, *post*, p. 550.

(n) *Stohall v. Heywood*, [1897] 1 Ch. 459.

(o) *Pim v. Reid* (*supra*).

(p) *Re Wilson and Scottish Insurance Corporation*, [1920] 2 Ch. 28.

(q) *Re Wilson and Scottish Insurance Corporation* (*supra*).

(r) *Handler v. Mutual Reserve Fund Life Association* (1904), 90 L. T. 192; *McKenna v. City Life Assurance Co.*, [1919] 2 K. B. 491; *Royal Exchange Assurance v. Hope*, [1928] Ch. 179.

(s) Revival of a lapsed motor insurance policy arose for consideration in *Jenkins v. Deane* (1933), 47 Ll. L. R. 342, in which GORDON, J. (at p. 347), distinguished renewal of an existing contract from revival of a lapsed contract and held the latter to constitute a new contract in law.

Before concluding this short survey of renewals it is opportune to make brief allusion in the text to the case *Re Wilson and Scottish Insurance Corporation (t)*. The assured had effected an insurance covering his car's full value in November 1913, stating its then value as £250. The insurance was renewed by mutual consent in November 1916, 1917 and 1918. In June 1919 the car was destroyed by fire, the arbitrator having found its then value to be £400. It was held, on a case stated, that if the whole increase in value had accrued since the last renewal the insured was entitled to recover £400, but if not, then he could only recover £250 upon the ground that the assured must be deemed to have continued or repeated the original estimate of £250 as to present value. EVE, J., in giving judgment to this effect, applied the following observation of CASWELL, J., in *Pim v. Reid (u)* :

" No fresh proposal appears, therefore, to be expressly required on either side at the end of the first year ; but it may be very material for the company to know of any change in the extent of the risk, to enable them to determine whether or not they will continue the insurance."

PART 10 —THE PREMIUM

Whilst in principle any consideration sufficient to support a simple contract may form the premium in the contract of insurance (v), in practice the premium invariably consists of a money payment moving from the assured to the insurers. It is unnecessary, therefore, to consider any form of premium other than the money payment which is invariably made.

The amount of the premium is a term of the agreement between the parties and depends upon the insurers' estimate of the risk involved (w). In practice motor vehicle insurers issue tables of premiums based upon experience and actuarial guidance (x), the appropriate item wherein, varying according to the value, age, and horse-power of the vehicle and the risks covered by the insurance, is applied to every individual offer of insurance, unless the risk proposed is of an extraordinary or unusual nature. The premium is an essential term of the contract of insurance, and unless and until it is agreed upon there is no completed contract (y). The policy may contain provisions under which in certain events the amount of the premium falls to be increased, or, more commonly, reduced, as by way of rebate, when no claim has been made under the policy.

Subject to the terms of the contract of insurance, the assured becomes bound to pay the agreed premium as soon as a completed agreement has come into being between him and the insurers (z). Although the duty of the insurers to issue a policy and the assured's duty to pay the premium are independent of one another, each party being bound to fulfil his obligations whether the other has defaulted or not (a), in practice the majority of policies by express provision make the payment of premium a condition precedent

(t) [1920] 2 Ch. 28.

(u) (1843), 6 Man. & G. 1.

(v) *British Marine Mutual Insurance Co v. Jenkins*, [1900] 1 Q. B. 299; *Prudential Insurance Co. v. Inland Revenue Comrs.*, [1904] 2 K. B. 658; *Hampton v. Toxteth Co-operative Provident Society, Ltd*, [1915] 1 Ch. 721; *Thomas v. Evans (Richard) & Co.*, [1927] 1 K. B. 33.

(w) *Re George and Goldsmiths and General Burglary Insurance Association, Ltd.*, [1899] 1 Q. B. 595.

(x) *Cf. Thomson v. Weems* (1884), 9 App. Cas. 671.

(y) *Christie v. North British Insurance Co.* (1825), 3 Shaw (Ct. of Sess.) 519; *Murfit v. Royal Insurance Co., Ltd.* (1922), 38 T. L. R. 334.

(z) *General Accident Insurance Corporation v. Cronk* (1901), 17 T. L. R. 233; *Adie & Sons v. Insurances Corporation, Ltd* (1898), 14 T. L. R. 544.

(a) *Thompson v. Adams* (1889), 23 Q. B. D. 361; *Roberts v. Security Co.*, [1897] 1 Q. B. 111.

to the insurer's liability. The effect of such a condition upon the validity of a motor vehicle insurance policy, as far as third party liability is concerned, has been discussed in the case of *Ocean Accident, &c., Corporation v. Cole* (b). Once the contract is completed it becomes the duty of the insurers to accept the assured's premium; refusal, therefore, does not relieve them of liability under the policy in such circumstances (c).

Unless the insurers or their agent, with authority, have expressly agreed to accept some other form of payment, the premium must be paid in cash (d). The premium may be made payable in instalments (e) or in one amount. The receipt of a premium by the insurers will constitute an acceptance of the assured's offer to insure, unless there is some condition attaching to its receipt, which entitles the assured to have a policy issued to him as part of the acceptance. Where the making of the contract has been affected by non-disclosure or misrepresentation or a condition has been broken and the insurers or their authorised agent receive a premium with knowledge of such circumstance, they will be estopped from denying that they are bound by the policy, and that there has been waiver of the breach of duty or condition of which they have knowledge (f).

The mere non-payment of premium, unless amounting by the express provisions of the policy to the breach of a condition precedent, does not affect the validity of the policy (g). Although the policy as a rule expressly provides that pre-payment of premium is a condition of the insurers' liability, or an event without which the policy is inoperative, yet if they issue a policy under seal reciting payment of the premium (h), or if by their conduct they relieve the assured from the necessity of compliance with such term (i), liability may, nevertheless, accrue to the insurers without the premium having been paid. The premium must, save in these exceptional cases, be paid to the insurers or their authorised agent (j) and in the proper form (k).

It remains to examine the circumstances in which a premium once paid becomes returnable to the assured, for some reason affecting to a greater or less extent the validity of the policy, and not under the express terms thereof. When a policy is avoided on the grounds of the assured's fraud (l) or illegality (m), unless in the latter case the assured is not in *pari delicto* with the insurers (n), premiums paid thereunder are not returnable. Where,

(b) [1932] 2 K. B. 100; see chapter IV, *ante*, p. 178.

(c) *Adie & Sons v. Insurance Corporation, Ltd.* (*supra*); *Canning v. Farquhar* (1886), 16 Q. B. D. 727.

(d) *London and Lancashire Life Assurance Co. v. Fleming*, [1897] A. C. 499.

(e) *Stuart v. Freeman*, [1903] 1 K. B. 47.

(f) *Biggar v. Rock Life Assurance Co.*, [1902] 1 K. B. 516; *Hemmings v. Sceptre Life Association, Ltd.*, [1905] 1 Ch. 365; *Holdsworth v. Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521; *Pearl Life Assurance Co. v. Johnson*, [1909] 2 K. B. 288.

(g) *Roberts v. Security Co.*, [1897] 1 Q. B. 111; *Adie & Sons v. Insurance Corporation, Ltd.* (1898), 14 T. L. R. 544. Cf. *Egan v. Bowler* (1939), 63 Ll. L. R. 266. *London and Scottish Insurance Corporation v. Ridd* (1940), 65 Ll. L. R. 46.

(h) *Roberts v. Security Co.* (*supra*); *Equitable Fire and Accident Office, Ltd. v. The Ching Wo Hong*, [1907] A. C. 96.

(i) *Canning v. Farquhar* (1886), 16 Q. B. D. 727; *London and Lancashire Life Assurance Co. v. Fleming*, [1897] A. C. 499; e.g. by wrongful refusal of the premium; by waiver of the condition; or by leading the insured to believe that a third party has paid the premium.

(j) See *post*, p. 476.

(k) I.e. in cash or other authorised mode.

(l) *Harse v. Pearl Life Assurance Co.*, [1904] 1 K. B. 558; cf. *Refuge Assurance Co., Ltd. v. Kestlewell*, [1909] A. C. 243. Fraudulent misrepresentation or non-disclosure is a criminal offence under the Road Traffic Act, 1930, s. 112; see chapter IV, *ante*, p. 259.

(m) *Harse v. Pearl Life Assurance Co.* (*supra*); *Goldstein v. Salvation Army Assurance Society*, [1917] 2 K. B. 291.

(n) *Hughes v. Liverpool Victoria Legal Friendly Society*, [1916] 2 K. B. 482; *Tofts v. Pearl Life Assurance Co., Ltd.*, [1915] 1 K. B. 169.

however, the assured has been guilty of non-disclosure not amounting to fraud (o) he is entitled, upon the insurers avoiding the policy, to obtain the return of his premiums (p) unless the policy contains some term disentitling him thereto (q). Similarly premiums are returnable, in the absence of contrary stipulation, where the formation of the contract is affected by mistake (r) or where the issue of the policy was illegal or *ultra vires* the company (s). This would, for example, be the case where policies of third party liability insurance under the Road Traffic Act, 1930 (t), were issued by persons as insurers who had failed to comply with the requirements of the law relating to deposits (u). Premiums are also returnable, subject to contrary agreement, where the risk insured is never run (v), as, for instance, when the assured mistakenly thinks he has an insurable interest in the subject-matter (w). A similar case would arise if the risk insured never attached, as where the proposer does not in fact purchase a car which, at the time of insurance, he intends to buy, or where the risk has ceased to operate before the insurance enters into force (x), as where the vehicle to be insured is destroyed or lost or the proposer dies before the entry into insurance. The right to claim return of premium is more fully considered in a later chapter (a).

PART II.—AGENCY IN MOTOR INSURANCE (b)

Most motor vehicle insurers, whether they are companies or individuals habitually act by means of agents whom they employ to procure proposals, to accept payments and, although less commonly, to enter into contracts (c). The insured person, too, frequently acts through agents, as when he employs a broker to effect an insurance with Lloyd's underwriters (d) or with a company, or when, as often becomes the case, he makes the insurer's agent his own agent for the purpose of completing the proposal form or making disclosure to the insurers (e). Whilst a broker may be the agent of both parties, in general he is deemed to be the agent of the assured (f). Agency

(o) *London Assurance v. Mansel* (1879), 11 Ch. D. 363.

(p) *Feiss v. Parkinson* (1812), 4 Taunt 640; *Hemmings v. Sceptre Life Association, Ltd.*, [1905] 1 Ch. 365.

(q) E.g. *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139; *Thomson v. Weems* (1884), 9 App. Cas. 671.

(r) *Scott v. Coulson*, [1903] 2 Ch. 249; *Looker v. Law Union and Rock Insurance Co., Ltd.*, [1928] 1 K. B. 554; *Hyams v. Paragon Insurance* (1927), 27 Ll. L. R. 448.

(s) *Flood v. Irish Provident Assurance Co., Ltd.*, [1912] 2 Ch. 597; *Re Argonaut Marine Insurance Co., Ltd.*, [1932] 2 Ch. 34.

(t) S. 36 (1), (5) (23 Halsbury's Statutes 637, 638).

(u) See chapter IV, ante, pp. 233 et seq.

(v) *Tyrie v. Fletcher* (1777), 2 Cowp. 600; *Penson v. Lee* (1800), 2 Bos. & P. 330.

(w) *Routh v. Thompson* (1809), 11 East, 428; but not where he knows he has no such interest, for there the insurance would be illegal and the parties *in pari delicto* (*Oom v. Bruce* (1810), 12 East, 225; *Hentig v. Stanforth* (1816), 5 M. & S. 122).

(x) *Pritchard v. Merchants' and Tradesman's Mutual Life Assurance Society* (1858), 3 C. B. (N.S.) 622; cf. *Bradford v. Symondson* (1881), 7 Q. B. D. 456, where the insurance was retrospective.

(a) Chapter IX, post, p. 663.

(b) And see ante, p. 400, as to non-disclosure and misrepresentation by agents.

(c) *Re Norwich Equitable Fire Assurance Society, Royal Insurance Co.'s Claim* (1887), 57 L. T. 241; *Hambro v. Burnand*, [1904] 2 K. B. 10. See, for motor cases, those cited ante, pp. 400 et seq. and note (f), infra.

(d) *Rocha v. Roberts* (1921), 9 Ll. L. R. 59; *Cooley, Ltd. v. Wing, Heath & Co.* (1930), 47 T. L. R. 78.

(e) See ante, p. 401; *Biggar v. Rock Life Assurance Co.*, [1902] 1 K. B. 516; *News-holme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356.

(f) See for cases in motor insurance, *Evans v. Ward* (1930), 37 Ll. L. R. 177; *Coles v. Young (F.)*, Ltd. (1929), 33 Ll. L. R. 83; and see *Rozanes v. Bowen* (1928), 32 Ll. L. R. 98, and cases there cited.

may arise either by express or by implied authority. Whether an agent is actually authorised to perform certain acts on behalf of his principals or, being without authority in fact, is nevertheless held out by his principals as being clothed with authority, both the principals and the third party are bound by the agent's actions (g).

When an agent with express or implied authority performs an act purporting to be on behalf of his principals, the question as to whether or not his principals are bound thereby depends upon the extent and scope of the authority conferred upon him (h). This matter is one vitally affecting the liability of insurers for their agent's actions and, correspondingly, the rights of insured persons. Where the agent in question is expressly authorised to perform certain acts, such as to accept premiums otherwise than in money (i), there can be no question that his principal is bound thereby. More difficulty arises, however, where no express authority has been conferred upon the agent. In such cases, the principal will be bound by his agent's acts within his apparent authority, provided such acts are either such as are necessarily (k) or as are ordinarily involved in the execution of his express authority (l). Even though such acts are neither necessarily nor ordinarily involved in the agent's authority, the principal will be bound thereby if he is precluded by his conduct from denying that the agent was in fact authorised to act on his behalf with respect to any particular matter such, for example, as the receipt of premiums or notices and the issue of policies in renewal receipts (m). Where an agent has neither express nor apparent authority to perform an act on behalf of his principals he cannot bind them, as when material facts are disclosed to the insurer's agent who neglects to pass them on to his principal (n). To some extent the question of the scope and character of the agent's apparent authority naturally depends upon the position which he occupies vis-à-vis his principals: thus a clerk or office employee's authority is limited to the specified acts with the performance of which he is entrusted (o), or an agent employed on commission to introduce business has no implied authority to enter into a contract of insurance or to receive premiums (p). Agents who are appointed to represent their principals for the purpose of particular transactions or class of transactions, such as to negotiate the terms of the assured's offer (q),

(g) *Aces v Fernie* (1840) 7 M. & W. 151; *Wing v Harvey* (1854), 5 De G. M. & G. 265; *General Accident Insurance Corporation v Cronk* (1901), 17 T. L. R. 233. The onus is on the party alleging agency to prove it (*Hams v Ward* (1930), 37 Ll. L. R. 177). See also *Norman v Matthews* (1937), 55 Ll. L. R. 351; *Sun Life Assurance Co of Canada v Jervis*, [1943] 2 All E. R. 425; *Algemeene Bankvereeniging v Langton* (1935), 51 Ll. L. R. 275.

(h) *Bigger v Rock Life Assurance Co* (1902), 1 K. B. 516; *Newsholme Brothers v. Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356; *Davey v Pearl Assurance Co* (1939), 63 Ll. L. R. 54; *Zurich General Accident Insurance Co v Buch* (1939), 64 Ll. L. R. 115; *Spraggon v Dominion Insurance Co., Ltd.* (1941), 69 Ll. L. R. 1 (C. A.).

(i) *London and Lancashire Life Assurance Co v Fleming*, [1847] A. C. 490.

(k) E.g. the authority of the assured's agent to make complete disclosure on the assured's behalf. See ante, pp. 400-405.

(l) *Rossiter v Trafalgar Life Insurance Association* (1859), 27 Beav. 377; *Davies v National Fire and Marine Insurance Co of New Zealand*, [1891] A. C. 485.

(m) *Wing v Harvey* (1854), 5 De G. M. & G. 265; *Holdsworth v Lancashire and Yorkshire Insurance Co* (1907), 23 T. L. R. 521; *Kelly v London and Staffordshire Fire Insurance Co* (1883), 1 Cab. & Ll. 47; *Kaufmann v British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399.

(n) Ante, p. 402; *Newsholme Brothers v Road Transport and General Insurance Co., Ltd.*, [1929] 2 K. B. 356.

(o) *Evans v Employers' Mutual Insurance Association* (1935), 51 Ll. L. R. 13.

(p) *Refuge Assurance Co., Ltd v Kettlewell*, [1909] A. C. 243.

(q) *Joel v Law Union, &c.*, [1908] 2 K. B. 863.

or receive premiums (*r*) or notices (*s*), are deemed to be authorised to perform all acts necessary and incidental to the transaction or transactions which they are employed to carry out, but nothing further. There are also other agents whose authority to bind and act on behalf of their principals is substantially unlimited—such are underwriters acting on behalf of their “names” (*t*), or directors and managers of companies (*u*) whose authority is general as to the business which they are employed to do on behalf of their principals.

1. Ratification.—Although acts falling outside the real or apparent authority of the agent do not bind his principal, they may become binding upon him by ratification. The conditions under which a principal may ratify his agent's unauthorised acts so as to become entitled and bound thereby have been discussed in a preceding chapter, and it is not thought necessary to repeat them. In one point the principles governing ratification in insurance differ from those elsewhere applicable. Except in marine insurance (*a*), ratification cannot take place after a loss to be insured under the unauthorised policy or contract of insurance has occurred (*b*). This principle, however, appears to be qualified in relation to circumstances when the unauthorised agent has himself an insurable interest in the subject-matter of the risk insured; in such cases the agent can sue upon the contract he has effected and can recover, as trustee, the value of his principal's interest, even though no ratification by the latter has taken place until after loss (*c*).

The rights and duties of agents as against their principals and as against third parties are a subject which does not, save in the particulars hitherto and hereafter considered, fall for treatment in a work on motor insurance. The agent must carry out diligently, honestly and expeditiously those tasks, and all and only those tasks which he is employed to perform. If he keeps within these limits he is entitled to be remunerated, reimbursed (*cc*) and indemnified by his principal, but if he exceeds the limits of his authority not only will he lose such rights against his principal but will additionally become liable to compensate him for the breach (*d*). An agent acting in pursuance of his authority incurs no liabilities towards and desires no rights against third parties, unless he binds himself personally (*dd*), as by signing a policy in his own name or where, as in the case of Lloyd's brokers, he incurs liability by custom or usage (*e*). If the agent, however, exceeds his authority, he is liable to third parties who are prejudiced by such excess upon breach of warranty of authority (*f*).

The position of agents is of special importance in insurance law to the extent that it bears upon the duty of disclosure. This has already been discussed (*g*).

(*r*) *Ayrey v. British Legal and United Provident Assurance Co.*, [1918] 1 K. B. 136.

(*s*) *Marsden v. City and County Assurance Co.* (1895), L. R. 1 C. P. 232; *A/S Rendal v. Arcos, Ltd.*, [1937] 3 All E. R. 577; *The Princess Juliana*, [1936] P. 139; [1936] 1 All E. R. 685.

(*t*) *Hambro v. Burnand*, [1904] 2 K. B. 10, and as in *Kaufmann's Case* (*supra*).

(*u*) *Ayrey v. British Legal and United &c.* (*supra*).

(*a*) Marine Insurance Act, 1906, s. 86 (9 Halsbury's Statutes 882); *Williams v. North China Insurance Co.* (1876), 1 C. P. D. 757.

(*b*) *Grover and Grover, Ltd. v. Mathews*, [1910] 2 K. B. 401; *Portavon Cinema Co. v. Price and Century Insurance Co.*, [1930] 4 All E. R. 601.

(*c*) *Waters and Steel v. Monarch Life Assurance Co.* (1856), 5 E. & B. 870; *London and North Western Rail. Co. v. Glyn* (1859), 1 E. & E. 652; *Aked & Co., Ltd. v. Wheel and Wings Assurance Association, Ltd. and Mountain* (1925), 21 Ll. L. R. 200; *Pailor v. Co-operative Insurance Society* (1930), 38 Ll. L. R. 237.

(*cc*) *Bright v. Wright* (1940), 70 Ll. L. R. 207.

(*d*) See generally, 1 Halsbury's Laws, 2nd Edn., 145 *et seq.*

(*dd*) *Bowers v. Morton* (1940), 67 Ll. L. R. 1.

(*e*) *Post*, p. 476.

(*g*) *Ante*, pp. 400 *et seq.*

(*f*) *Collen v. Wright* (1857), 7 E. & B. 301.

2. Payment to agents.—Questions frequently arise as to the position of parties to the insurance contract in making payments to the agent of the other, whether by way of premiums ⁽ⁱ⁾ or by way of sums in respect of the indemnity of the insurers. Otherwise than under Lloyd's policies, with a separate consideration of which this chapter is concluded, the validity of a payment to an agent falls to be considered from two aspects, the agent's authority to receive payment and the form of the payment. It is only when an agent is expressly or impliedly authorised to receive it that a payment to him will take effect as a payment to his principal whether or not the latter receives it in fact ^(h). Thus, where the assured's agent is left in possession of the policy of insurance, he will be deemed to have authority to receive payment of a loss ⁽ⁱ⁾.

The question of payment of monies due under the policy (in respect of a loss) to an agent of the insurers, is further considered in a later chapter, where an account of *McCarthy's Case* is given ^(k).

PART 12.—LLOYD'S POLICIES

The same considerations apply to contracts of insurance effected by members of Lloyd's as insurers as to all motor insurance contracts ^(l). Although business at Lloyd's is regulated by well-settled usages, and such usages ^(m) bind brokers and underwriters respectively, yet a member of the outside public, the common insured person, is not affected by the usage of Lloyd's unless he has expressly or impliedly assented to be bound thereby ⁽ⁿ⁾. Underwriting members of Lloyd's do not do business with the outside public direct, but with Lloyd's brokers, one of whom must be employed by the prospective assured who seeks cover at Lloyd's ^(o). Whilst by Lloyd's usage brokers and underwriters deal with one another as principals, the broker is nevertheless the assured's agent ^(p) for the purpose of entering into the contract of insurance, although not subsequently ^(q). In this connection the case of *Coles v. Young (F.), Ltd.* ^(r) should be noted. The underwriter, whilst contracting only in fact with Lloyd's brokers, nevertheless contracts with them on behalf of their true principals, the insured persons, to whom he incurs a personal liability ^(s), not limited or confined by any usage of Lloyd's adverse to his interests unless he has consented to be so bound ^(t).

Brokers.—Although Lloyd's brokers are generally deemed to be the agents of the assured, motor insurance "cover-notes" are issued by them

^(h) *Acey v. Fernis* (1840), 7 M. & W. 151; *Royster v. Frajalgas Life Assurance Association* (1859), 27 Beav. 377.

⁽ⁱ⁾ *Xenos v. Wickham* (1866), L. R. 2 H. L. 296; *Sweeting v. Pearce* (1861), 9 C. B. (N.S.) 534.

^(h) (1924), 19 Ll. L. R. 29, 58.
^(l) *Seaton v. Burnand*, [1900] A. C. 135; *Tammenbaum & Co. v. Heath*, [1908] 1 K. B. 1032; *Sagui and Lawrence v. Stearns*, [1911] 1 K. B. 426; *Wimble, Sons & Co. v. Rosenberg & Sons*, [1913] 3 K. B. 743; see per HAMILTON, J., at pp. 761-2; *Dunn v. Campbell* (1920), 4 Ll. L. R. 36.

^(m) Its validity as such usage must be established; *Provincial Insurance Co. v. Crowder* (1927), 27 Ll. L. R. 28.

⁽ⁿ⁾ *Sweeting v. Pearce* (1861), 9 C. B. (N.S.) 534; *Legge v. Byas, Mosley & Co.* (1901), 18 T. L. R. 137.

^(o) *Thompson v. Adams* (1889), 23 Q. B. D. 365.

^(p) *Roche v. Roberts* (1921), 9 Ll. L. R. 59; *Rosanes v. Bowen* (1928), 32 Ll. L. R. 98; *Cooloe, Ltd. v. Wing, Heath & Co.* (1930), 47 T. L. R. 78.

^(q) *Dalsell v. Mear* (1808), 1 Camp. 532; *De Gaminde v. Pigou* (1812), 4 Taunt. 246.

^(r) (1924), 33 Ll. L. R. 83.

^(s) *De Gaminde v. Pigou* (1812), 4 Taunt. 246; *Scott v. Irving* (1830), 1 B. & Ad. 605; *Sweeting v. Pearce* (*supra*).

^(t) *Legge v. Byas, Mosley & Co.* (*supra*); *Todd v. Reid* (1821), 4 B. & Ald. 210; *Sweeting v. Pearce* (*supra*).

as agents for the underwriters. This is done in order to overcome the difficulty that delivery of the certificate (which is incorporated with the cover-note) to the assured's agent might not satisfy section 36 (5) of the Road Traffic Act, 1930 (u), and is effected by skilfully drafted wording on the note, whereby the broker is deemed to be the underwriters' agent.

The usages concerning payments of premiums and losses under Lloyd's policies call for short special treatment. As a general rule the assured is not personally liable to the underwriter for the payment of premium, but to the broker, who himself is liable to the underwriter. In fact, such payment is made by entry in the books of the broker and underwriter, and effected in the quarterly settlement of the balance of accounts. Claims are entered and settled by the underwriters in the same manner (v). The assured is not affected by the usage as to payments of premium, since his liability is as a rule to pay the broker whom he employs to effect the insurance and not the underwriter; further, he is not bound by the usage as to payment of losses unless he has expressly or impliedly assented thereto or has authorised the broker to receive payment of losses in this manner (w). In this connection *McCarthy's Case* (x), of which an account is given later (y), should be referred to. With the exception of the above matters, Lloyd's policies are governed by principles no different from those which apply to all contracts of insurance and are generally framed in the same terms as policies issued by other insurers, except that they often contain no arbitration clause.

(u) See *ante*, chapter V, p. 214, *Starkey v. Hall*, [1936] 2 All E. R. 18.

(v) *Provincial Insurance Co. v. Crowder* (1927), 27 Ll. L. R. 28.

(w) *Scott v. Irving* (1830), 1 B. & Ad 605.

(x) (1924), 19 Ll. L. R. 29, 58.

(y) *Post*, p. 649.

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PART 1.—INTRODUCTION

It has already been pointed out (a) that the proposal form is generally incorporated with the policy and that when this is done it forms part of the whole contract (b). Then the body of the policy (c) contains the general

(a) See *ante*, chapter VII, pp. 385 *et seq.*

(b) As to the general principles of construction, see *post*, pp. 481 *et seq.*

(c) The whole policy may be printed on one side of a folded sheet, may be on several sheets in book form, or may be printed partly on the front and partly on the back of a folded sheet.

insurance clauses of the various classes of cover (*d*). Each of these usually contains some express exception or exclusion applying only to the clause in which it appears.

After these, and also in the body of the policy, is generally to be found a "General Exceptions" clause (*e*), which contains a specification of the various classes of loss for which the insurers will not be liable. Some of these "General Exceptions" apply to all the preceding insurance clauses, whilst others are applicable only to some of them (*f*). Next, in the body, comes as a rule the "Description of Use" (*g*) clause, which defines the uses of the vehicle which are covered by the policy, and expressly excludes some, but not all, which are not (*h*). Finally, there come the so-called "Conditions" (*i*) of the policy, which are sometimes printed on the face, and sometimes on the back of it, and most often in very small print.

Amongst these conditions, which deal with various matters which the assured is required to do or not to do, there is generally to be found one which is often the most vital part of the whole policy. This makes the fulfilment of *every* term in the policy or proposal form a condition precedent to the assured's right to claim *any* payment under it whatsoever (*j*).

In addition to these there is a schedule (*k*), to be found either in the body or on the back of the policy, which contains descriptive particulars of the insured vehicle (*l*) and of the assured, his business or profession and address. This schedule and the particulars which it contains may or may not have contractual force; the effect of it, as in the case of the answers in the proposal form (*m*), differs according to the exact circumstances of each case.

Yet again there may be endorsements (*n*) or slips attached to the back or face of the policy which contain further terms binding on the assured. The differences between policies issued by different insurers are considered later (*o*).

But it must here be emphasised, as it is the most important difference from the point of view of the layman, that there is not always uniformity amongst insurers in regard to the general form or structure of the policy. Thus the policy invariably contains certain exceptions (*p*)—that is, species of loss for which the insurers do not undertake to pay, and uses of the vehicle for which the policy does not provide. Not only are exceptions of both types placed indiscriminately by different insurers in the particular insurance clauses of the policy (*q*), or in a clause called the "General Exceptions" clause (*r*), or in the "Descriptions of Use" clause (*s*), or amongst the General Conditions (*t*) of the policy, but as a rule in any one policy these exceptions

(*d*) *I.e.* cover against loss or damage to the car, third party liability, injury to owner, etc.

(*e*) See *post*, p. 561.

(*f*) See *post*, p. 561.

(*g*) *Cf. ante*, chapter VII, pp. 431 *et seq.*, as to descriptions of use in the proposal form.

(*h*) *E.g.* using the vehicle for the purposes of the motor trade is excluded by this clause, whilst using the vehicle in an unsafe condition is excepted by another.

(*i*) As to the meaning of "condition" in motor policies, see *post*, pp. 496 *et seq.*

(*j*) See *post*, p. 623, and see *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 46 T. L. R. 71; *MacKay v. London General Insurance Co.* (1935), 51 Ll. L. R. 201.

(*k*) See *post*, p. 582.

(*l*) And sometimes of the garage where the vehicle is to be kept.

(*m*) As to which, see *ante*, chapter VII, p. 413.

(*n*) As to endorsements, see *post*, chapter IX, p. 631.

(*o*) *Post*, pp. 489 *et seq.*

(*p*) As to which see, for examples, *post*, p. 503.

(*q*) *I.e.* the clauses which give the various classes of cover—public liability clause, loss or damage to vehicle clause, etc.

(*r*) As to which, see *post*, p. 561.

(*s*) See *post*, p. 570.

(*t*) For conditions, see *post*, pp. 589 *et seq.*

are scattered in the different parts described, without any apparent attempt at formulation (u). The result is that the assured has to search every part of every clause in his policy to find out the exact extent to which he is covered—and then when he has thoroughly mastered the geography of one policy, the assured may change his insurers (w) and obtain a different policy. On looking at it he will find that it apparently follows the same form as the former and contains clauses headed "General Exceptions," "Descriptions of Use," and "Conditions." Thinking he knows from his study of the old policy what to look for and where to find it, he may be excused if he looks under the same headings for the exceptions and exclusions contained in the old policy. He may or may not find them there. If he does, he will be quite wrong in assuming that there are no others; if he does not, he will be equally misguided if he imagines that they have been omitted from the policy.

Judicial comment upon this peculiar form which motor insurance policies have assumed by a process of development since they were first issued has already been mentioned (v). Thus in *Provincial Insurance Co. v. Morgan* (w) Lord RUSSELL OF KILLOWEN said (x) :

"I have read the policy, but I have been unable to discover how or where any obligation is imposed on the assured by this indorsement. It may be that we have here some form of commercial shorthand, which an expert could transcribe into a contractual obligation. I am unequal to the task.

"For myself I think it is a matter of great regret that the printed forms which insurance companies prepare and offer for acceptance and signature by the insuring public should not state in clear and unambiguous terms the events upon the happening of which the insuring company will escape liability under the policy. The present case is a conspicuous example of an attempt to escape liability by placing upon words a meaning which, if intended by the insurance company, should have been put before the proposers in words admitting of no possible doubt."

And in the same case Lord WRIGHT (y) observed that :

"The policy is in a form which has in its general scheme long been in use by insurance companies, though the general scheme has exhibited many variations, some major and some minor, in detail. In that scheme there is a proposal form, signed by the assured, containing various particulars and answers to various questions, and a declaration that the answers are to be the basis of the contract and an agreement to accept the company's policy. The policy itself contains a recital incorporating the proposal and declaration, and it sets out the risk insured, certain exceptions and conditions and a schedule embodying various particulars. Though this general scheme of policy has been, as it were, sanctified by long usage, it has often been pointed out by judges that it must be very puzzling to the assured, who may find it difficult to fit the disjointed parts together in such a way as to get a true and complete conspectus of what their rights and duties are, and what acts on their part may involve a forfeiture of the insurance. An assured may easily find himself deprived of the benefits of the policy because he has done something quite innocently, but in breach of a condition ascertainable only by the dovetailing of scattered portions."

(u) For example, see *post*, p. 303.

(w) Or they may alter the form of their policy.

(v) *Ante*, p. 277.

(x) In which the policy in question was in the common form now in use.

(y) [1933] A. C. 240, at p. 250. See also *Jones and James v. Provincial Insurance Co., Ltd.* (1919), 35 Ll. L. R. 135, *per* ROWLATT, J., at p. 136, and *per* MACKINNON, J., *post*, p. 309 note (a).

(y) [1933] A. C. 240, at p. 251.

In *Pailor v. Co-operative Insurance Society* (x), in which a motor policy substantially in the form now commonly in use came to be construed by the Court, SCRUTTON, L.J. (a), remarked :

" I only say that in the course of the discussion it has been clear that
" there are several matters in the wording of this policy as to which I do
" not propose to lengthen this judgment by mentioning the various riddles
" which the ingenuity of various people, including the Court, has propounded
" at various stages during the litigation " (b).

In the introduction to this chapter it remains to consider the following topics :

- (1) Rules of construction of policies ;
- (2) Oral evidence in regard to the meaning or effect of the terms of a policy ;
- (3) Interpretation of policies by reference to other documents ;
- (4) Conflict between policy and proposal form ;
- (5) Classification of policies ;
- (6) Classification of terms in policies.

These may be taken in turn.

1. Rules of construction of policies.—The rules of construction of motor insurance policies which are the same as in the case of other insurance policies, and, indeed, similar to those which govern the construction of all kinds of contract (c), are now so well known as to need little exposition in this book (d). The leading principles may be summarised as follows :

(1) The object of construction is to give effect to the intention of the parties (e) ;

(2) The intention of the parties is to be deduced from the words of the policy, or of any other document (f) or documents which constitute the contract (g) ;

(3) When once a particular form of words in a policy has been construed by the Courts, the same meaning must be given to the same words in similar policies (h). But where the words differ, a previous decision, though useful as a guide, is not binding (i). As Lord ATKIN has put it :

" On a question of construction I protest against one case being treated
" as an authority in another unless the language and the circumstances are
" substantially identical " (j).

(4) Whilst the meaning of a policy must be construed with reference to the facts of the particular case in which it comes into question, regard must be paid to the effect of a proposed construction upon other policies containing similar words (k). Thus in *Etherington's Case* (l) Lord Justice VAUGHAN WILLIAMS said (m) :

(x) (1930), 38 Ll. L. R. 237.

(a) *Ibid.*, at p. 239.

(b) See also *per* ROWLATT, J., in *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 35 Ll. L. R. 135, at p. 136.

(c) See *Smith v. Accident Insurance Co.* (1870), L. R. 5 Exch. 302.

(d) For a full account, see Welford on Accident Insurance, 2nd Edn., pp. 64 *et seq.*

(e) See *Braunstein v. Accidental Death Insurance Co.* (1861), 1 B. & S. 782.

(f) *E.g.* the proposal form.

(g) *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399 ; 33 Ll. L. R. 315.

(h) *Clift v. Schwabe* (1846), 3 C. B. 437.

(i) *Lawrence v. Accidental Insurance Co.* (1881), 7 Q. B. D. 216 ; *Clift v. Schwabe* (*supra*).

(j) *Re Calf and Sun Insurance Office*, [1920] 2 K. B. 366, at p. 382.

(k) *Cf.* note (n) *infra*.

(l) *Re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K. B. 591.

(m) *Ibid.*, at p. 597.

" We must construe this policy not merely in reference to this particular case ; we must recollect that it is a document in the form which is used for the regular issue of policies by the Company to persons who are desirous of insuring with them, and one must consider whether the construction contended for by the Company would lead if we were to adopt it. . . . I think that some limitation of the terms of the proviso contained in the policy ought to be welcomed by the insurance company themselves, for otherwise, in my opinion, the number of cases in which the policy could be enforced against the company would be so very much reduced that the practical result would soon be that very few persons would care to insure " (n).

It is submitted, however, that only in rare cases is this principle applicable.

(5) The intention of the parties must be deduced not only from all the documents which constitute the contract, but from the whole of such documents (o).

" To ascertain the true meaning . . . the whole policy must be studied (p) and the object of the parties to it must be studiously borne in mind " (q).

(6) In construing the words of a policy their ordinary meaning (r) must be given to ordinary English words (s).

(7) **The ejusdem generis rule.**—In determining the meaning of particular words, the rule known as the *ejusdem generis* rule must in some cases be applied (t). This rule is, however, of limited operation (u) and is applicable only in the following cases :

(i) Where a general word of wide meaning is followed by particular words of a narrower meaning, the general word must be taken as applicable only to the matters particularised (v).

(ii) Conversely, where an enumeration of particular matters is followed by a word of wider or more general significance, the last word is taken to be limited in application to matters of the same sort as those first enumerated (w).

(iii) Where a category of words refer to matters or things of the same sort any one of such words must be taken as referring only to a matter or thing of that sort, although if taken by itself it might have a

(n) Cf. *per* MacKINNON, J., in *Robert v. Anglo-Saxon Insurance Association* (1926), 26 Ll. L. R. 154, at p. 155. " Presumably the Anglo-Saxon Insurance Company, if it is to live up to its name, can express its meaning in English, in perfectly clear terms, and if they desire to put in a condition to the effect suggested, I think they must do so in perfectly clear Anglo-Saxon, the result of which, I suppose, would be that an increasingly small number of people would desire to insure with them ".

(o) See *per* Lord RUSSELL OF KILLOWEN in *Re George and Goldsmiths and General Burglary Insurance Association, Ltd.*, 1899, 1 Q. B. 595, at p. 605.

(p) *Per* LINDLEY, L.J., in *Cornish v. Accident Insurance Co.* (1889), 23 Q. B. D. 453, at p. 456.

(q) Cf. *Gale's and Loyd's Cases*, *post*, p. 529.

(r) As to when a different meaning must be given, see the extract from Lord ELLENBOROUGH's judgment in *Robertson v. French* (1803), 4 East 130, quoted *post*, p. 485.

(s) *Thomson v. Wrems* (1854), 4 App. Cas. 671; *Clift v. Schwabe* (1846), 3 C. B. 437; *Re George and Goldsmiths and General Burglary Insurance Association Ltd.* (1899), 1 Q. B. 595.

(t) *Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484.

(u) See, e.g., *Sun Fire Office v. Hart* (1889), 14 App. Cas. 98.

(v) See, e.g., *Joel v. Harvey* (1857), 5 W. R. 488. This is the much less common case to which the rule is applied. See *Ambatielos v. Anton Jurgens Margarine Works*, [1923] A. C. 175, at p. 183.

(w) See, e.g., *King v. Travellers' Insurance Association Ltd.* (1931), 48 T. L. R. 53; *Muir v. Railway Passengers Assurance Co., Ltd.* (1877), 37 L. T. 350.

wider meaning (x). So in *Watchorn v. Langford* (y) a fire policy insured "household furniture, linen and wearing apparel" and it was held that "linen" in this context referred only to household linen and not to a stock of linen drapery goods (z). This is sometimes called the "*noscitur a sociis*" rule (z).

Thus in *King v. Travellers' Insurance Association, Ltd.* (a), a railway luggage policy contained a clause that "jewellery, watches, field glasses, cameras, and other fragile and specially valuable articles must be separately declared and valued." A fur coat costing £240 was lost and a claim therefor made under the policy. It was contended on behalf of the insurers, who resisted payment, that the coat was a specially valuable article which should have been separately declared. ROWLATT, J. (b), decided this point in the following words:

"I have been addressed upon the doctrine of *ejusdem generis*, and the construction of the *ejusdem generis* rule, recourse having been had to a language which is no longer spoken. I think I can put the point popularly and in current language as a matter really of common sense. The question I have to ask myself is whether furs are specially valuable articles in the same sort of sense as jewellery, watches, field glasses and cameras are fragile or specially valuable articles. I think that is the modern and plain English translation of the doctrine of *ejusdem generis*. In other words, are they specially valuable articles in the sense exemplified by the particular instances named? That is the natural way of putting it.

"I do not think they are. Furs are a commonplace article of dress in the case of nearly every woman of any sort of comfortable means at all. The circumstance that they afford great scope for extravagance and vanity, so that you can get furs of fantastic price, does not, to my mind, show that being commonplace articles of dress they are specially valuable in the same sort of way that jewellery, watches, field glasses and cameras are."

In *Brewster v. Blackmore* (c) it was suggested by MACKINNON, J., that the *ejusdem generis* rule might be used to exclude the loss of a car by fire caused by its being deliberately set alight by a third party (d), under a clause which covered:

"All damage caused by fire to any motor car described in the schedule . . . whether arising from self-ignition, lighting, explosion or any other cause,"

although the policy also contained a clause covering

"Any damage caused maliciously by any person not in the assured's service" (dd).

(8) In construing the meaning of a particular clause in a policy the maxim *expressio unius exclusio alterius* must on occasions be applied (e).

Thus in *Fowkes v. Manchester and London Assurance Association* (f) where the proposal form containing a declaration that the statements in it

(x) Cf. the maxim *expressio unius exclusio alterius*, *infra*.

(y) (1813), 3 Camp. 422.

(z) "Here we may apply *noscitur a sociis*," per Lord ELLENBOROUGH in the case cited *Watchorn v. Langford* (1813), 3 Camp. 422.

(a) (1931), 48 T. L. R. 53; 41 Ll. L. R. 13.

(b) As reported *King v. Travellers' Insurance Association, Ltd.* (1931), 41 Ll. L. R. 13, at p. 15.

(c) (1925), 21 Ll. L. R. 258.

(d) Not in the assured's service.

(dd) For a complete understanding of the rule, the case of *Ambatielos v. Anton Jurgens Margarine Works*, [1922] 2 K. B. 185; on appeal, [1923] A. C. 175, should be studied.

(e) E.g. where there are certain matters specially excepted from the policy.

(f) (1863), 3 B. & S. 917.

were true, that it was *incorporated in the policy*, and that it should be the basis of the policy went on to stipulate that the policy should be void in the event of the proposal containing any fraudulent concealment or designedly untrue statement, it was held that the later words qualified the earlier and that the policy could only be avoided on the ground of a designedly untrue statement (g).

(9) The maxim *verba chartarum fortius accipiuntur contra proferentem* must in certain cases be applied to the construction of policies (h).

"In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty" (i).

It should be observed that the maxim is only applicable where there is an ambiguity, and must not be used to discover an ambiguity which is not patent (j).

It has been said that the maxim is applicable to words put forward by the assured such as answers to questions in the proposal form (k). However

(g) "There are rules of construction which, though they may be cited on both sides, furnish several principles for our guidance, and one of those rules is, that in all deeds and instruments the language used by one party is to be construed in the sense in which it would be reasonably understood by the other. If there is any ambiguous phrase, another rule of construction, which was also known to the civil law, applies: *Verba chartarum fortius accipiuntur contra proferentem*. And if the party who proffers an instrument uses ambiguous words in the hope that the other side will understand them in a particular sense, and that the Court which has to construe the instrument will give them a different sense, the above rules apply, and they ought to be construed in that sense in which a prudent and reasonable man on the other side would understand them. Here we find in the declaration attached to the policy these words: 'I do hereby declare that the above-written particulars are correct and true throughout'; that is a declaration that those particulars are correct and true. 'And I do hereby agree that this proposal and declaration shall be the basis of the contract between me and the Manchester and London Life Assurance Association'; that makes the declaration a warranty. Then it goes on: 'And if it shall hereafter appear that any fraudulent concealment or designedly untrue statement be contained therein, the money paid shall be forfeited and the policy be void'. I think a common person reading this declaration would read 'and' at the beginning of the last clause as pointing out the consequence of an untrue statement, just as if it had begun 'so that if it shall hereafter appear, &c., the policy shall be void. I think another ordinary rule applies: *expressio unius exclusio alterius*, or, as it is also worded, *expressum facit cessare tacitum*. The express mention of fraudulent concealment and designedly untrue statement fairly leads to the construction that the declaration parts with the implied tacit agreement that any untrue particulars should vitiate the policy, and that it means that, if there were a designedly untrue statement, the policy should be void, and not otherwise. And when we bring the declaration so understood into the policy, we must construe the word 'untrue' in the policy in the same sense as in the declaration. I do not agree with the ingenious argument of Mr. Mellish, that because the declaration was signed first it became the contract between the parties, and that the policy may have a different meaning from the declaration, and go farther than it does. That would give Insurance Companies the power of cheating persons. The proviso and the declaration must be read together, and then the effect of the declaration is to limit the word 'untrue' to the sense 'willfully false' (1863), 3 B. & S. 917. *Per* BLACKBURN, J., at pp. 929-931.

(h) See *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399.

(i) *Per* LINDLEY, L.J., in *Cornish v. Accident Insurance Co.* (1889), 23 Q. B. D. 453, at p. 456. Cf. *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

(j) See *Simmonds v. Cechell*, [1910] 1 K. B. 843.

(k) See *Welford on Accident Insurance*, 2nd Edn., p. 73, citing *Condaglanis v. Guardian Assurance Co.*, [1921] 2 A. C. 125, which case does not seem to be an authority for the proposition. The rule does not always operate against the insurers; cf. *A/S Ocean v. Black Sea Insurance Co.* (1934), 50 Ll. L. R. 179 (C. A.); on appeal (1935), 51 Ll. L. R. 365.

this may be, it must always be remembered that the sufficiency of an answer in the proposal form may be determined by the form of the question to which it is given (*l*). In such a case, if the question is ambiguous, a strictly accurate answer may be sufficient although it does not reveal the whole truth (*m*), and the maxim is applied to the question and not to the answer (*n*).

(*io*) Where there is a conflict between printed and written words (*o*) in a policy in cases of doubt preference will be given to the written words (*p*).

As was pointed out by WALTON, J., in *Cunard Steamship Co. v. Marten* (*q*):

"It is obviously necessary in every case to consider carefully the description of the risk or special kind of indemnity expressed in the written words of the policy in order to ascertain whether any particular clause of the printed form applies to the insurance effected by the policy. It is most unusual to find that the superfluous or inapplicable words have been struck out of the printed form."

Moreover (*r*),

"the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz. that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect is that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects" (*r*).

(*l*) See *ante*, chapter VII, pp. 448-449.

(*m*) See, e.g., *Corcos v. de Rougemont* (1926), 23 Ll. L. R. 164; *Revell v. London General Insurance Co.* (1934), 50 Ll. L. R. 114; *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

(*n*) See *ante*, chapter VII, p. 448, and cases there cited.

(*o*) Where, as sometimes happens, printed words have been struck out with the intention of both parties of restricting the cover, and the result is that, disregarding the words so erased, the cover of the whole policy is actually more extensive, oral evidence can be given of the mistake and rectification of the policy claimed. See case cited in next note, and, as to rectification, see *post*, chapter IX. Where one party alters the wording of the policy without the consent of the other, see *post*, p. 487.

(*p*) *Kaufmann v. British Surety Insurance Co. Ltd.* (1929), 33 Ll. L. R. 315.

(*q*) [1902] 2 K. B. 624, approved by BIGHAM, J., in *Western Assurance Co. of Toronto v. Poole*, [1903] 1 K. B. 376, at p. 389.

(*r*) *Per* Lord ELLENBOROUGH in *Robertson v. French* (1803), 4 East, 130, at pp. 135, 136.

(11) If the contract of insurance be contained in two documents between which there is a conflict, the later document is as a rule (s) to be preferred (t) to the earlier as showing the latest intention of the parties (u).

2. Oral evidence of policy.—The general rule is that oral evidence is not allowed to be given in order to explain, add to, vary or contradict the written terms of a document (v).

There are many exceptions (w) to this rule, which has not been exemplified in many reported motor insurance cases (x). An account of one of these (y) is given in a succeeding section of this chapter, as it is only in circumstances such as those present in that case that the rule will in practice become important in motor insurance (z). It must, of course, be remembered that oral evidence may always be given to show that the policy is void, or that for some reason the insurers are entitled to repudiate it (a) or their liability (b) under it. Of these more instances are found in motor insurance cases than in many other branches of the law of contract (c). Oral evidence may also be given to show that the policy does not represent the true contract between the parties (d), or that one of them has by his conduct precluded himself from relying upon one of its terms (e). An example of an oral variation of the cover provided by an insurance policy occurred in *Palmer v. Cornhill Insurance Co.* (cc). In that case insurers issued a certificate covering three months' use. Insurers alleged and proved that thereafter and before the accident, the subject of the claim, occurred, the insurance was varied by mutual oral agreement, so as to restrict the cover to the use of the vehicle in the Mepal district of Cambridgeshire only. They further alleged that a new certificate incorporating the new term had been delivered to the assured before the accident.

3. Interpretation of policy by reference to other documents.—

The position of the statutory insurance certificate has been considered separately in an earlier chapter (f), where it will be found that that document cannot as a rule (g) affect the interpretation or operation of the

(s) For an exception, see *post*, p. 487.

(t) Cf. *Fowler v. Manchester and London Life Assurance Association* (1863), 3 B & S 917, as to which see further *ante*, at p. 484.

(u) *Kaufmann v. British Surety Insurance Co. Ltd.* (1929), 33 Ll. L. R. 315, *per* ROWLATT, J., at p. 318.

(v) See generally Welford on Accident Insurance, 2nd Edn., p. 74, and Powell on Evidence, 10th Edn., pp. 150 *et seq.* and see *Anglo-Californian Bank, Ltd. v. London and Provincial Marine and General Insurance Co., Ltd.* (1904), 10 Com. Cas. 1.

(w) See, for a summary of these, Welford on Accident Insurance, 2nd Edn., p. 74.

(x) See, e.g., *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39.

(y) *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399.

(z) See *post*, p. 487.

(a) Or that it does not exist—as e.g., where there has been a mistake—as to which see *ante*, chapter I, and *post*, chapter IX.

(b) See *post*, chapter IX.

(c) E.g. charterparties, or contracts between landlord and tenant.

(d) See *South East Lancashire Insurance Co. Ltd. v. Crowdale* (1931), 40 Ll. L. R. 32, *Sum Life Assurance Co. of Canada v. Jervis*, 1943, 2 All E. R. 425 (C. A.).

(e) By estoppel or waiver—as to which see *post*, chapter IX, and see *Kaufmann v. British Surety Insurance Co., Ltd.* cited in text in the next section.

(cc) (1935), 52 Ll. L. R. 78. It was argued but not decided that there could be oral alteration. Apparently no policy had been issued, so that the policy, if any, was oral unless the certificate incorporated a cover note.

(f) Chapter II, *ante*, p. 110.

(g) Exceptional cases might occur where the insurers issue a certificate which does not conform to the requirements of Regulations issued by the Minister of Transport—for example, if that official prescribed that all limitations of use to be found in the policy must be stated on the certificate, an assured might in some circumstances be entitled to assume that the use stated on his certificate was the use allowed by the policy.

policy (*h*). Whilst the general rule excluding oral evidence equally applies to prevent reference being made to any other document which does not form part of the contract between the parties, as will be seen from the account of *Kaufmann v. British Surety Insurance Co., Ltd.* (*i*), given in the next section, it sometimes occurs that other documents are permitted to be used in cases of ambiguity to show what the real contract between the parties was intended to be. In motor insurance cases this will generally occur where the assured has in his proposal form or otherwise bargained for a policy "in the usual form," or "containing the usual conditions" of the policies issued by the particular insurers. If he gets a policy not in that form, or not containing those conditions (*k*) he will be entitled to refer to any document, such as a prospectus or advertisement issued by the insurers, to show what was the real contract (*l*). Where, for instance, an illustration was drawn up by an agent and the application for insurance was only intelligible as embodying the terms of the illustration, the illustration was held to be a document forming the contract, and the policy was ordered to be rectified to give effect to that contract (*m*).

Moreover, it is submitted—as is indeed to some extent shown by *Kaufmann's Case* (*n*)—that reference to other documents may sometimes be made to show what is the meaning of any ambiguous term in the policy, although there is no other evidence of differing intentions between the parties than that to be deduced from an examination of such documents themselves. Thus if the assured is asked to choose, from three different "Descriptions of Use" clauses, the one he desires inserted in his policy, the insurers could not, it is submitted, in a case of ambiguity seek to put upon the clause accepted by the assured an interpretation which would render its effect equivalent to one of those which he rejected (*o*).

4. Conflict between policy and proposal form.—Cases of conflict between policy and proposal form do not often occur. When they do, each case must be considered in regard to the facts and the particular conflict of that case. It is submitted that no general rule can be laid down (*p*). It has been said that the general rule is that the policy, being the later document, prevails (*q*). This proposition rests upon the authority of the case of *Kaufmann v. British Surety Insurance Co. Ltd.* (*r*), in which the facts were as follows :

The assured, Kaufmann, carried on the business of letting out cars on hire to persons who would drive the hired cars themselves. He desired to effect a policy which would cover accidents occurring whilst his cars were being driven by customers and would also cover them when being used by himself for his own private pleasure purposes. He instructed insurance brokers to obtain for him a policy giving the cover indicated. The brokers asked the insurers' underwriter, a Mr. Hastings, whether their policy would give this cover. Mr. Hastings in reply handed a specimen form of policy

(*h*) See *ante*, chapter II, and see *Gray v. Blackmore*, [1934] 1 K. B. 95.

(*i*) (1929), 45 T. L. R. 399.

(*k*) As to his rights in such a case see *post*, chapter IX, and see *South East Lancashire Insurance Co., Ltd. v. Croisdale* (1931), 40 Ll. L. R. 22.

(*l*) See *Bawden v. London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q. B. 534.

(*m*) *Sun Life Assurance Co. of Canada v. Jervis*, [1943] 2 All E. R. 425 (C. A.).

(*n*) *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399.

(*o*) See further *post*, p. 570, and the example there given.

(*p*) See, e.g., *Fowkes v. Manchester and London Assurance Association* (1863), 3 B. & S. 917; also *Knowler v. Rennison*, [1947] K. B. 488; *sub nom. Rennison v. Knowler*, [1947] 1 All E. R. 302.

(*q*) *Welford on Accident Insurance*, 2nd Edn., p. 62, note (*m*).

(*r*) (1929), 45 T. L. R. 399; 33 Ll. L. R. 315.

- to the brokers, pointing out that it contained in Schedule A, under the heading "purposes for which used," the typed words: "private pleasure or private hire by the assured and/or private hire by the assured and/or private pleasure by hirer." Upon this information the brokers informed Kaufmann that the policy would cover his driving for his own private pleasure. A proposal form was subsequently filled in by Kaufmann. This proposal form related only to hire driving and in his answer to the question as to the purposes for which the policy would be used Kaufmann stated "private hire."

Upon this a policy was issued in the form of the specimen shown to the brokers, covering use for private pleasure by the assured as well as hire driving customers. It also contained a condition to the effect that the car was not covered when being used otherwise than for the purposes stated in the proposal form.

Whilst the car was being used for Kaufmann's private pleasure an accident occurred and a claim in respect thereof was made under the policy. The insurers resisted this claim on the ground *inter alia* that the condition referring to use other than as described in the proposal form applied. Oral evidence was admitted by the arbitrator as to the negotiations leading up to the issue of the policy between the assured and the brokers, and between them and the insurers, as described above. On an appeal by way of motion to set aside the arbitrator's award on the ground that the oral evidence ought not to have been admitted it was held that the evidence was admissible (s) and that the insurers were liable on the policy (t). The judgment of ROCHÉ, J. (u), is instructive on a number of the principles considered in this section.

5. Classification of Policies.

(1) *Different kinds of Insurer.*—Before proceeding to consider in detail the various clauses of a motor insurance policy and their meaning and effect, it is necessary to remind the reader that there are many differences, both in structure and in wording, between motor policies issued by different insurers (p). The difference between tariff and non-tariff companies and that between insurance companies and underwriting members of Lloyd's (w) need not here be explained (x). It is sufficient to say that a large number of insurance companies have agreed amongst themselves upon uniform rates of premium for the various risks which they insure, and upon a standard form of policy in each class of such risks. These are called "tariff" companies. Again, both "tariff" and non-tariff companies and under-

(s) On the ground that such evidence is admissible to show consistently with the language of the policy what the risk is (cf. *Hunting & Son v. Boulton* (1895), 1 Com. Cas. 120) and also to show estoppel (cf. *Bawden v. London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, and *Holdsworth v. Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521.)

(t) By application of the three rules of construction, the *contra proferentes* rule, that written words prevail over those printed (*Glyn v. Margeson & Co.*, [1893] A. C. 351), and that if there be conflict between two documents, the later one is to be regarded as the more expressive of the intention of the parties (cf. *Williams Brothers v. Agius, Ltd.*, [1914] A. C. 510, at p. 527.

(u) As reported 33 Ll. L. R. 317.

(v) See *ante*, pp. 474 *et seq.* for a general description. As to whether a motor insurance policy need be in writing embodied in one document, see *Norman v. Gresham Fire and Accident Insurance Society, Ltd.*, [1936] 2 K. B. 253; [1936] 1 All E. R. 151, and *Palmer v. Cornhill Insurance Co.* (1935), 52 Ll. L. R. 78. In these cases the assured claimed indemnity although there was no written policy. The Road Traffic Acts, 1930 (ss. 35 and 36) and 1934 (s. 10), seem clearly to require writing either in the form of a policy or of a cover-note.

(w) As to Lloyd's policies, see further chapter VII, *ante*, p. 476.

(x) Since the differences are largely internal—i.e. they do not affect the assured.

writers have internal working arrangements amongst themselves, which, with the one possible exception of the knock-for-knock agreement (y), do not affect the position of policy-holders. Whilst it is recognised that all policies issued by tariff companies are in a standard form of identical wording in each class, it is sometimes thought that most policies issued by other insurers—non-tariff policies—substantially conform to this standard, both in wording and effect. This, however, is not always so. Although there are many similarities between tariff and non-tariff policies, on the one hand, and *inter se* amongst the policies issued by non-tariff insurers on the other, there are respectively as many differences. Moreover, not every policy issued by the same insurers—whether tariff or non-tariff—is precisely the same. Thus each insurer has various "descriptions of use" (z) clauses which are inserted in a standard form of policy according to the requirements of the particular assured. Whilst the general structure and outward form of the policy and the classification of its terms are common to many motor policies now in use, this apparent similarity is, as has been explained (a), often highly misleading and the actual words used in every clause and the whole policy must in each case where *any* policy is in question be carefully considered.

(2) *Different kinds of policy.*—The different types of motor policy may be explained and classified by the following summary :

(A) *Classification of policies according to the class of vehicle insured.*

1. Private cars and motor cycles ;
2. Commercial vehicles ;
3. Paying passenger vehicles.

(B) *Classification of policies according to the risk covered.*

1. Comprehensive cover ;
2. Third party cover only ;
3. Road Traffic Act cover only ;
4. Other forms of limited cover ;
5. Special policies ;
6. Cover against fire and theft only (b).

(C) *Classification according to the use of the vehicle.*

1. Use for pleasure only ;
2. Use for business only ;
3. Use for both business and pleasure.

The above A, B, and C may be explained shortly in turn. The classification according to the class of vehicle insured clearly differs from that based upon the risk covered. Thus a commercial vehicle may be insured only against third party risks, whilst a private car policy may cover that car only when being used for the purposes of pleasure. The insurance of any class of vehicle may be of the comprehensive kind, that is, as explained below (c), covering all risks of loss of all types which the assured may incur arising out of his ownership or use of the vehicle, or covering only one particular risk—as, for example, a policy insuring against loss by fire only (d).

(y) See *post*, chapter IX, as to knock-for-knock agreements.

(z) As to "Description of Use" clauses, see *post*, p. 570.

(a) *Ante*, p. 479.

(b) E.g., a garage proprietor's policy, or an ordinary private car policy where the car is "laid up" and the insurers agree to suspend the policy so far as it covers the use of the vehicle, leaving the fire and theft clauses in force. As to the former, for an example see *Yorkshire Insurance Co. v. Craine*, [1922] A. C. 541, and as to the latter, see *post*, chapter IX.

(c) *Post*, pp. 480 *et seq.*

(d) See note (b), *supra*.

Again, the classification according to the use of the vehicle covered differs from either of the above. Thus a private car may be insured under a policy which gives comprehensive cover when the vehicle is being used for pleasure and no cover at all when it is being used for any other purpose (e). It will be seen that the above classification does not by any means separate every motor policy into a watertight compartment. In fact any such classification is impossible. Thus there are comprehensive commercial vehicle policies; Road Traffic Act private car policies; comprehensive private business policies; policies covering primarily use for pleasure, but which insure a limited use for business, and so on.

(a) Different classes of vehicle.—Vehicles are placed in different classes by insurers for purposes of business convenience—chiefly for the purpose of regulating the determination of the premium for any particular vehicle.

1. *Private cars and motor cycles.*—These are cars and cycles owned either by private individuals or by business concerns. The word private in this classification refers to the type of the vehicle itself, and only partly to the purpose for which it is to be used. Thus any ordinary five-seater touring car will generally come into the class of private vehicle, whether it is to be used for the purposes of pleasure or business or both. But it may come into another class if it is to be used for the carriage of goods, or for the conveyance of passengers for hire or reward. On the other hand, a 30-cwt. motor lorry chassis or a motor coach will generally be classified as commercial or public service vehicles respectively. But either of these might in certain circumstances be classified as private vehicles. For example, if a light lorry is converted into a private caravan, or a small motor coach used exclusively for private purposes (f).

2. *Commercial vehicles.*—These are motor vehicles used for the purpose of carrying goods or merchandise of any sort.

3. *Public service vehicles or paying passenger vehicles.*—These are motor coaches (g) and buses used for conveying passengers for hire or reward and cars—e.g. taxis, hackney carriages and private hire cars—used for the same purpose (h).

(b) Different classes of risk.

1. *Comprehensive cover.*—Comprehensive cover (i), which is more frequently found in private car policies than in policies insuring other types of vehicle, is, as its name implies, all-embracing. It is designed to cover (with certain exceptions) (j) as far as possible every loss which the assured may sustain as a result of his possession or ownership of the vehicle, or arising out of its use by him or on his behalf (k). Thus a comprehensive policy covers:

(1) Any liability which the assured may incur to third parties arising out of the use of the insured vehicle, whether the liability is in

(e) In many private car policies.

(f) E.g. a shooting brake.

(g) As to public service vehicles and the statutory requirements as to insurance in their case, see *ante*, chapter IV, p. 203.

(h) As to vehicles in which passengers are carried for hire or reward and the statutory requirements as to insurance in their case, see *ante*, chapter IV, p. 204.

(i) For an example of comprehensive cover see the specimen policy set out and considered in this chapter, *post*, pp. 498 *et seq.* And see, for a general description, *ante*, chapter II, p. 106.

(j) E.g. the assured's own property or property held in trust by him.

(k) Or by friends to whom he has lent the vehicle. As to the enforceability of this part of the cover, see *ante*, chapter II, p. 96, and chapter IV, p. 211.

respect of death, bodily injury, or damage to property, and whether the third party is a voluntary passenger (*l*) or the liability is one against which insurance is compulsory or not (*m*), and however the liability may be caused (*n*).

(2) Any accidental damage to the insured vehicle resulting from any cause outside the vehicle itself—whether as a result of the negligent driving by the assured or some other person of the vehicle itself, or of the negligence (*o*) of some third party, or with some exceptions (*p*) some purely fortuitous means, such as, for example, the collapse of the garage in which the vehicle is kept which damages or destroys it.

(3) Destruction of the vehicle by fire.

(4) Loss of the vehicle by theft.

(5) Death of or personal injury to the assured arising out of the use of the vehicle.

(6) Medical expenses (*q*) incurred by the assured as a result of personal injuries sustained by him or his passengers in a motor accident.

(7) Legal expenses incurred by the assured in prosecutions arising out of an accident involving damage or injury to third parties.

(8) Theft of rugs, luggage, personal goods, etc.

(9) Risks arising from transportation of the car, and, in some cases, use of the car abroad.

2. *Third party cover only*.—A policy of this type (whether issued in respect of a private, commercial, or public service vehicle) gives insurance only against liability which the assured may incur to third parties arising out of the use of the vehicle on the road. But it insures against any such liability to any such party—and in these important respects differs from the type of cover next described (*r*). It insures against liability in respect of damage to property (*s*) as well as in respect of death or personal injuries; it insures (sometimes with certain exceptions) (*t*) against liability to any third party, whether such third party is, for example, a friend or relative of the assured driving with him in the car, or a pedestrian knocked down by him on the road (*a*), or the owner of a wayside building into whose wall the assured crashes.

3. *Road traffic cover only*.—This type of policy is issued for the purpose of satisfying the requirements (*b*) of Part II of the Road Traffic Act, 1930 (*c*), and for that purpose alone. It gives only the insurance which is made

(*l*) As to who is a voluntary passenger, see *ante*, chapter IV, pp. 203 *et seq.*

(*m*) *E.g.* liability in respect of damage to property. As to what insurance is compulsory, see *ante*, chapter IV, pp. 188 *et seq.*

(*n*) As to the legality of some policies which restrict the indemnity to liability arising from specified causes, see *ante*, chapter IV, p. 104, and as to the legality of insurance against liability resulting from the criminal act of the assured, see *ante*, chapter II, pp. 107 *et seq.*, and *post*, chapter IX.

(*o*) Or malicious damage. See *Brewster v. Blackmore* (1925), 21 Ll. L. R. 258.

(*p*) *E.g.* damage caused by war, riot, etc.

(*q*) As to insurance against the statutory liability for medical fees for attendance on third parties in certain instances, which is now deemed to be included in the statutory requirement of insurance against liability in respect of bodily injury, see *ante*, chapter IV, p. 267, and chapter V, p. 341.

(*r*) "Road Traffic Act only" cover.

(*s*) Which is not compulsory. See *ante*, chapter IV, pp. 188 *et seq.*

(*t*) *E.g.* a servant of the assured.

(*a*) Even, it would appear from the wording of certain policies, if the pedestrian is the 'Lloyds' underwriter who issued the policy to the assured. See *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319.

(*b*) As to these requirements, see *ante*, chapter IV, pp. 188 *et seq.*

(*c*) 23 Halsbury's Statutes 607; see *ante*, chapter IV, p. 188.

compulsory by that enactment—namely, insurance against any liability (except contractual liability) in respect of the death of or personal injury to certain classes of third parties (d). The exact requirements of this statute have been examined in detail in an earlier chapter (e), and it is unnecessary to enlarge upon them again here. It need only be repeated that this type of policy does not insure against liability to anyone in respect of any damage to property, and does not cover liability to certain classes of third party—for example, liability to non-paying passengers carried in the car. The doubt as to the legality (f) of some policies of this type which, while covering liability in respect of the death or bodily injury of a passenger carried by reason of or in pursuance of a contract of employment, as is required by the Act (g), exclude cover of such liability in respect of passengers carried for hire or reward, which liability is equally required to be insured against by the Act, has been pointed out (h).

4. *Other forms of limited cover.*—It is not possible to do more than barely mention some of these. A motor policy may, for example (as when a car is being "laid up" or is otherwise out of use on the road) (i), insure only against loss by fire or theft.

5. *Special Policies.*—These also cannot be more than mentioned. For example, a policy may be issued to cover the use of a racing car in a particular race, giving cover for one or more of the risks described above (k). Again, a vehicle being transported by land or sea might be insured against the risks of that particular transport (l). Other types of special policy are those which do not insure a definite ascertained vehicle, but insure any vehicle which may come within the class defined in the policy (m).

(c) *Classification according to the use of the vehicle.*—This has been called a classification more for the purpose of convenience than for reasons of law or logic. Practically every motor policy defines the use of the vehicle which the insurance covers (n). This is called "limitation of risk," and the effect of this "limitation of risk" varies according to the terms of the policy. In most cases its effect is merely that the vehicle the subject-matter of the policy is not regarded as such when being used for any purpose outside the scope of the use defined—whilst being so used it becomes for practical purposes, and is treated in law as if it were, another vehicle altogether (o). Thus if a private car is insured whilst being used for purposes of pleasure it is insured only whilst being so used, and when

(d) See *ante*, chapter IV.

(e) Chapter IV, *ante*, pp. 188 *et seq.*

(f) *I.e.* for the purpose of satisfying the requirements of the Road Traffic Act, 1930—as to which see *ante*, chapter IV.

(g) The Road Traffic Act, 1930, s. 36 (1) (b) (iii) (23 Halsbury's Statutes 637).

(h) See *ante*, chapter IV, p. 203.

(i) See note (b), *ante*, p. 489, and see *post*, chapter IX.

(k) Cf. *Jackson v. London Motor Sports Co.* (1940), 66 Ll. L. R. 16.

(l) As to the cover given by the ordinary comprehensive policy in respect of transit of the vehicle see *post*, pp. 501 *et seq.*

(m) *E.g.* Motor traders' policies, for a description of which see *post*, chapter IX.

(n) See the "Description of Use" clause, described *post*, p. 570.

(o) See *Fair v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 669; *Roberts v. Anglo-Saxon Insurance Association* (1927), 43 T. L. R. 359; *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240; *Dawsons, Ltd. v. Houston*, [1921] 2 A. C. 413; *Jones v. Welsh Insurance Corporation, Ltd.*, [1937] 4 All E. R. 149; *Levanger v. Licenses and General Insurance Co.* (1936), 54 Ll. L. R. 68; *Passmore v. Vulcan Boiler and General Insurance Co.* (1936), 54 Ll. L. R. 92; *Slone v. Licenses and General Insurance Co.* (1942), 71 Ll. L. R. 256; *Bonham v. Zurich General Accident and Liability Insurance Co.*, [1943] K. B. 292; [1945] 1 All E. R. 427; *Herbert v. Railway Passengers Assurance Co.*, [1938] 1 All E. R. 650. And see further *post*, pp. 493 *et seq.*

being used for business it is not the vehicle insured by the policy (*p*), and for all practical purposes might be an entirely different vehicle—just in the same way as where a policy insured a 20 h.p. 5-seater private car, and that car was converted into a 50 h.p. 20-seater public service vehicle, it would not be the car covered by the policy (*q*). But there is in general this distinction between the two examples given. In the first, although the car when being used for any purpose not covered by the policy ceases to be insured by the policy, it becomes so insured directly it is used for the defined purpose again. In the second example, even if the converted vehicle were restored to its original character it would not as a rule become the insured vehicle without the permission of the insurers (*r*).

But in some cases, if certain words are used in the policy, the effect of this "limitation of use" clause may be that if the insured car is once used for any purpose other than that defined in the limitation of use clause the policy itself or the insurers' liability to make any payment thereunder may cease to exist (*s*), as between the parties to the contract. The position of "Road Traffic Act third parties" has, it will be remembered, been safeguarded by the M.I.B. Agreements (*t*).

6. Classification of terms of the policy.—The difficulties of ascertaining from a contract constructed in the manner which has been described exactly what are the rights of the parties thereunder have also been pointed out (*u*). Other but not lesser difficulties arise from the fact that different terms of the policy have different effects in law. The three main types of clauses have already been described (*v*) as being descriptions (of the subject-matter and of the risk insured), non-essential conditions and essential conditions (*a*). The difficulty of distinguishing the particular clauses of a motor policy in accordance with this classification is intensified by the different meaning which is given to the terms "warranty" and "condition" in different branches of the law. In the law relating to the sale of goods (and in other branches of the law of contract) a condition in a contract is one the breach of which vitiates the contract (*b*). It is a term on which the contract is based or on which it depends (condition precedent), or from which it is suspended (condition subsequent), and if the condition is broken the whole contract may fall to the ground (*c*). This is sometimes expressed as being a term which goes to the root of the contract. In distinction to this meaning of the word "condition" the term "warranty" is used as signifying a clause the breach of which cannot vitiate or avoid the whole con-

(*p*) See *Roberts v. Anglo-Saxon Insurance Association* (1927), 43 T. L. R. 359; *Gray v. Blackmore*, [1934] 1 K. B. 95.

(*q*) Cf. *Seaton v. London General Insurance Co.* (1932), 48 T. L. R. 574, and see *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1931), 48 T. L. R. 17.

(*r*) See *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (*supra*).

(*s*) See *per* Lord BUCKMASTER in *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240, at p. 247, and *per* SCRUTTON, L.J., in the same case, [1932] 2 K. B., 70, at p. 82.

(*t*) See chapter VI, *ante*.

(*u*) *Ante*, p. 479.

(*v*) *Ante*, pp. 280, 281.

(*a*) See *per* ROMER, L.J., in *Roberts v. Anglo-Saxon Insurance Association* (1927), as reported 27 Ll. L. R. 313, at p. 317, and *per* BANKES, L.J., in *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 669, at p. 673.

(*b*) See Chalmers on Sale of Goods, 11th Edn., pp. 44, 139.

(*c*) This, however, is at the option of the party against whom the breach is committed. See *per* Lord READING, C.J., in *Stobbing v. Liverpool and London and Globe Insurance Co., Ltd.*, [1917] 2 K. B. 433, at p. 437, and approved by the Court of Appeal in *Stevens & Sons v. Timber and General Mutual Accident Insurance Association, Ltd.* (1933), 45 Ll. L. R. 43, and see *post*, chapter IX. Cf. also *Heyman v. Darwins, Ltd.*, [1942] A. C. 356; [1942] 1 All E. R. 337.

tract (d), but has effect independently, leaving the contract in uninterrupted existence for all purposes save those directly touched by that breach. But in insurance law, as Lord HALDANE pointed out in *Dawsons, Ltd. v. Bonnin* (e) :

“ ‘Warranty’ is a somewhat unfortunate expression to have been used in this connection. The proper significance of the word in the law of England is an agreement which refers to the subject-matter of a contract, but, not being an essential part of the contract either intrinsically or by agreement, is collateral to the main purpose of such a contract. Yet irrespective of this the word came to be employed in England when what was really meant was something of wider operation, a pure condition. If goods tendered in performance of a contract do not satisfy the conditions stipulated for, the buyer may reject them ; but he may alternatively accept the goods and claim damages for breach of the stipulated condition, thus treating his claim as one for damages for a breach of warranty, sufficiently so constituted. The condition is thus wider than the warranty strictly so called, but may sometimes be founded on as giving rise to a contract of warranty.”

In insurance law, therefore, the terms condition and warranty are used indifferently and indiscriminately (f). The matter is further complicated by the fact that the use of a particular word in a clause in the policy does not necessarily determine the character of that clause. Thus, as SCRUTTON, L.J., pointed out in *Re Morgan and Provincial Insurance Co.* (g) :

“ No doubt a great deal turns upon the language of the particular policy ; but it must be remembered that in contracts of insurance the word ‘warranty’ does not necessarily mean a condition or promise the breach of which will avoid the policy. A warranty that a marine policy is free from particular average certainly does not mean that if there is a partial loss to the insured ship the whole policy is avoided. It merely describes the risk, and means that the only risk being insured against is the risk of a total loss and that a partial loss is not the subject of the insurance. Again, if a time policy contains the clause ‘warranted no St. Lawrence between October 1 and April 1,’ and the vessel was in the St. Lawrence on October 2, but emerged without loss, and during the currency of the policy in July a loss happens, the underwriters cannot avoid payment on the ground that between October 1 and April 1 the vessel was in the St. Lawrence : *Birrell v. Dryer* (h). That is an example of a so-called warranty which merely defines the risk insured against.”

In motor insurance policies the word condition is generally used to describe all clauses of the policy having contractual force (i), and the term warranty is not so often used. It must be understood, therefore, that when either of these words is found in a motor policy it has no special significance except in so far as it may give to a particular clause in the policy contractual force which that clause might otherwise not have (k). With these distinc-

(d) Cf. *post*, p. 496, as to the difference between “fundamental” and “non-fundamental” terms. Cf. too the judgment of Lords WRIGHT and PORTER in *Heyman v. Darwins, Ltd.*, [1942] A. C. 356 ; [1942] 1 All E. R. 337.

(e) [1922] 2 A. C. 413, at p. 422.

(f) See many policies where the word “warranty” is used in one part as merely descriptive and in another as essential—e.g., “warranted to be used only for business purposes” and “the truth of statements in proposal form is warranted.”

(g) [1932] 2 K. B. 70, at p. 79.

(h) (1884), 9 App. Cas. 345.

(i) Thus most of the clauses to be found under the general heading of “conditions” are generally merely conditions precedent to the insurers’ liability in respect of a particular claim, and the failure to observe them will not necessarily affect any other claim, though it generally has this effect by reason of the operation of another clause. See *post*, p. 623.

(k) E.g. “warranted to be kept only at the assured’s own garage.” Without the word “warranted” this clause might mean merely that the vehicle was generally to be kept there. See *Seaton v. London General Insurance Co., Ltd.* (1932), 48 T. L. R. 574.

tions in mind it becomes necessary to consider the classification of clauses in a motor policy which has been outlined and described. The authorities have been fully examined in the last chapter (*l*).

1. Descriptions :

- (i) of the subject-matter ;
- (ii) of the risk insured.

2. Non-fundamental (*m*) conditions.

3. Fundamental (*m*) conditions.

Of these in turn :

1. (a) **Descriptions of the subject-matter.**—These are the clauses which describe the vehicle and the person or persons insured. No vehicle and no person that does not answer this description comes within the terms of the policy (*n*). Thus if the policy describes the insured car as a 20 h.p. Ford, a 50 h.p. Rolls-Royce is not covered by the policy (*o*).

Again, if the "assured" is described in the proposal form as A.B. 25 years of age, A.B. 80 years of age is probably not the person insured, or the person whose driving is insured by the policy (*p*). In such a case the policy would, it is apprehended, be voidable (*q*) on any one or more of the grounds of mistake, material non-disclosure, or false representation (*r*), or merely on the ground that that person was not insured by the policy. It must always be remembered that after July 1, 1946, mistake, misrepresentation or non-disclosure only affect the existence of the policy between insurer and assured. The rights of "Road Traffic Act third parties" are now safeguarded by the M.I.B. Agreements, in that thereby, when personal injuries are suffered by them in an accident occurring at a time when a policy of insurance, whether voidable or not, purports to cover the tortfeasor who caused those injuries, the third parties will receive satisfaction of any unsatisfied judgment obtained by them against the tortfeasor, either from M.I.B. or from the insurer concerned (*s*).

1. (b) **Descriptions of the risk insured by the policy.**—These must be carefully distinguished from descriptions of the subject-matter.

The clauses of a policy which describe the risk are those which describe the insurance which the policy gives together with those which may describe the insurance which the policy does not give. These last are sometimes called "Exceptions." Thus the clause in a policy which states that the insurers will indemnify the assured against any liability which may be incurred by him to third parties is a clause which describes the risk insured—

(*l*) *Ante*, p. 433.

(*m*) The use of the words "essential" and "non-essential" to describe the different classes of terms, although it has received judicial sanction, is to be deprecated, since the assured may find that by failing to observe a "non-essential" term he can make no claim under his policy for a particular loss (and in some cases *any* loss), or that he may be obliged to reimburse his insurers in enormous sums which they have paid to a third party under the provisions of s. 38 of the Road Traffic Act, 1930, or ss. 10 or 12 of the Road Traffic Act, 1934. He would hardly regard a term which produced such results as "non-essential."

(*n*) See *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1931), 48 T. L. R. 17, and cf. *Seaton v. London General Insurance Co., Ltd.* (1932), 48 T. L. R. 574.

(*o*) It must always be remembered that a motor policy insures (a) "The use of a particular vehicle (or vehicles) by a particular person (or persons), and (b) The interest of a particular person (or persons) in a particular vehicle." See *per BANKES, L.J.*, in *Bell Assurance Association v. Licenses and General Insurance Co., Ltd.* (1923), 17 Ll. L. R. 100.

(*p*) *Newcastle Fire Insurance Co. v. Macmorran & Co.* (1815), 3 Dow. 255.

(*q*) At the suit of insurers in proceedings between them and the assured.

(*r*) As to non-disclosure and misrepresentation generally, see *ante*, chapter VII.

(*s*) See chapter VI, *ante*, p. 359.

namely, the risk of liability to third parties (*i*). So also is a clause which says that such indemnity will only be payable provided the insured vehicle is at the time of the occurrence giving rise to the third party liability, being driven by the assured in person (*u*). So, also, is a clause which says that the assured will be paid £500 in the event of his losing the sight of both eyes (*a*). So also is a statement by the assured in the proposal form that the vehicle will be garaged at a particular place (*b*), or used for a particular purpose (*c*). All these are descriptions of the risk insured by the policy.

The following is an example of a description of risk which is more commonly inserted in the form of a fundamental term (*d*): "The insurers will not be liable for any injury, loss or damage caused by driving the vehicle in an unsafe condition" (*e*).

Any risk which does not answer to the description in the policy is not covered by the policy, and if such a risk materialises into a loss no claim in respect of it can be made by the assured under the policy (*f*). It must, however, be carefully observed that any clause of the policy which is a description of the risk insured may also be a condition—either of the essential or the non-essential type.

2. Non-fundamental (*g*) conditions.—In the form of motor policy in general use there are few conditions which can properly be placed in this category. In regard to such as there are, the distinction is generally only of academic importance, for, as will be seen, the policy generally contains a clause which makes the breach of a non-fundamental term have for all practical purposes the same result as that of a fundamental term (*h*). Non-essential terms are usually that type of clause which stipulates that the assured must do, or must not do, something after a loss has occurred. This is the kind of clause which is hit by section 38 (*i*) of the Act of 1930 (*k*). The breach of it does not necessarily entitle the insurers to avoid or cancel the policy—it entitles them to refuse payment to the assured of a particular loss (*l*), or, according to the terms of the policy in question, to refuse payment to him of any loss, whether connected with the particular breach relied upon or not (*m*).

For example, a clause may provide that the assured shall give notice in writing to the insurers within twenty-four hours after the occurrence of any

(*i*) For an example of such a clause, see *post*, p. 514. In so far as such a clause describes the cause of the liability—i.e. driving—it will be a description of the subject-matter.

(*u*) See, e.g., *Herbert v. Railway Passengers Assurance Co.*, [1938] 1 All E. R. 650, and the facts of *Knowler v. Rennison*, [1947] K. B. 488; *sub nom. Rennison v. Knowler*, [1947] 1 All E. R. 302.

(*a*) See this clause, discussed *post*, p. 540.

(*b*) See, e.g., *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(*c*) See, e.g., *Roberts v. Anglo-Saxon Insurance Association* (1927), 43 T. L. R. 359; *Levinger v. Licenses and General Insurance Co.* (1936), 54 Ll. L. R. 68.

(*d*) See *post*, p. 606, and see *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 46 T. L. R. 71.

(*e*) *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39; and see further *post*, p. 606.

(*f*) See *Roberts v. Anglo-Saxon Insurance Association* (*supra*); *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 669; *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240.

(*g*) See note (*m*), *ante*, p. 495.

(*h*) See further *post*, p. 623, and see *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 46 T. L. R. 71; *Machay v. London General Insurance Co.* (1935), 51 Ll. L. R. 201.

(*i*) As to this section and its effect, see *ante*, chapter IV, pp. 219 *et seq.*

(*k*) I.e. the Road Traffic Act, 1930 (23 Halsbury's Statutes 607), *ante*, chapter IV.

(*l*) See further *post*, pp. 589 *et seq.*, 623.

(*m*) See *Jones and James v. Provincial Insurance Co., Ltd.* (*supra*).

accident, and that if he fails to do so the insurers shall not be liable to make any payment under the policy in respect of any loss arising out of that accident (*n*). If an accident involving a loss covered by the policy occurs, and the assured fails to make any claim in respect of it, this failure does not entitle the insurers to avoid or cancel the policy or, by force only of the term of which it is a breach, to repudiate claims arising out of other accidents in respect of which due notice has been given (*o*). But—and the qualification is great—the policy may, and usually does, contain a compendious condition which makes the due observance of every term in the policy a condition precedent to the assured's right to claim any payment thereunder. This condition robs the distinction between essential and non-essential terms of all practical force in many cases. Thus, if the assured fails to give notice of one third party claim, he may find that when another such arises, and he does give notice, he can enforce no claim in respect of it under his policy, having by his neglect to give notice in the first case failed to satisfy the condition precedent (*p*). It should also be observed that every breach of contract gives rise to a claim for at least nominal damages (*q*). Whatever other effect the breach of a non-fundamental condition may have, it should always give the insurers (or the assured, as the case may be) the right to claim damages for breach of contract, the damages to be such as were, in the contemplation of the parties, to be measured according to the actual loss caused (*r*) thereby (*s*).

3. **Fundamental (*t*) conditions.**—These are conditions upon which the whole structure of the contract is supported. The breach of them entitles the insurers, if they wish, to avoid the whole policy (*u*). Of these the most common type are those to be ascertained by reference to the proposal form whereby it is stipulated that every statement made therein by the assured is warranted by him to be true and this warranty is made the basis of the contract (*v*). Thus if the assured states in the proposal form that he has had no convictions for motoring offences when in fact he has had several (*w*), this misstatement constitutes a breach of fundamental condition which makes the policy voidable at the option of the insurers. It should be noticed at this stage (though the subject is more fully dealt with in a later chapter) (*x*) that although the breach of a fundamental condition enables the party entitled to take advantage of it to avoid the policy (*a*), such party is not obliged to take this course, and he may, if he choose, treat the breach as if it had effect as a breach of a non-fundamental condition, or as if it had no effect at all (*b*).

(*n*) As to clauses of this type, see *post*, p. 500, and see *Verelst's Administratrix v. Motor Union Insurance Co., Ltd.*, [1925] 2 K. B. 137.

(*o*) It must always be a matter of construction in each case. See *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240.

(*p*) See, as to the usual clause in motor policies making fulfilment of all its terms a condition precedent to the right to make any claim under the policy, *post*, p. 623.

(*q*) See *Rolin v. Steward* (1854), 14 C. B. 595; *Marzetti v. Williams* (1830), 1 B. & Ad. 415; *per* Lord BLACKBURN in *London Guarantee Co. v. Fearnley* (1880), 5 App. Cas. 911, at p. 915; and *per* FLETCHER MOULTON, L.J., in *Re Coleman's Depositories, Ltd. and Life and Health Assurance Association*, [1907] 2 K. B. 798, at p. 809.

(*r*) The obligation to satisfy the judgment obtained by a third party would only be directly caused by the assured's breach if the term broken was such as that given in the text. See, for example, *Barrett v. London General Insurance Co.*, [1935] 1 K. B. 238.

(*s*) As to the rules regulating the measure of damages for breach of contract, see 10 Halsbury's Laws, 2nd Edn. 121.

(*t*) See note (*m*), *ante*, p. 495.

(*v*) See *ante*, chapter VII, p. 467.

(*x*) *Post*, chapter IX.

(*b*) In some circumstances he may be obliged so to treat it. See *post*, chapter IX.

(*u*) See further, *ante*, p. 495.

(*w*) *Ante*, pp. 445 *et seq.*, chapter VII.

(*a*) See also *ante*, chapter VII, p. 405.

PART 2.—CONSTRUCTION OF EACH CLAUSE IN A
STANDARD FORM OF POLICY

It is impossible in the space of a chapter to consider in any detail the terms of more than one policy of one type. For this reason the form of policy to the standard of which most other policies conform has been taken as a typical example—that is, the form of policy which has been adopted by a large group of insurance companies who, as has been previously indicated, use this policy as a common form (c).

The type of policy chosen for this purpose is the comprehensive private car policy. In dealing with this policy clause by clause, reference will as far as possible be made both to variations of the clause under consideration used by other insurers, and also to corresponding or similar clauses in different types of policy, such as commercial vehicle policies, road traffic cover policies, etc. In other words, the standard form of private car comprehensive policy is taken as the framework of this part of this chapter. The substance of it will consist of comments on each clause of that policy, and in addition comments on such other clauses of other policies as may be mentioned.

I.—BASIS CLAUSE

"WHEREAS the assured described in the Schedule hereto (hereinafter called 'the assured') by a proposal and declaration (dated as stated in the said Schedule) which shall be the basis of this contract and is deemed to be incorporated herein has applied to THE X.Y.Z. COMPANY LIMITED (hereinafter called 'the Company') for the insurance hereinafter contained and has paid the premium stated in the said Schedule as consideration for such insurance in respect of accident, loss or damage occurring during the period of insurance stated in the said Schedule or during any period for which the Company may accept payment for the renewal of this Policy."

Most of this clause in the policy needs little explanation. It merely recites the facts of the contract made between the insurers and assured. The most important part of it is the words "*by a proposal and declaration . . . which shall be the basis of this contract and is deemed to be incorporated herein.*" The proposal referred to is, of course, that contained in the proposal form (d). The "declaration" referred to is also to be found in the proposal form, in dealing with which it has already been explained (e). It is noticeable (as has been pointed out) that this "declaration" in the proposal form also states that it and the proposal shall be the basis of the contract. It seems, therefore, that in cases where it is stated in the "declaration" in the proposal form (f) that the proposal form shall be the basis of the contract the repetition of this statement in the policy is only necessary for the sake of placing this beyond doubt. It follows that the really important part of this clause is that which incorporates the proposal form with, and makes it part of, the contract. Without these words in a policy it is doubtful how far the proposal form and the statements in it would be regarded as part of the contract (g). This question, though interesting, may be regarded as academic, since every motor policy now in use invariably contains words whereby the proposal is incorporated in the policy (h). The effect of this

(c) The "tariff" companies.

(d) For the proposal form generally, see *ante*, chapter VII, pp. 419 *et seq.*

(e) *Ante*, chapter VII, p. 467.

(f) As to which, see *ante*, chapter VII, pp. 413, 467.

(g) See *ante*, pp. 385, 413, 467.

(h) See further, however, *ante*, chapter VII, p. 467.

basis clause has been considered by the House of Lords in the case of *Dawsons, Ltd. v. Bonnin* (i). In that case the assured stated in the proposal form that the insured vehicle would usually be garaged at the X address. The proposal form contained no "declaration" whereby the truth of the statements made by the assured was warranted by him. But the policy contained the clause that: "the proposal shall be the basis of this contract and be held as incorporated herein." In fact the insured vehicle was not at any time garaged at the X address, but at the Y address. The statement in the proposal form was therefore false when made, and continued to be false. The following extracts from the judgments given in the House of Lords show clearly the effect of these words in law:

"As Lord BLACKBURN observed in *Thomson v. Weems* (h): 'It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of any thing a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material.' He goes on to point out that in policies of marine insurance it is settled that any statement of a fact bearing on the risk is, 'by whatever words and in whatever place, to be construed as a warranty, and, *prima facie*, at least, that the compliance with that warranty is a condition precedent to the attaching of that risk.' Without going so far as to hold that this rule is also applicable to the construction of life policies generally, he thought that it applied to the life policy before him, and 'when we look at the terms of this contract, and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars (which, I think, include his statement that he was of temperate habits) is warranted.' (a)

"My Lords, Lord BLACKBURN lays stress in these words on the expression 'basis.' In *Att.-Gen. v. Ray* (b), JAMES and MELLISH, L.JJ., two great masters of accuracy in legal phraseology, employ the same term to denote what they considered descriptive of what was foundational or essential in the transaction before them. The case was not one in which the expression 'basis' occurred in any policy, for it was concerned with a grant of an annuity for life, based on a representation as to age, granted by the Commissioners for the Reduction of the National Debt. MELLISH, L.J., none the less, likened the transaction to one of an ordinary contract of life assurance where the representation is made the 'basis,' or an essential term of the contract, and materiality is consequently irrelevant. I do not think that it matters whether the representation which is made 'basic' is as to a state of present fact or to something to be carried out in the future, such as garaging at a particular place. What is important in the latter alternative is that the insured cannot recover unless he can show that he has performed his part, for his performance has been made the condition of performance by the other party" (c).

"Both on principle and in the light of authorities such as those I have already cited, it appears to me that when answers, including that question, are declared to be the basis of the contract this can only mean that their truth is made a condition exact fulfilment of which is rendered by stipulation foundational to its enforceability." *Per Lord HALDANE* (c).

(i) [1922] 2 A. C. 413.

(h) (1884), 9 App. Cas. 671, at p. 684.

(a) *Per Lord HALDANE, Dawson, Ltd. v. Bonnin*, [1922] 2 A. C. 413, at p. 422.

(b) (1874), 9 Ch. App. 397.

(c) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413, at pp. 423, 424, 425.

"What, then, does the sentence quoted mean? I cannot think that it amounts to nothing more than a statement that the proposal initiated the transaction and led to the grant of the policy. That fact sufficiently appears from the recital of the proposal; and the addition of an express stipulation that the proposal shall be treated as incorporated in the policy and shall be the basis of the contract, is plainly intended to have some further effect. 'Basis' is defined in the Imperial Dictionary as 'the foundation of a thing; that on which a thing stands or lies'; and similar definitions are to be found elsewhere. The basis of a thing is that upon which it stands, and on the failure of which it falls; and when a document consisting partly of statements of fact and partly of undertakings for the future is made the basis of a contract of insurance, this must (I think) mean that the document is to be the very foundation of the contract, so that if the statements of fact are untrue or the promissory statements are not carried out, the risk does not attach. No doubt the stipulation is more concise in form than those which were contained in the policies which fell to be construed in *Anderson v. Fitzgerald* (d) and *Thomson v. Weems* (e), in each of which cases the policy contained an express provision to the effect that if anything stated in the proposal was untrue, the policy should be void; but I think that the effect is the same as if those words had been found in the present policy. Indeed, it is remarkable that in *Anderson v. Fitzgerald* (f) Lord CRANWORTH referred to the above-mentioned provision, as to the avoidance of the policy if any of the statements in the proposal should be untrue, as a provision making those statements the basis of the contract; and in *Thomson v. Weems* (g), Lord BLACKBURN said: 'But I think when we look at the terms of this contract, and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars . . . is warranted.' Lord ESHER, in *Hambrough v. Mutual Life Insurance Co. of New York* (h), uses the word 'basis' in the same sense.

"Upon the whole, it appears to me, both on principle and on authority, that the meaning and effect of the 'basis' clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy; and if that be the contract of the parties, it is fully established, by decisions of your Lordships' House, that the question of materiality has not to be considered." *Per* Viscount CAVE (i).

"That raises the pure question, as yet I think undecided, when certain statements are said to be the 'basis of the contract and incorporated therewith,' is that equivalent to saying that these statements are held to be contractually material?"

"After much consideration, unwillingly in the circumstances of the case, and contrary to my first impression, I have come to the conclusion that it is. I think that 'basis' cannot be taken as merely pleonastic and exegetical of the following words, 'and incorporated therewith.' It must mean that the parties held that these statements are fundamental—i.e., go to the root of the contract—and that consequently if the statements are untrue the contract is not binding." *Per* Lord DUNEDIN (j).

"During the period of insurance stated in the said Schedule or during any period for which the company may accept payment for the renewal of this policy."—The question of renewal of the policy, and whether renewal constitutes a new contract or is merely an extension of the old, was considered

(d) (1853), 4 H. L. Cas. 484.

(e) (1884), 9 App. Cas. 671.

(f) (1853), 4 H. L. Cas. 484, at p. 500.

(g) (1884), 9 App. Cas. 671, at p. 684.

(h) (1895), 72 L. T. 140.

(i) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413, at pp. 432, 433.

(j) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413, at p. 435.

in an earlier chapter (*k*). But it should be noted here that the wording of this clause strongly suggests that a renewed policy is merely the old policy continued (*l*).

"NOW THIS POLICY WITNESSETH that subject to the Terms
"Exceptions and Conditions contained herein and of any endorsement
"hereon."

"Any endorsement hereon."—These words make it clear that any endorsement upon the policy is to be taken as a term of the policy itself, ranking in contractual force equally with all other terms of the policy. The subject of endorsements—of which there are various kinds—is treated separately in the next chapter (*m*).

II.—LOSS OF OR DAMAGE TO CAR CLAUSE

"The Company will indemnify the assured against loss of or damage
"(including damage by frost) to any motor car described in the Schedule
"hereto and/or its accessories and spare parts whilst thereon arising in
"Great Britain, Ireland, the Isle of Man, or the Channel Islands or whilst
"in transit by sea between any ports therein and/or during the process of
"loading and unloading incidental to such transit."

"Indemnify."—This means make good the financial loss thereby caused (*n*). As will be seen later it does not include indemnity against the loss of use of the vehicle, or of any, incidental loss thereby caused. For example, an accident putting his car out of action might cause the assured to miss an important business engagement (*o*). This loss would be one arising from the loss of use of the vehicle, which as will be seen is a peril expressly excepted by the policy (*p*). Even if it were not so expressly excepted it would not, it is submitted (*q*), come within the risks insured, these being "loss of, or damage to" the insured vehicle (*r*). The indemnity is also limited in amount to the total value of the vehicle, as stated later in the clause.

"Including damage by frost."—The inclusion of damage by frost seems to be unnecessary and misleading, as it might be thought to imply (*s*) that damage caused by other similar causes was not included—for example, damage by lightning (*t*). This, it is submitted, is not so, and the clause should be held to give (subject to the express (*u*) and implied (*v*) exceptions which are noted below) complete cover against loss however caused (*w*). In other words, loss from all perils save those specifically excepted in the policy is insured against (*x*). It does not matter whether the loss is caused

(*k*) Chapter VII, *ante*, pp. 468 *et seq.*

(*l*) See, as to whether this is so, *ante*, chapter VII, pp. 468 *et seq.*

(*m*) *Post*, chapter IX.

(*n*) As to the meaning of "indemnify," see fully chapter II, *ante*, pp. 71 *et seq.*

(*o*) *Post*, p. 504.

(*p*) See *post*, p. 504.

(*q*) See *Theobald v. Railway Passengers Assurance Co.* (1854), 10 Exch. 45, *per* POLLOCK, C.B., at p. 58.

(*r*) See *Re Wright and Pole* (1834), 1 Ad. & El. 621; *Rogers & Co. v. British Ship-owners' Mutual Protection Association, Ltd.* (1896), 1 Com. Cas. 414; *Shelbourne & Co. v. Law Investment and Insurance Corporation*, [1898] 2 Q. B. 626.

(*s*) By application of the *expressio unius exclusio alterius* rule—as to which see *ante*, p. 483.

(*t*) Some policies expressly cover lightning.

(*u*) E.g. earthquake, war, etc. See *post*, pp. 561 *et seq.*

(*v*) As to implied exceptions, see *post*, p. 561 and chapter IX.

(*w*) See *Welford on Accident Insurance*, 2nd Edn., p. 390.

(*x*) This form of damage clause must be contrasted with those in other policies which only insure damage caused in a specific manner, e.g. by "accidental external means" (for the meaning of which see *post*, pp. 543 *et seq.*), and with such clauses as that in *Seaton v. London General Insurance Co.*, (1932) 48 T. L. R. 574, which covered damage only if it arose whilst the car was being driven by the assured or his licensed driver.

by an "act of God" (y), by the negligence of the assured (z) or by the negligence of a third party (a) or by a wilful act of destruction by a third party (b). Provided that the loss is directly caused by some peril not expressly (c) or impliedly (d) excepted by the policy it is a loss which is covered by the policy (e). But it must be directly caused by a peril insured against (f). The determination of the direct cause of a particular loss is often a matter of considerable difficulty. The difficulty has been previously referred to (g) and illustrated by two insurance cases. It is submitted that it is not possible to lay down any useful working rules which can be applied in practice for this purpose (h). Each case must depend upon its own facts. Thus it is doubtful whether "loss of" includes loss by fraud. If the vehicle is stolen, the loss is covered, but the loss of it through false pretences or conversion would probably be regarded as a loss of money and not the vehicle (hh). It should be stated, moreover, that whilst the loss must not be caused directly by any of the risks which are expressly or impliedly excepted by the policy, it must be caused at such time and in such circumstances as are covered by the policy (i). Thus if the vehicle is insured only when being used for private pleasure purposes, a loss occurring whilst it is being used for business purposes will not be covered (j) although not caused by any of the matters expressly excepted by this clause (k).

"And/or its accessories and spare parts whilst thereon."—It is unnecessary, if not impossible, to attempt a definition of what constitutes an accessory or a spare part (l). But it should be noticed that these things are only insured whilst on the vehicle (m). Thus a spare wheel (n), if it be a "spare part," taken off a car and left standing in a garage would not be covered, and if destroyed by fire or stolen, loss would not come within the terms of the policy.

In *Seaton v. London General Insurance Co.* (o) the policy covered the vehicle and the "lamps, tyres and accessories whilst thereon." The engine was removed from the chassis and whilst so apart destroyed by fire. It

(y) See *Paradine v. Jane* (1647), 1 Alyn, 26; *Atkinson v. Ritchie* (1809), 10 East 530; *Thuis v. Byers* (1870), 1 Q. B. D. 244.

(z) As to whether his criminal negligence is covered, see *post*, chapter IX.

(a) The assured cannot recover both from the third party and from the insurers. See *post*, p. 510 and chapter IX.

(b) See, e.g., *Brewster v. Blackmore* (1925), 21 Ll. L. R. 258.

(c) See, as to express exceptions, *post*, p. 503, and pp. 561 *et seq.*

(d) As to implied exceptions, see *post*, chapter IX.

(e) *Re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K. B. 591.

(f) See *per ERLE, C. J.*, in *Marsden v. City and County Assurance Co.* (1865), L. R. 1 C. P. 232, at p. 239. Cf. also *Smith v. Cornhill Insurance Co., Ltd.*, [1938] 3 All E. R. 145.

(g) *Ante*, p. 197.

(h) For a full discussion, see Welford on Accident Insurance, 2nd Edn., pp. 174 *et seq.*

(hh) And therefore not a loss insured against, and not a peril insured against.

(i) See *post*, p. 570.

(j) See, e.g., *Gray v. Blackmore*, [1934] 1 K. B. 95; and see *post*, pp. 570 *et seq.*

(k) Though as a rule such use will be expressly excepted in a "general exception" clause. See *post*, pp. 561 *et seq.*, and *Levinger v. Licenses and General Insurance Co.* (1936), 54 Ll. L. R. 68; *Stone v. Licenses and General Insurance Co.* (1942), 71 Ll. L. R. 256; *Passmore v. Vulcan Boiler and General Insurance Co.* (1936), 54 Ll. L. R. 92.

(l) For example, is a horn either? Is a jack attached to the vehicle? Some are.

(m) Thus a fire extinguisher ordinarily attached to the vehicle is presumably not covered when taken off it. The meter of a taxi-cab has been held to be an "accessory" (*Roman v. Universal Insurance Co., Ltd.* (1939), 64 Ll. L. R. 288 (C. A.)).

(n) In many policies reference is only made to "accessories" in this clause. It seems doubtful whether a spare wheel is an accessory.

(o) (1932), 48 T. L. R. 574; 43 Ll. L. R. 398.

was suggested that the clauses quoted precluded recovery for loss of anything whilst not on the vehicle. DU PARCQ, J. (p), dealt with the point as follows :

" Even if I read that as meaning that the necessary accessories are only insured if they are actually on the car at the time, I think it carries the matter no further. Without such a provision accessories would not be covered at all unless they were an essential part of the car, and having included them the company say they are only to be included on condition that they are on the car. The engine is not an accessory and it is not suggested that it is. It is an essential part of the car, and in my opinion the mere fact that the engine is for the time being separated from the body does not deprive Mr. Seaton of his right to indemnity when the motor vehicle has been damaged, in the sense that one of its integral parts has been damaged."

" *Arising in Great Britain, Ireland, the Isle of Man, the Channel Islands or whilst in transit by sea between any ports therein and/or during the process of loading and unloading incidental to such transit.*"—This part of the clause (which like the rest of it must be read as subject to the express or implied exceptions (q) detailed hereafter) is reasonably simple. It is clear that the loss must "arise" whilst the vehicle is within the specified places or in transit (r). "Arise," it is submitted, is equivalent to "occurs" and does not mean "appear" (s), and, therefore, damages occurring for example in Germany but not appearing until the vehicle has returned to England would not be covered (s).

In this connection it should be noted that the loss must arise or occur in the sense indicated during the currency of the policy (t). Thus if a loss occurs before the policy comes into force it is not covered, although it only becomes apparent after that date (u). On the other hand, a loss which actually occurs during the currency of the policy, but becomes apparent only after its expiry, will in most cases be covered (v). But a loss which occurs after the policy expired is not covered, even though the cause of the loss occurred before, since the insurance is against loss and not against accident (w). It is equally important to note that not only must the loss arise within the area or places specified in this clause (x), and during the currency of the policy, but it must also arise during such use of the vehicle as is insured by the policy. When considering, therefore, what are the "excepted causes" not only this clause but the "description of use" clause (y), the "general exceptions" clause (a), and the "conditions" (b) must be looked at.

III.—EXCEPTIONS

The Company shall not be liable to pay for—"

" (a) Loss of use depreciation wear and tear mechanical or electrical breakdowns failures or breakages.

" (b) Damage to tyres by application of brakes or by road punctures cuts or bursts."

(p) As reported, 43 Ll. L. R., at p. 400.

(q) For implied exceptions, see *post*, pp. 561 *et seq.*, and chapter IX, "Implied Terms."

(r) As to meaning of "arise," see further *ante*, chapter IV, p. 197.

(s) See *post*, pp. 555 *et seq.*, as to the territorial limits of the policy generally.

(t) See, e.g., *Moore v. Evans*, [1918] A. C. 185.

(u) For a full statement of the law as to the time of occurrence of loss, see Welford on Accident Insurance, 2nd Edn., pp. 186 *et seq.*, and *Norman v. Gresham Fire and Accident Insurance Co.* (1935), 52 Ll. L. R. 292.

(v) See, e.g., *Verelst's Administratrix v. Motor Union Insurance Co.*, [1925] 2 K. B. 137.

(w) See *per* Lord ESHER in *Hough & Co. v. Head* (1885), 55 L. J. Q. B. 43, at p. 44.

(x) See, e.g., *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39.

(y) For this clause and explanation thereof, see *post*, p. 570.

(a) See pp. 561 *et seq.*, *post*.

(b) See pp. 589 *et seq.*, *post*.

To the exceptions here enumerated, a third and fourth paragraph might well for the sake of clarity be added, viz. :

(c) Loss or damage arising at any time when the vehicle is being put to any use other than the use insured by this policy, or is caused by, or arises out of, any matter specified in the General Exceptions Clause of this policy.

(d) Loss or damage caused by or arising out of any breach by the assured of the express (c) or implied (d) terms of this policy.

This part of this clause is perhaps as good an example as any of the peculiar way in which, as pointed out by the House of Lords, motor policies are drafted (e). These are the exceptions to this clause—i.e. to the "loss or damage to the vehicle" part of the insurance given by the policy. But later on it will be found that there are other exceptions to this clause. These come under a clause headed "General Exceptions," under which it might be supposed that exceptions applicable to each separate class of insurance in the policy would be found. But on examining the "general exceptions" clause, it will be seen that several of them are appropriate only to this part of the policy (f).

"(a) Loss of use depreciation wear and tear mechanical or electrical breakdowns failures or breakages."—This exception (and, as will be seen, that which follows it) presents many difficulties of construction.

1. "Loss of use."—This refers to the loss which the assured sustains of the user of the vehicle during the time that it is out of action as a consequence of some damage covered by the clause. As has been pointed out (g), such loss would without this express exception not be covered (h), unless the policy expressly extended to it. In certain circumstances, it should be noticed, insurers who fail to perform their part of the contract may be liable for loss of use (i). The exclusion of loss of use excludes any further loss caused thereby. One instance of such has already been given (k). Another example is the loss of the inland revenue tax (l), or the waste of garage space which may have been hired for a fixed period. It is noticeable that whilst loss of use is excluded from the cover given by the policy (m), damages for loss of use can be recovered from a third party who causes it (n). The implications of this circumstance upon "knock-for-knock" agreements are considered later (o).

2. "Depreciation."—This word presents little difficulty. It means that the insurers are not liable to make good any loss attributable to depreciation. In certain cases the loss by depreciation may be a considerable part

(c) E.g. driving the vehicle when in an unsafe condition. For an express clause to this effect, see *Bonney v. Cornhill Insurance Co* (1931), 40 Ll. L. R. 39; and as to implied condition of roadworthiness, *post*, pp. 606 *et seq.*, and *Trickett v. Queensland Insurance Co.*, [1936] A. C. 159.

(d) As to implied terms, see *post*, chapter IX.

(e) In *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413. See *ante*, p. 480.

(f) See *post*, p. 561.

(g) *Ante*, p. 502.

(h) See *Re Wright and Pole* (1834), 1 Ad. & El. 621; *Rogers & Co. v. British Ship-owners' Mutual Protection Association, Ltd.* (1846), 1 Com. Cas. 414; *Shelbourne & Co. v. Law Investment and Insurance Corporation*, [1898] 2 Q. B. 616.

(i) See *Player v. Anglo-Saxon Insurance Association, Ltd* (1930), 38 Ll. L. R. 62. And see *post*, chapter IX.

(k) *Ante*, p. 502.

(l) Some policies expressly cover this loss.

(m) Loss of use can, of course, be included for a special premium.

(n) See *Hobbs v. London and South Western Rail. Co.* (1875), L. R. 10 Q. B. 111; *The Grta Holme*, [1897] A. C. 596. And see *per Lord DUNEDIN* in *Admiralty Comrs. v. SS. Susquehanna*, [1926] A. C. 653, at p. 661.

(o) *Post*, chapter X.

of the total loss caused by damage to a vehicle. This may arise in two ways. In the first place a new car which has sustained serious damage, although that damage has been adequately repaired, is not so valuable as a new car which has never been damaged. In some cases, of course, the vehicle's value may appreciate as a result of the repair of damage, as when a new part such as an engine radiator or gear box in an old car is replaced for one such irreparably damaged.

In the second place the value of the vehicle may be considerably depreciated by the effluxion of time during its repair. A six months' old car of a current model is generally worth considerably more than one a year old and of the last year's model. Thus damage involving repairs which take a long time to execute may in certain cases involve a considerable depreciation in the second-hand value of the car. These, however, are rare cases.

3. "Wear and tear."—It is at this point the real difficulty of understanding these exceptions first appears. Loss of use and depreciation (or at any rate loss of use) clearly refers to a loss caused by or arising out of a loss covered by the clause (*p*).

"Wear and tear," on the other hand, is clearly a species of loss which cannot be caused by any of the losses insured against (*q*). It becomes necessary to decide whether "wear and tear" refers to the loss itself or to its cause. These words mean that no loss caused by wear and tear (*r*) is covered, or that loss or damage which can be described as being wear and tear is not covered, or they have both these meanings.

Loss or damage to the vehicle might in many cases be directly caused by wear and tear. Thus a loose steering wheel, shoeless brakes or trackless tyres, which would all be "wear and tear," might (as in *Barrett's Case* (*s*)) each be the direct cause of an accident resulting in the class of damage otherwise covered by the policy (*t*). And in such cases the loss or liability so caused might be (*u*) excluded by the implied condition of roadworthiness (*v*) or by an express term to that effect (*w*). It is submitted, however, that the true interpretation of the whole exception (*a*) is that it describes the type of loss or damage for which the insurers will not pay, and does not operate to exclude loss or damage caused by any of the matters enumerated (*b*).

(*p*) *I.e.* is a "consequential" loss, not so obviously outside the risks covered.

(*q*) *I.e.* is not a "consequential" loss. See as to wear and tear causing loss in marine insurance cases *Marine Insurance Act, 1906*, s. 55 (*c*) (9 Halsbury's Statutes 851), and *Chalmers' Marine Insurance*, 4th Edn., p. 71; and cases cited in note (*t*), *infra*.

(*r*) Cf. *McCull and Pollock, Ltd. v. Indemnity Mutual Marine Assurance Co., Ltd.* (1930), 47 T. L. R. 26.

(*s*) *Barrett v. London General Insurance Co.*, [1935] 1 K. B. 238; 49 Ll. L. R. 99.

(*t*) It is submitted that, apart from this excepting clause, it is doubtful whether damage caused by wear and tear would be covered by the policy. See *Wilson, Sons & Co. v. Xantho (Cargo Owners), The Xantho* (1887), 12 App. Cas. 503; *Koebel v. Saunders* (1864), 33 L. J. C. P. 310; *Wadsworth Lighterage and Coaling Co., Ltd. v. Sea Insurance Co., Ltd.* (1929), 35 Com. Cas. 1, and *British and Foreign Marine Insurance Co. v. Gaunt*, [1921] 2 A. C. 41, *per* Lord Birkenhead, at pp. 46, 47. It is important, therefore, if possible, to construe the exception in the sense indicated in the text.

(*u*) It would depend upon the facts of each case. See further *post*, pp. 606 *et seq.*

(*v*) See further *post*, pp. 608 *et seq.*, chapter IX, and *Trickett v. Queensland Insurance Co.*, [1936] A. C. 159.

(*w*) See the "unsafe condition" clause discussed, *post*, p. 606.

(*a*) Applying the *eiusdem generis* rule, as to which see *ante*, p. 482.

(*b*) This construction is fortified by the fact that the policy generally contains a condition expressly excluding liability arising from the vehicle's unsafe condition. See *post*, p. 606. But the clause in this specimen policy does this in a roundabout manner. There is no express exclusion of loss caused by unsafe condition. See p. 606, *post*.

This construction is, it is submitted, borne out by the circumstance that the exception expressly refers to *losses* in respect of which the insurers will not pay (c). It must be admitted, however, that this interpretation is made doubtful by the succeeding words (d), and by the fact that most policies which do not conform to this standard policy contain clauses worded in such a way as to make it clear whether a particular type of loss or any loss resulting from particular causes is excluded (e).

4. "Mechanical or electrical breakdowns failures or breakages."—

It is submitted that these words also must be taken merely as descriptive of the kind of loss for which the insurers will not pay, and do not refer to causes in respect of which the resultant loss or damage is excluded from the cover (f). Thus, if a mechanical failure or breakage occurs in the steering of the car, whereby the car is caused to collide with a lamp post (g), the damage resulting from the impact with the lamp post is covered (unless excluded by the express or implied exception as to unsafe condition (h)), although the breakage in the steering is not, and although the proximate cause of the collision with the lamp post is the breakage in the steering (i). On the other hand, whilst these words must be taken as descriptive of the kind of loss for which the insurers will not pay, the words must, it is submitted, be taken as *ejusdem generis* (k) with the preceding words "wear and tear." If this be so, "mechanical breakdown failure or breakage" does not mean precisely what it says, but means mechanical breakdown, failure or breakage *caused* by something inherent in the vehicle itself. Thus the breakage of an axle is a mechanical breakage, but if that breakage is caused by collision with another vehicle it is clearly covered by the policy (l). If, however, it is caused by some inherent defect in the axle itself, such as a flaw or fatigue in the metal, it is, it is submitted, a loss or damage excluded by this clause (m).

Again, a fire *caused* by an electrical failure or breakdown and resulting in the gutting of the whole car would be a loss covered by the policy (n): but the fusing of the lighting system resulting only in the electric wiring of the car being burned out would apparently not be covered. This, however, is doubtful, since there is no real distinction between the burning of wires caused by an electrical breakdown and the burning of any other part of the vehicle caused by the same (o). Moreover, it is difficult to find any distinction in principle between an electrical breakdown or failure which causes the whole car to be burned (p) and a mechanical breakage which causes

(c) i.e. "the insurers will not pay for"

(d) i.e. mechanical or electrical breakdowns, etc.

(e) See *post*, p. 513.

(f) See *above*

(g) See, for an example of this defect causing a collision with a third party, *Hutchins v. Maunder* (1920), 37 T. L. R. 72

(h) See *post*, pp. 506 *et seq*

(i) See, e.g., *Wadsworth Lighterage and Coaling Co., Ltd. v. Sea Insurance Co., Ltd* (1924), 35 Com. Cas. 1, and cases cited in note (l), *supra*

(k) As to the *ejusdem generis* rule, see *ante*, p. 482

(l) Since otherwise no damage to the vehicle would be covered

(m) Cf. *McCull and Pollock, Ltd v. Indemnity Mutual Marine Assurance Co., Ltd.* (1930), 47 T. L. R. 26; 48 Ll. L. R. 79

(n) Cf. some policies which expressly say that loss from fire so caused is covered.

(o) See, however, *Musgrove v. Pandelis*, [1919] 2 K. B. 43, where it was held that where a fire which consumed a car and other property originated in the carburettor, the cause of the damage was not the original fire in the carburettor but the greater fire which spread therefrom.

(p) N.B.—As indicated above (*ante*, p. 501, note (x)) many policies expressly limit the damage covered to that caused by "accidental external means." For the meaning of this phrase, see *post*, pp. 545 *et seq*.

other damage in the car itself (q). Thus the breakage of one connecting rod in the engine may irreparably damage the whole engine. Presumably, not merely the breakage of the connecting rod but all such damage consequent thereon would be regarded as mechanical breakage (or etc.) and excluded by this exception. But it is difficult to see what is the distinction between such damage and a case where the mechanical breakage of, say, a wheel, or the bursting of a tyre, causes the car to overturn or collide with another (r). These seem difficult questions which may have to be decided under such a clause as this (s).

5. "Damage to tyres by application of brakes or by road punctures cuts or bursts."—This exception clearly refers to the cause of the loss or damage, whilst also describing its nature. It follows that any description of loss or damage to tyres caused by any of the matters enumerated is excluded.

Those matters must, however, be the direct cause of the loss or damage. Thus, if the negligent application of brakes causes the car to collide with another object and the tyres are injured in the collision, it will be a question of fact to be decided in that case whether the damage to the tyres was caused by the collision or by the application of brakes (t). The same difficulty might arise where a collision involving damage to the covers of the tyres was caused by the bursting of the inner-tube of one of them (u).

IV.—REINSTATEMENT RIGHT

"The Company may at its own option repair, reinstate or replace such motor car or any part thereof and/or its accessories and spare parts or may pay in cash the amount of the loss or damage. The assured's estimated value as stated in the Schedule hereto shall be the maximum amount payable by the Company in respect of any claim for such loss or damage."

This part of the clause needs little comment. It should be observed that the insurers have the choice of paying cash in respect of any loss or damage or of themselves making it good.

Difficulties in respect of this optional right to make good rarely arise in practice in motor insurance cases. The right, which is known as the right of reinstatement, is one which is nearly always given to insurers in fire policies. It does not exist unless expressly given. Nevertheless, there appear to be very few English authorities upon the effect of this right. It may be said that, as appears obvious, the assured has no right to insist (v) either that the

(q) It should be noted that other damage to the car and other loss under the policy may be caused by an electrical breakdown as where there is a sudden "black-out" at night resulting in a collision. (*Cf. Barrett v. London General Insurance Co. (infra)*).

(r) See, e.g., *Barrett v. London General Insurance Co.*, [1935] 1 K. B. 238; 49 Ll. L. R. 99 (*post*) where an accident was caused by a sudden breakage of the brake-rod.

(s) In considering these matters it must be remembered that the policy nearly always contains a clause excluding liability if the loss is caused by the dangerous or inefficient state of the vehicle. As to this clause, see *post*, p. 606.

(t) For a full account of the position where a loss is apparently caused partly by a risk insured against and partly by an excepted risk, see Wellford on Accident Insurance, 2nd Edn., pp. 182 *et seq.*, and the cases there cited. And see the cases of which an account is given, *ante*, chapter IV, p. 197. It is submitted, however, that no general rules can be laid down.

(u) In such cases the insurers could not successfully argue that the accident was caused by the unsafe or deficient condition of the vehicle unless the burst was caused by a defect in the tyre. If it was, apparently they would repudiate in some cases, even if the defect was unknown to the assured. See *Trickett v. Queensland Insurance Co.*, [1936] A. C. 159.

(v) On the other hand, if the insurers elect to pay, they have no right to insist that the money shall be expended on reinstatement. See *ante*, chapter II, pp. 75 *et seq.*, and cases there cited, and see *Queen Insurance Co. v. Vey* (1867), 16 L. T. 239.

insurers shall pay or shall reinstate (*w*). Once the insurers have elected to reinstate they are bound by their election (*a*), and their liability under the policy becomes a liability to reinstate which cannot be discharged except by reinstatement (*b*).

If the insurers then fail to reinstate they are liable for damages for breach of contract (*c*), and the amount of such damages may or may not be the amount which would have been payable under the policy in lieu of reinstatement (*d*). Thus if, for example, the insurers elected to reinstate a car which had been lost or destroyed, and later failed to do so, they might be obliged to pay more than the value of the car at the time of the loss by way of damages—presumably the measure of damages would be the cost of replacement (*e*).

Under this part of this clause the insurers are not obliged, nor, on the other hand, can they assert a right, to reinstate the loss or damage at any particular place (*f*). If the car is wholly destroyed or lost, the insurers, if they decide to reinstate, must give the assured a car which is the equivalent of the car destroyed or lost (*g*). Presumably this could only be done by procuring a car of the same make, model, year and equipment as regards body work, etc., in as good condition as the old car. In most cases this would be difficult to do without the assured's consent (*h*), though it might in some be of advantage to both parties (*i*).

If the car is not wholly destroyed or lost, the insurers may choose themselves to execute any necessary repairs, and if they do so, the repairs so done must be sufficient to restore the car to its condition and value before the accident (*k*). In this case, as has been pointed out, the insurers are not (apart from any clause in the policy such as that considered below) entitled to insist that the repairs shall be done at any particular place (*l*), at any rate unless they pay the cost of any removal necessitated thereby.

V.—TOTAL LOSS

It should also be noted that whilst the *maximum* amount which the insurers can be called upon to pay in respect of any one claim is the estimated value of the car as stated in the policy, it does not follow that they will always be obliged to pay the whole of that amount even though the car is completely lost or destroyed. Thus in *Brewster v. Blackmore* (*m*) it was

(*w*) See *per* BOWEN, L.J., in *Anderson v. Commercial Union Assurance Co.* (1885), 55 L. J. Q. B. 146.

(*a*) *Brown v. Royal Insurance Co.* (1859), 1 E. & E. 853. And see *Anderson v. Commercial Union Assurance Co.* (*supra*).

(*b*) See *Brown v. Royal Insurance Co.* (*supra*).

(*c*) *Brown v. Royal Insurance Co.* (*supra*). And see *Times Fire Assurance Co. v. Hawke* (1859), 28 L. J. Ex. 317. Cf. *Plaver v. Anglo-Saxon Insurance Association, Ltd.* (1930), 38 Ll. L. R. 62.

(*d*) *Brown v. Royal Insurance Co.* (*supra*).

(*e*) The point has, however, never been decided. See *Brown v. Royal Insurance Co.* (*supra*), where the Court expressly refused to decide it. In cases where insurers agreed to reinstate an obsolete part which later was found to be unprocureable the cost of replacement might in some circumstances exceed the value of the car. *Quaere* whether in this case the limitation of their liability to the scheduled value would apply. And cf. the common limitation as to obsolete spare parts, *post*, p. 514.

(*f*) *Anderson v. Commercial Union Assurance Co.* (1885), 55 L. J. Q. B. 146.

(*g*) *Anderson v. Commercial Union Assurance Co.* (*supra*), *per* Lord Esher, at p. 148.

(*h*) Since it would be difficult to find a car sufficiently alike in condition, etc.

(*i*) As where the insurers had come into possession of a car (by way of salvage) in respect of which they had paid another assured. See further, *post*, p. 699.

(*k*) See *Anderson v. Commercial Union Assurance Co.* (*supra*).

(*l*) See *Anderson v. Commercial Union Assurance Co.* (*supra*).

(*m*) (1925), 21 Ll. L. R. 258.

held, under a similar policy, that, although the question was extremely doubtful, only the actual value of the car (*n*) could be recovered on a total loss. The policy provides that the insurers will indemnify the assured against loss, and this means actual loss. Except in the case of what are known as "valued" policies (*o*), which in practice are very often issued in motor insurance, the assured can never recover more than the amount of the loss or damage which he has in fact suffered (*p*). In *Edney v. de Rougemont* (*q*) the Official Referee gave a judgment in which he laid down the principles applicable and the method to be applied in determining the loss. These were as follows :

(1) The value of the car at the time of loss is to be calculated upon a basis of depreciation ;

(2) The rate of depreciation is to be ascertained by finding upon the evidence in each case what was the theoretical life (*r*) of the car (*s*) ;

(3) The depreciation for the first year (*s*) will be the rate per cent. so found plus something in respect of the dealer's commission on the car (*t*) ;

(4) The depreciation for the last year will be the rate so found less the scrap value of the car at the end of its life (*a*) ;

(5) The rate of depreciation is to be applied from year to year to the car's value at the beginning of each year, and not yearly to its original cost.

In the result the Official Referee held that an American car bought in February 1924 for £500 was at the time of its destruction by fire in December 1926 worth £255, its theoretic life being 5 years and the rate of depreciation therefore 20 per cent. per annum.

In this case it was held that the evidence of a prospective purchaser as to the price he would have given for the car was not the proper test. Whilst the rate of depreciation is clearly a reliable method, it is submitted that special factors in each case must be considered (*b*). On the other hand, the market price at which a car of similar make, type and year could be bought at the time of loss does not seem to be a fair test (*c*).

Even if a fair test, it is one extremely difficult, as a rule, to find on the evidence. Thus in *Brewster v. Blackmore* (*d*) the assured in 1923 bought a car, which at that time was 10 years old, for £100. He spent a considerable

(*n*) The actual value was found to be £300, the "insured value" being £500.

(*o*) "It is very desirable in these cases that the point should be made clear ; and I certainly think that to a layman looking at his policy, he, with good reason, would be led to suppose that he had got a real valued policy on which he could recover the insured amount on a total loss." *Per* MACKINNON, J., in *Brewster v. Blackmore* (*infra*).

(*p*) (1925), 21 Ll. L. R. 258, at p. 203. (*q*) (1927), 28 Ll. L. R. 215.

(*r*) *I.e.* the life the car would have lived had it not been destroyed.

(*s*) *I.e.* from the date on which it was bought by the assured. But where, as often may happen, the car is bought just after or before a new model has come out, it is submitted the rate of depreciation for the first year would be more rapid.

(*t*) Thus if the theoretical life is 5 years, as was found in the case cited, the rate will be 20 per cent.

(*a*) *I.e.* in the case cited, 20 per cent. plus 5 per cent. It is difficult to understand why the dealer's commission should be taken into account. The assured had to pay this, and would have to pay it in buying a new car. And if the dealer's commission, why not the manufacturer's profit ?

(*b*) *E.g.* the use to which the car had been subjected during its actual life : whether it had been recently repaired or renovated : the value of any special accessories destroyed or lost with it, etc., etc.

(*c*) Because there is generally a considerable difference between the price for which a second-hand car can be bought and that at which it can be sold. Moreover, what is the "market"—is it motor dealers or private sellers or both ?

(*d*) (1925), 21 Ll. L. R. 258.

sum upon renovating it (e) and insured it for £500. It was destroyed in 1924 by being deliberately and maliciously burned by a third party (f). At the trial (g) evidence was given of the value of the car at the time of loss ranging from £50 to £500. In the result **MACKINNON, J.**, found the value to be £300, and gave judgment for the assured accordingly.

Whilst the limitation of the insurers' liability under this clause to the amount stated as the value of the car in the Schedule makes it clear that no more than that amount can in any circumstances be recovered, it should be noted that where no such limitation is clearly stated, the insurers may be liable to pay an amount greater than the value so stated. Thus in *Re Wilson and Scottish Insurance Corporation* (h) a claim was made under a motor policy in respect of a total loss of the insured car caused by fire. The policy contained the following clause :

"The insurers will indemnify the assured against damage by fire : . .
"of any vehicle belonging to the assured and described in the Schedule
"hereto to an amount not exceeding the full value of the car . . ."

In the proposal form the assured had stated that he estimated the then value of the car as £250. It was proved that at the time of the fire the car was worth £400, and the assured sought to recover this sum under the policy. The insurers objected that he could not recover more than the value as estimated in the proposal—namely, £250. It was held that, provided the increase in value had wholly accrued since the date on which the policy was renewed, the assured was entitled under the policy to recover the full value of the car—namely, £400.

1. Real loss necessary.

At this stage it should be noted, as an illustration of the rule that the insurers are only obliged to indemnify the assured in respect of his actual loss, that if the assured is compensated for his loss from any other source the insurers' obligation to indemnify is *pro tanto* discharged. The type of policy now under consideration expressly provides in a clause which will be dealt with later (i) that in the event of the assured being covered in respect of any loss or damage by another policy the insurers shall not be liable to pay or contribute more than its rateable proportion of the indemnity for such loss or damage. Apart from this the general rule is that

"Where there is a contract of indemnity . . . and a loss happens, anything
"which reduces or diminishes that loss reduces or diminishes the amount
"which the indemnifier is bound to pay" (j).

The latter part of this rule, which is treated as a branch of the principle of subrogation, is dealt with later (k) when that subject is considered (l). The first part of it is illustrated in cases where the loss or damage has been caused by a third party from whom the assured recovers compensation therefor. In such cases the insurers' liability is reduced by the amount which the assured so recovers (m).

(e) The report does not say what sum.

(f) The insurers alleged, but failed to prove, at the instigation of the assured.

(g) The insurers having repudiated liability on the ground stated in the last note.

(h) [1920] 2 Ch. 28.

(i) *Post*, pp. 527 *et seq.*

(j) *Per Lord BLACKBURN* in *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333, at p. 339.

(k) *Post*, chapter X.

(l) See *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.* (1877), 5 Ch. D. 569; *Law Fire Assurance Co. v. Oakley* (1888), 4 T. L. R. 309; *Fifth Liverpool Starr-Bowdell Building Society v. Travellers Accident Insurance Co., Ltd.* (1893), 9 T. L. R. 221; and see *per BRETT, L.J.*, in *Darrell v. Tibbitts* (1880), 5 Q. B. D. 560, at p. 562.

(m) See *post*, chapter IX, as to the assured's right to payment of an indemnity.

But in this case, of course, the sum by which the insurers' obligation is reduced is the sum recovered by the assured after deduction of the expenses of recovering it (n).

The same rule applies where the assured receives gratuitous compensation for his loss (o). But the compensation which the assured thus receives must be paid in respect of the loss (p).

Thus if after the assured loses his car by theft or fire, he receives another car by way of gift, the gift does not diminish his loss for this purpose unless it was made with that object (q).

2. Cost of removal.

"If such motor car is disabled by reason of such loss or damage the Company will bear the reasonable cost of protection and removal to the nearest repairers. The Company will also pay the reasonable cost of delivery to the assured after repair of any loss or damage insured under the policy not exceeding the reasonable cost of transport to the address of the assured in Great Britain Ireland the Isle of Man or the Channel Islands as stated herein."

This part of the clause needs little explanation. It should, however, be observed that it only operates in respect of a breakdown caused by loss or damage covered by the policy (r). It applies whether the insurers elect to reinstate (s) or to pay money in discharge of the indemnity. As was pointed out above (t), the insurers cannot, if they elect to reinstate, insist upon the car being brought to any particular place at the assured's expense. On the other hand, without and apart from this clause they would probably be obliged to pay the cost of removal of the car to the nearest repairers, and of its return after repair to the place where the damage occurred. But it is submitted that they would not, apart from any such clause as this, be obliged to deliver the vehicle to the assured wherever he was at that time. Thus if the assured, resident in London, takes his car to Ireland on holiday, and whilst there the car being damaged is repaired, but the assured is obliged to return to London, the insurers would not, it is submitted, be obliged to pay the cost of transporting the car from Ireland to London. But it seems that under this clause they undertake such liability. It should be noted, however, that neither under this clause nor apart from it (u) are the insurers liable to pay any extra travelling expenses to which the assured may be put by reason of his being unable to make use of his car (v). Presumably, the word "protection" in this context refers to cases where a damaged vehicle has to be left by the roadside and it is necessary (w) to employ some

(n) *Post*, chapter X; and see *Horse, Carriage and General Insurance Co., Ltd. v. Petch* (1916), 33 T. L. R. 131.

(o) See *Hatch, Mansfield & Co., Ltd. v. Weingott* (1906), 22 T. L. R. 366; *Assicurazioni Generali di Trieste v. Empress Assurance Corporation, Ltd.* [1907] 2 K. B. 814.

(p) See *Stearns v. Village Main Reef Gold Mining Co., Ltd.* (1905), 10 Com. Cas. 89, and cf. *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333; *Randal v. Cockran* (1748), 1 Ves. Sen. 98.

(q) See *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333. And see further, *post*, chapter X.

(r) Some particularly generous policies cover towage after a breakdown of any kind, for example a mechanical or electrical failure of the type expressly excluded from the policy reproduced in this chapter.

(s) As to reinstatement, see *ante* pp. 507 *et seq.*

(t) *Ante*, p. 508.

(u) *I.e.* apart from the express exclusion of indemnity for loss of use.

(v) Since this arises from loss of use. See *ante*, p. 504. As to when the insurers may be liable for the hire of a car by the assured in place of the insured vehicle, see *Player v. Anglo-Saxon Insurance Association, Ltd.* (1930), 38 Ll. L. R. 62, and see *post*, p. 678.

(w) To prevent theft (*s.g.*, of the accessories).

person to guard it (a). The different rights in the case of damage occurring abroad should be noticed (b).

3. Cost of repairs.

"In the event of any car described in the Schedule hereto sustaining damage for which the Company may be liable under this policy the assured may take any necessary steps to have such car removed to the nearest repairer and may give instructions to proceed with such repairs as are reasonable and necessary subject to a detailed estimate being previously obtained by the assured and forwarded to the Company."

The effect of this clause is not altogether clear. On the one hand, it does not expressly say that the insurers will pay for such repairs as are ordered by the assured in accordance with its terms; whilst on the other it does not make clear whether the approval of the estimate referred to is a condition precedent to the insurers' liability to pay for such repairs. If there is such a condition precedent, the clause seems meaningless, since it gives the assured no rights which he would not otherwise have (c), but if approval of the estimate is not a condition precedent this seems inconsistent with the insurers' optional right themselves to repair the car. It is apprehended, however, that the true meaning of this clause is that the insurers undertake to pay for any reasonable and necessary repairs in respect of damages, for which they are liable under the policy, provided that the repairs are not ordered by the assured without first obtaining a detailed estimate from the repairers and provided that he forwards such estimate without delay to the insurers. If he complies with these provisions it would seem that the insurers are liable to pay for the repairs, although the charges in respect thereof are in fact unreasonable (except, it is submitted, where this unreasonableness is apparent to the assured (d) on the face of the estimate).

Although the subjects of waiver and estoppel are dealt with elsewhere (e) in connection with clauses of this kind dealing with the assured's right to order repairs the decision in *McConnell v. Poland* (f) should be noted. In that case the assured sustained damage to his car. His policy contained a clause providing that no charges for repairs should be incurred without the written consent of the insurers. The assured obtained no written consent, but the insurers verbally accepted an estimate given by a firm of repairers, but did not order the repairs, which were done on the instructions of the assured. The insurers refused to pay on the ground that no written consent had been given. Another point taken by them was that the assured had prejudiced their position by agreeing to pay (and in fact paying) unreasonably high charges for the repairs.

It was held that :

- (1) The insurers having given verbal assent could not rely upon the lack of written consent ;
- (2) The assured did not act to their prejudice in ordering the repairs,

(a) Or to cover it with tarpaulin to prevent weather damage.

(b) The liability for cost of delivery to the assured being then limited to delivery to him in the country where the damage occurred. See *post*, p. 555.

(c) In the case of an accident occurring on the road he would in any case be entitled if not obliged to remove the car to the nearest garage (which in some cases would be the nearest repairers, though often the nearest garage is unable to execute any serious repair work).

(d) *See quære* : in the case next cited in the text it appears to have been held that the insurers could never be liable for more than reasonable charges, though on what principle was not explained.

(e) See chapter IX, *post*.

(f) (1926), 23 Ll. L. R. 77.

since even if the charges were unreasonable the insurers could not be liable for more than what was reasonable (*g*).

Before leaving the above clause of this specimen policy the reader must again (*h*) be reminded that the clause must be read as subject to :

- (i) The exceptions within it ;
- (ii) The further exceptions to be found in the General Exceptions Clause ;
- (iii) The conditions printed at the foot of the policy ;
- (iv) Any exceptions to be implied.

Four examples to illustrate the importance of this may be given here :

(1) By a sub-paragraph of the General Exceptions Clause (*i*) the insurers are not liable under this clause in respect of any loss or damage to the car sustained whilst it is being driven by a driver who is not qualified to hold a driver's licence.

(2) By a further sub-paragraph of the General Exceptions Clause the insurers are not liable under this clause in respect of any damage caused by civil commotion in Ireland.

(3) By the combined operation of Conditions 5 and 7 (*k*) of the conditions at the foot of the policy the insurers are not liable under this clause for any loss or damage if the assured has failed to take all reasonable steps to safeguard from loss or damage or to maintain the car in an efficient condition (*l*). Thus if the assured has failed to keep his car in an efficient condition he may be unable to recover any loss or damage to it sustained in accident even though the accident was neither caused by nor happened at the time of such inefficient (*m*) condition. Moreover, if after the accident the assured fails to take a reasonable step to minimise the damage thereby caused—as, for example, by driving the car under its own power when it ought to be towed—he may find himself unable to recover under this clause (*n*).

Finally, it should be noted that the loss and damage clause and other clauses of the same type (*o*) are unaffected (*p*) by either of the Road Traffic Acts, 1930 (*q*)-1934 (*r*).

4. Loss and Damage Clauses in other Policies.—The corresponding loss and damage clauses to be found in other motor policies which do not conform to the standard of which a specimen is examined in this chapter, and in policies which insure other classes of vehicles, contain many differences in form and a considerable number in substance. Of the latter, considerations of space forbid the mention of more than the following points :

- (1) Many policies exclude loss or damage caused by frost.

(*g*) Cf. *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308, *post*, chapter IX.

(*h*) See further *ante*, p. 503.

(*i*) *Post*, p. 561.

(*k*) See *post*, as to the effect of these conditions, pp 606 and 623. (*l*) See *post*, p. 606.

(*m*) See *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 46 T. L. R. 71.

(*n*) Cf. *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39, and see further, *post*, pp. 606 *et seq.*

(*o*) *I.e.* insuring against loss or damage to the insured car.

(*p*) Save that where the insurers have been obliged to pay in respect of a third party claim by reason only of the provisions of s. 38 of the Act of 1930, of s. 12 of the Act of 1934, or of the M.I.B. Agreements, they may be entitled to claim from the assured a sum in excess of that which he claims for damage to the car. See *ante*, chapters IV, V and VI, and *post*, chapter IX.

(*q*) 23 Halsbury's Statutes 607.

(*r*) 27 Halsbury's Statutes 534, which apply only to insurance in respect of third party liability for death, personal injuries, or statutory medical fees.

(2) Some policies expressly provide that, whilst the insurers are not liable for wear and tear, etc., they will pay for loss or damage sustained in an accident or fire caused by wear and tear, mechanical or electrical breakage, etc. (s).

(3) Policies frequently provide that in the event of the licence on the vehicle being lost or destroyed in accident to or loss of the vehicle the insurers will indemnify the assured against the pecuniary loss thereby caused (t).

(4) In many policies the value of the insured vehicle is agreed (a), so that whenever during the currency of the policy the vehicle is lost or completely destroyed the insurers pay the full amount of the value as stated in the policy (b) whatever the real value at the time of the loss may be (c).

(5) Some policies contain a provision of which the following may be taken as an example :

"Notwithstanding anything contained in this policy, in the event of
 "any part of the insured motor cycle and/or side-car and/or its accessories
 "becoming unobtainable or obsolete in pattern and therefore out of stock,
 "the liability of the insurers shall be for the value of that part at the time
 "of the accident not exceeding the manufacturers' last list price in respect
 "of such part or accessory."

(6) *Personal Luggage Clause*.—Many private car policies insure against loss or damage not only the vehicle or its accessories, but also luggage, rugs and other personal belongings carried on it up to a certain value.

The meaning of "personal luggage" was discussed in *Piddington v. Co-operative Insurance Society* (d), of which a full account has been given in a previous chapter (e). It was held that the phrase "personal luggage" meant something in contradistinction to "merchandise" and that laths of wood for gardening purposes were "personal luggage."

"Any other construction leads to the conclusion that the carriage of a
 "packet of seeds, or a rosebush, or the various other articles which ordinary
 "users of private motor cars habitually carry home for the adornment or
 "use of their families, their homes, or their gardens . . . would constitute
 "the conveyance of 'goods other than personal luggage'" (f).

(7) Commercial vehicle policies covering steam-driven vehicles usually exclude liability to pay for loss of or damage to the insured vehicle if caused by explosion of the vehicle's boiler (g).

(8) Many policies cover loss by fire under a separate clause (h).

VI.—LIABILITY TO THIRD PARTIES CLAUSE

"The Company will indemnify the assured in the event of accident
 "caused by or through or in connection with any motor car described in
 "the Schedule hereto in Great Britain Ireland the Isle of Man or the
 "Channel Islands against all sums including claimant's costs and expenses
 "which the assured shall become legally liable to pay in respect of—

"(a) Death of or bodily injury to any person except where such death
 "or injury arises out of and in the course of the employment of
 "such person by the assured.

(s) Cf. *ante*, p. 505, the difficulties of interpretation under this clause

(t) To some extent, but they do not generally indemnify completely against this.

(a) Called "valued policies."

(b) In the absence, of course, of fraud.

(c) Cf. *ante*, p. 507, and see *Brewster v. Blackmore* (1925), 21 Ll. L. R. 258

(d) [1934] 2 K. B. 236

(e) Chapter V, *ante*.

(f) *Per* LAWRENCE J., *Piddington v. Co-operative Insurance Society*, [1934] 2 K. B. 236, at pp. 238, 239

(g) And some exclude any loss or liability caused by the goods which the vehicle carries, e.g. explosives, a separate insurance for these being required.

(h) See, e.g., *Seaton v. London General Insurance Co., Ltd.* (1932), 48 T. L. R. 574; *post*, p. 589.

" (b) Damage to property other than property belonging to the assured
" or held in trust by or in the custody or control of the assured.

" The Company will pay all costs and expenses incurred with its written
" consent.

" The Company will pay the solicitor's fee for representation at any
" coroner's inquest or fatal inquiry in respect of any death which may
" be the subject of indemnity under this section or for defending in any
" court of summary jurisdiction any proceedings in respect of any act
" causing or relating to any event which may be the subject of indemnity
" under this section."

A great deal of the law relevant to this clause has already been considered in a previous chapter (i) when dealing with the requirements of section 36 (1) (b) of the Road Traffic Act, 1930 (k). It is unnecessary to repeat here the explanation and discussion of those requirements.

" *The insurers will indemnify the assured.*"—The nature and meaning of indemnity have been explained in an earlier chapter (l).

(1) The obligation to pay the indemnity arises at the moment the liability to the third party is incurred by the assured—viz. at the moment of the accident (m).

(2) It is to some extent doubtful whether the assured has now (n) in any case a right to claim payment of the indemnity to himself. This question is discussed later (o), where it will be seen that in most cases the obligation to indemnify can be discharged by satisfying the assured's liability to the third party by payment to the third party direct.

It should be noticed that there is nowhere in the specimen policy any express term equivalent to the reinstatement term in the loss or damage to vehicle clause (p) which entitles the insurers to discharge the third party liability indemnity by payment direct to the third party to whom the corresponding liability is incurred. It is therefore doubtful, at any rate under some policies, whether the obligation to indemnify can be discharged otherwise than by payment of a sum of money to the assured equivalent to his liability to the third party (q). That is to say, it is doubtful whether the insurers can discharge their obligation to their assured by discharging his liability to the third party, as by paying compensation to the third party direct. This question is now, however, of only academic importance in most cases (r), for the following reasons:

(1) By the Third Parties Act, 1930 (a), the assured's trustee in bankruptcy cannot, as he could before that Act came into force, claim payment of the indemnity for the benefit of the assured's creditors in case of bankruptcy (b), the right to the indemnity being transferred in that event to the third party by that Act. It follows that in the only case where insurers by

(i) *Ante*, chapter IV, pp. 188 *et seq*

(k) 23 Halsbury's Statutes 607.

(l) *Ante*, chapter II, pp. 72 *et seq*

(m) *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch 793, at p. 800.

(n) As to the position formerly, see *ante*, chapter II, pp. 74 *et seq*.

(o) *Post*, chapter IX

(p) See *ante*, p. 501.

(q) See *ante*, chapter II, pp. 74 *et seq*. and chapter III, p. 157, and *cf. per* GREER, L.J., in *Israelson v. Dawson*, [1933] 1 K. B. 301, and in *France v. Piddington* (1932), 43 Ll. L. R. 491.

(r) It could only now be of practical importance in cases of damage to third party's property, and see further, *post*, chapter IX.

(a) The Third Parties (Rights against Insurers) Act, 1930 (23 Halsbury's Statutes 12), *ante*, chapter III.

(b) See *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793.

paying the third party direct might be obliged to pay the indemnity twice can no longer arise (c). In all other cases insurers who had discharged the assured's liability to the third party could at most be made to pay nominal damages for not having paid the indemnity to the assured direct (d).

(2) The provisions (e) of section 10 of the Road Traffic Act, 1934 (f), impose upon insurers the overriding obligation to discharge the third party liability by direct payment to the third party in all cases where such liability is in respect of death or bodily injuries or fees for emergency treatment, and when judgment has been obtained for such liability by the third party (g).

(3) Practically every motor policy now in use contains a clause whereby the insurers have the right to take over and conduct in the name of the assured the settlement of any third party claim (h). Although it depends upon the exact words used in each case, it is thought that in most cases this clause gives the insurers the right to pay the third party direct.

It should also be remembered that the obligation to indemnify, however it may be discharged, arises at the very moment the liability to which it relates is incurred by the assured—namely, at the time of the accident (i). Moreover, although the obligation to pay the indemnity may be discharged by payment to the third party, the right to claim is vested in the assured sufficiently to enable him to assign it to the third party (j).

"Accident caused by or through or in connection with any motor car described, etc."—The meaning of the word "accident" is discussed (k) later in this chapter (l) when considering the meaning of the word "accident" in a succeeding clause (l) of the policy (m). Trespass might be covered in its absence (mm). In this part of the clause the phrase "in connection with" is of importance. The words which precede it would by themselves apply only to an accident directly caused by the insured car. Thus where a third party was bitten by a dog left in the car (n), and known by the assured to be vicious, the assured might be liable to such third party in damages. The accident giving rise to the liability would not be one caused by or through the car, but it might be said to be in connection with it (n). Thus in *Musgrove v. Pandelis* (o) the owner of a car was held liable to a third party for the results of a fire which started by a back-fire in the carburettor when the car was stationary in its garage, spread to the petrol tank, and eventually reached the third party's property. Again,

(c) A possible case of difficulty might arise where the insurers paid the sum in settlement to the wrong person, e.g. a person not properly constituted agent of the third party to receive it. See *McCarthy v. Dixon & Co. (London), Ltd* (1924), 19 Ll. L. R. 29, *post*, chapter IX, and the analogous case of *Bowers v. Morton* (1940), 67 Ll. L. R. 1.

(d) As to nominal damages, see *ante*, chapter I.

(e) As to these provisions, see *ante*, chapter V, pp. 278 *et seq.*

(f) 27 Halsbury's Statutes 534

(g) See *ante*, chapter V, p. 341

(h) As to this clause, see *post*, p. 596

(i) See *per* TOMLIN, J., in *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch 793, at p. 800. The obligation to pay money in discharge of the indemnity cannot, however, arise until the amount thereof is quantified

(j) See *Jenkins v. Deane* (1933), 103 L. J. K. B. 250

(k) *Post*, p. 543.

(l) The "injuries to owner" clause, where the word "accidental" has, it is submitted, the same meaning as in this context.

(m) For a complete collection of the authorities and a very full discussion, see Welford on Accident Insurance, 2nd Edn.

(mm) Some policies cover "any liability" which would apparently cover trespass, as to which see *ante*, p. 35.

(n) See, e.g., *Sycamore v. Ley* (1932), 147 L. T. 342; and *cf. Fardon v. Harcourt-Rivington* (1932), 48 T. L. R. 215.

(o) [1919] 2 K. B. 43.

under section 16 (p) of the Road Traffic Act, 1934 (q), the assured may become liable to pay certain fees for emergency medical treatment in cases where bodily injury is sustained by any person "arising out of" (r) the use of the insured car whether caused by its use or not. This, it is submitted, would clearly be a liability "in connection with" the insured car (s), and would therefore be covered by this clause provided it could be said to be a liability in respect of bodily injuries (t). It should be noted that the corresponding clauses in many other policies which do not follow this standard form provide indemnity in respect of liability caused by, or arising out of the use of the insured car. It is submitted that in such clauses "arising out of" has the same meaning (u) as "caused by," and that therefore such policies do not cover liability in respect of emergency treatment under section 16 administered to persons for whose injuries the assured is not responsible. Moreover many policies use the expression "caused by" alone. In this connection the use of the compendious expression "caused by or arising out of the use of a vehicle on a road" in the Road Traffic Acts should be observed. Section 36 (1) (b) (v) refers to liability to third parties "caused by or arising out of the use of the vehicle on a road" (w). As was submitted before (x), the phrase "arising out of" is in this section synonymous with "caused by." In other words, that section requires liability to be covered which is directly caused by the use of the vehicle (y), and not any liability of which the use of the vehicle may be a *causa sine qua non* (z).

In subsection (1) of section 16 (a) of the Road Traffic Act, 1934 (b), the motorist is made liable to pay certain fees for medical treatment in respect of bodily injury or death "caused by, or arising out of," the use of a motor vehicle. In this subsection, it is submitted, the use of commas makes it clear that "arising out of" is not synonymous with "caused by" and has the wider meaning which includes a mere *causa sine qua non*. That that is the effect of these words in this subsection is made clear by subsection (3) of section 16 (c). Where these words are found, *without commas*, in a motor policy it is submitted that the two expressions are synonymous and that a liability arising out of the use of the insured car, in the sense that such use was the *sine qua non* (d), but not the direct cause of the liability, is not covered (e). Thus, if a lorry insured under a commercial vehicle policy which provided an indemnity against liability caused by or arising out of the use of the vehicle on the road, carried some goods which exploded and caused damage

(p) See *ante*, chapter V, p. 341.

(q) 27 Halsbury's Statutes 534.

(r) As to the meaning of this phrase, see further, *ante*, chapter IV, p. 197, and chapter V, p. 343.

(s) Or in connection with its use.

(t) It should be noticed that such medical fees are "in respect of" death or bodily injuries, and are so deemed to be by the section itself. See *ante*, chapter IV, p. 189.

(u) See further as to the meaning of "arising out of," *ante*, chapter IV, p. 197, and cases there cited.

(v) See *ante*, chapter IV, p. 188.

(w) See further, *ante*, chapter IV, p. 197, and cases there cited.

(x) *Ante*, chapter IV, p. 197.

(y) It may be difficult in certain cases to determine whether the liability is caused by the use of the vehicle. See, e.g., *Musgrove v. Pandelis*, [1919] 2 K. B. 43.

(z) For the meaning of this phrase, see *ante*, chapter IV, pp. 168 *et seq.*

(a) *Ante*, chapter V, p. 341.

(b) 27 Halsbury's Statutes 547.

(c) *Ante*, chapter V, p. 347.

(d) See *Winspear v. Accident Insurance Co.* (1880), 6 Q. B. D. 42; *Lawrence v. Accidental Insurance Co., Ltd.* (1881), 7 Q. B. D. 216; but cf. *Re Hawke, Ex parte Scott* (1885), 16 Q. B. D. 503.

(e) Cf. *Musgrove v. Pandelis*, [1919] 2 K. B. 43, where a car whilst in a garage caught on fire, the fire spread and damaged a third party's property. The fire started in the carburettor and spread to the petrol tank, which exploded.

to a third party (*f*), it is doubtful whether the resultant liability to the third party would be covered by the policy (*g*).

"*In Great Britain, etc. . . . against all sums including claimant's costs and expenses which the assured shall become legally liable to pay.*"—The questions of use outside Great Britain are considered later (*gg*). It must be observed that this clause makes no provision for costs or expenses for which the assured may become liable to other than third parties—for example, to his solicitor for defending proceedings, or to a taxi driver for conveying an injured third party to hospital. Whether or not the assured is entitled to an indemnity for these depends upon other clauses (*h*) in the policy and upon the circumstances, and is a question considered later (*i*).

It should also be noticed that without these words the insurers may be liable for any costs or expenses (*j*) for which the assured becomes liable to a third party provided this liability has not been created or increased by his unreasonable conduct, as for example by his insisting upon fighting an action to which there was no reasonable defence (*k*). Thus in *Allen v. London Guarantee and Accident Co., Ltd.* (*l*), where the indemnity was limited to £300 in respect of third party claims *including* costs and expenses, it was held that the insurers were liable to indemnify the assured in respect of the costs awarded against him in proceedings which they had insisted on defending (*m*) although the damages exceeded £300. But in practice in motor policies the question of the defence of third party proceedings is always governed by an express condition considered later (*n*). The operation of that condition usually determines the liability of the insurers for the "claimant's costs" as well as for the assured's own costs.

At first sight the words printed above might seem to suggest that the insurers are only obliged to pay an indemnity in respect of a liability which has been transformed into a judgment debt (*o*): in other words, that "legally liable" (in other policies "liable at law" and similar expressions are used) means liability which "shall" after the accident "become" established in a Court of law. It is submitted, however, that this is not the meaning of this clause, since the liability is expressly said to be in respect of death or bodily injury and damage to property. It follows that the obligation to indemnify arises as soon as the liability is incurred (*p*), but the obligation to pay a sum of money in discharge of the indemnity does not arise until the amount thereof is quantified (*q*).

"*Claimant's costs and expenses.*"—It is not completely clear what this refers to.

(*f*) See, e.g., *Farrant v. Barnes* (1862), 11 C. B. (N. S.) 553. This is sometimes expressly excluded from commercial vehicle policies.

(*g*) As to whether such a liability is required to be insured against, see *ante*, chapter IV, p. 197.

(*gg*) *Post*, pp. 555 *et seq*.

(*h*) See *post*, p. 542, and chapter X.

(*i*) *Post*, p. 542 and chapter X.

(*j*) Cf. *Xenos v. Fox* (1869), L. R. 4 C. P. 665.

(*k*) *Post*, chapters IX and X.

(*l*) (1912), 28 T. L. R. 254.

(*m*) Under a clause giving them power to do so, see further, *post*, p. 582.

(*n*) *Post*, p. 582.

(*o*) Cf. the provisions of s. 10 of the Road Traffic Act, 1934, under which they are obliged to discharge such a liability directly to the third party. See *ante*, chapter V, p. 278.

(*p*) See *per* TOMLIN, J., in *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch 793, at p. 800, and see further, chapter II, *ante*, pp. 72 *et seq.*, as to the meaning of "indemnity".

(*q*) *I.e.* until the amount of the compensation or damages due to the third party is determined in one way or another, e.g. by settlement with him or by judgment. In this connection the case of *Marlin v. Bannister* (1933), 47 Ll. L. R. 270, *post*, chapter X, should be noticed.

It may be either or both :

- (i) costs or expenses arising out of the subject-matter of the liability—the death, bodily injury or damage to property (r), or
- (ii) costs and expenses incidental to litigation incurred for the purpose of enforcing the liability.

In so far as it means the former it is apparently redundant (s). In so far as it signifies the latter it is not superfluous, since without their express inclusion it might be doubtful how far costs would be "in respect of" death or bodily injury, etc., rather than "in respect of" the litigation. The difficult questions which arise where the insurers repudiate and the assured, although able to pay the sum claimed by the third party, wrongfully or unreasonably refuses to do so, are discussed in a later chapter (t).

1. Death or injury.

"(a) *Death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the assured.*"—This part of the clause follows the wording of section 36 (1) (b) of the Road Traffic Act, 1930 (u), and the proviso to that subsection. The requirements of that subsection have been considered in a former chapter, to which the reader is referred (v). It may be remarked here that this clause goes further than is required by section 36 (1) (b) in that it includes liability in respect of passengers in the insured vehicle, whether such passengers are carried for hire or reward or in pursuance or by reason of a contract of employment or not. Some comprehensive policies exclude liability to passengers who are "members of the assured's household," others exclude liability to any friend or relative of the assured. On the other hand, policies which give "Road Traffic Cover" only, exclude liability to *voluntary* passengers (a), as is permitted by the proviso to section 36 (1) (b) (c). Again, certain other policies, generally those covering commercial vehicles, limit the classes of persons entitled to be carried in the insured vehicle (d). The meaning of the phrase "member of the assured's household" was considered in *English v. Western* (e). The plaintiff assured sued the defendant underwriter for a declaration that he was entitled to be indemnified by the defendant in respect of compensation which the plaintiff might be liable to pay to his father and his sister following an accident in which the plaintiff was involved while driving the insured car with his father and sister as passengers. Both the plaintiff and his sister lived with their father and were in receipt of allowances from him, paying nothing towards the household expenses. The policy excluded cover for death or injury to "any member of the assured's household who is being carried in the car." The defendant contended that the sister was a member of the assured's household. The Court of Appeal by a majority (c) (SISSER and CLAYTON, L.J.J., GODDARD, L.J. (as he then was), dissenting) held that the phrase in question was ambiguous, in that it could be construed to refer either to the narrower class

(r) *E.g.* the third party's medical expenses.

(s) Since such expenses are included in the liability "in respect of" death or bodily injury to third parties. See *ante*, p. 189.

(t) See further, *post*, chapter X.

(u) 23 Halsbury's Statutes 607; *ante*, chapter IV.

(v) *Ante*, chapter IV, p. 188.

(a) *I.e.* non-paying passengers.

(b) See *ante*, chapter IV, pp. 202 *et seq.*

(c) Such policies *include* liability to persons being carried by reason of or in pursuance of a contract of employment as required by s. 36. See *ante*, chapter IV, p. 202.

(d) Cf. *Twine v. Bean's Express, Ltd.*, [1946] 1 All E. R. 202.

(e) [1940] 2 K. B. 156; [1940] 2 All E. R. 515 reversing judgment of BRANSON, J.

of members of a household of which the assured was head, or to the wider class of which the assured was a member, and that therefore the *contra proferentes* rule must be applied against the insurer. On that basis therefore the claim in respect of the sister was not excluded by the policy.

It should be noticed that, with the exception of contractual liability which is expressly excluded by a later clause, the specimen policy under consideration covers all classes of liability to third parties. Some policies, however, cover only a limited class of liability such as "liability at Common Law or under the Fatal Accident Acts" (f). These, as has been seen, do not comply with the requirements of section 36 (1) (b), inasmuch as liability may be incurred in respect of bodily injury not arising out of or in the course of an employee's employment (g) under the Employers' Liability Act, 1880 (h), and in respect of death under the Law Reform (Miscellaneous Provisions) Act, 1934 (i).

Moreover, in some instances the user of a vehicle on the road may become by statute liable to a third party in respect of damage to property without any negligence on his part (k). Thus in *Postmaster-General v. Beck and Pollitzer* (l) the defendant's servant while driving their motor-lorry accidentally and without any negligence on his part ran into and damaged a fire alarm post belonging to the Postmaster-General, and it was held that they were liable for this injury (m).

The phrase "Death of or bodily injury to any person" was considered and defined in the case of *Digby v. General Accident, Fire and Life Assurance Corporation, Ltd.* (n). The assured, Miss Merle Oberon, the film actress, was on March 16, 1937, riding as a passenger in the insured car, which was being driven by her chauffeur Digby, when she received severe personal injuries in a collision with another car. She sued the drivers of both cars, and was awarded £5,000 and costs against her own chauffeur, the claimant. He then commenced an action against the General Accident Corporation claiming indemnity under his employer's policy, but the insurers denied the claimant's right to sue under the policy and pleaded in the alternative that in any case the dispute must first be referred to arbitration. The action was discontinued, and the matter came before an arbitrator.

In view of the importance of the decision, a full account of the progress of the case through the courts is given here. First, the questions for decision before the arbitrator were agreed as being (1) whether the claimant was entitled to avail himself of arbitration under the policy, and (2) assuming that he was so entitled, whether the policy terms extended to indemnify the claimant against the assured's claims against him.

The relevant terms of the policy taken out by Miss Merle Oberon with the insurers were as follows :

(f) The Fatal Accident Acts, 1846-1908 (12 Halsbury's Statutes 335-340).

(g) See *ante*, chapter IV, p. 201.

(h) *Ante*, chapter IV, p. 198. This Act has now been repealed.

(i) *Ante*, chapter I, p. 55.

(k) E.g. by damaging a lamp post under condition 20 of the Appendix to the Electric Lighting Clauses Act, 1899 (7 Halsbury's Statutes 705).

(l) [1924] 2 K. B. 308 (C. A.)

(m) Under the Telegraph Act, 1878, s. 8 (19 Halsbury's Statutes 267).

(n) [1940] 1 All E. R. 514; varied, [1940] 2 K. B. 226; [1940] 3 All E. R. 190 (C. A.); reversed, [1943] A. C. 121, [1942] 2 All E. R. 319 (H. L.). The words in question were "All sums which the policy holder shall become legally liable to pay in respect of any claim by any person (including passengers) for loss of life or accidental bodily injury." This case was followed in *Richards v. Cox*, [1943] K. B. 139; [1942] 2 All E. R. 624, in which a solicitor was held to have been negligent in failing to advise his client, who was in the same position as Digby, that he had a good cause of action against insurers.

Section 2 (Third Party Liability).

(1) All sums which the policy holder shall become legally liable to pay in respect of any claim by any person (including passengers) for loss of life or accidental bodily injury . . . caused though or in connection with such automobile . . .

(3) The insurance under this section shall also extend to indemnify in like manner any person while driving any automobile described in the Schedule hereto on the order or with the permission of the policy holder provided that . . . such person shall as though he were the policy holder observe, fulfil and be subject to the terms, exceptions and conditions of this policy in so far as they can apply . . .

Section 3 (Accidents to Policyholder).

In the event of death or accidental bodily injury, caused in direct connection with any automobile described in the Schedule of this policy, . . . the Corporation agrees to insure the policy holder for the following benefits (here followed a schedule of compensations similar to that set out later in this chapter (o)).

Conditions.

(8) If any difference shall arise between the policy holder and the Corporation, such difference shall be referred to two arbitrators mutually chosen or their umpire . . . and an award shall be a condition precedent to any liability of the Corporation or any right of action against the Corporation.

The proposal form, which was deemed to be incorporated in the policy, incorporated in turn a description of its benefits and special privileges, which included the following :

Third Party Indemnity.

Public Liability and Property Damage.

Unlimited indemnity in respect of claims by the public (including passengers, subject to exclusions) for personal injury or damage to property against :—

1. The policy holder or his personal representative.
2. Any person driving on the policy holder's order or with his permission or his personal representative. . . .

The policy, taken out on October 27, 1936, was in force on March 16, 1937, the date of the accident.

Before the umpire, the insurers contended that when the insurance was extended under section 2 (3), the words " any person " in section 2 (1) did not include the policy holder, but were limited to third parties, i.e., those who were not parties to the policy, but who were members of the public. The umpire, Sir DAVID MAXWELL FYFE, K.C., M.P. (oo), found for the claimant on both the points referred to above, but submitted them for the opinion of the Court. ATKINSON, J. (p), agreed with the umpire on both points, but in the Court of Appeal, whereas it was unanimously decided that Digby could and should avail himself of arbitration against the insurers, the majority (MACKINNON and GODDARD, L.J.J., LUXMOORE, L.J., dissenting) held that the words " any person " in section 2 (1) of the policy meant a third party, and did not include the policy holder or her driver, and therefore the claimant was not entitled to the indemnity claimed.

(o) *Post*, p. 540.

(oo) Then Mr. MAXWELL FYFE, who wrote the introduction to the first edition of this work.

(p) 66 Ll. L. R. 89.

In the House of Lords, by a majority decision (Lords ATKIN, WRIGHT and PORTER, Viscount SIMON and Viscount MAUGHAM dissenting), the decision of ATKINSON, J., and the umpire on the meaning of "any person" in section 2 (1) of the policy was restored.

Lord SIMON felt that the main provision of section 2 was contained in subsection (1), and that subsection (3) was subsidiary. Under subsection (1) it was manifest that the policy holder could have no claim to indemnity, and he did not consider that the range of persons whose claims might lead to indemnity under section 2 of the policy changed because of the extension in subsection (3). He felt that if by a roundabout method of suing a negligent driver the policy holder might get, though him, from the insurance company unlimited compensation for any and every sort of injury, it was hard to see why "accidents to owner" benefits should be inserted in the policy.

Lord MAUGHAM also considered that the litigation was really for the benefit of the assured rather than for her chauffeur. He did not think that a claim by the policy holder-passenger against a permitted driver could be a claim by one of "the public," or that the risk of the permitted driver being sued in this way could be called a "Third Party Risk." He felt that the policy ought not to be construed as imposing on the Corporation a liability to indemnify the policy holder extending far beyond that which the proposal and the policy seemed to indicate (q).

Lord ATKIN, on the other hand, considered that the policy was obviously based on the requirements of sections 35 and 36 of the Road Traffic Act, 1930, and that the insurers intended to issue a policy which in respect of third party risks complied with the Act. It would be necessary, therefore, that the permitted driver should be covered against the risk of running the owner down.

Lord WRIGHT upheld the contention of the appellant that by subsection (3) of section 2 the Corporation undertook in his favour a separate insurance against third party liability in such events as had happened, so that he thus became in that connection the assured while Miss Oberon became *pro hac vice* the third party. The extension clause covered Digby against claims "by any person," and he could not read those words to mean "by any person other than Miss Oberon." The new assured was by the terms of the extension clause to observe, fulfil and be subject to the terms, exceptions and conditions of the policy so far as they could apply. Thus he was bound by the arbitration clause. In addition, Condition 1 (Notices) and Condition 2 (Claims and legal proceedings and their conduct) would apply to him, while Condition 6 (Contribution, if there is another insurance) would, it seemed, not apply because subsection (3) of section 2 was subject to the proviso that there was to be no other insurance subsisting under which the permitted driver might be indemnified (r). In the result, the position was in no way different from what it would have been if Digby had been insured against third party risks by a separate policy issued to himself. It was because Lord ROBERTSON in *General Accident Fire and Life Assurance Corporation v. Watson* (s) held that there was only one contract and hence the policy

(q) See *Yorkshire Insurance Co. Ltd. v. Campbell*, [1917] A. C. 218, at p. 225.

(r) *Quaere*, if the other insurance policy contained a similar clause. See *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243; affirmed, [1945] K. B. 250 (C. A.); [1945] 1 All E. R. 310.

(s) Now reported [1942] 73 Ll. L. R. at p. 189. This Scottish case was based on almost identical facts as *Digby's Case*, but Lord ROBERTSON in the Court of Session had come to the opposite conclusion to the majority of the House of Lords in *Digby's Case*.

holder could not be divested of her character of assured, or become a third party, that he came to the opposite conclusion.

Lord PORTER said, about "third party" insurance (f) :

"In the second place it is contended that, as appears from the statement 'in the margin of section 2, the insurance is only against third party liability; that the policy-holder is a party to the contract and therefore cannot be included in the term 'third party'; that having regard to the 'marginal reference and general scope of the policy the words 'any claim' by any person' must be confined to any third person; that the wording 'of subsection (3) shows the policy holder and authorised driver as alike parties to the policy—second parties if you please, the insurance company being the first—but not third parties. The argument, I think, fails. I doubt if the phrase 'third party liability' when used in the policy has any such definite meaning as that ascribed to it by the respondents. In my view, in a policy such as this, indemnity against third-party liability is used in contradistinction to indemnity against 'loss or damage' to the car and means only that the insurer will indemnify the insured against any proper claim made upon him by a person who is injured by the negligent driving of the car. I do not think that there is any question of first, second and third parties. The phrase is merely a useful description of a particular type of insurance. Consequently the policy holder would be entitled to indemnity even if she were responsible for an accident to (say) a Lloyds underwriter who insured her, and the authorised driver would be protected against a claim in respect of such an accident and against a claim such as is made in this case by the policy holder herself."

"Let me assume, however, that 'third party' is used precisely and necessitates the existence of three parties, the third of whom must make a claim before the insured can demand to be indemnified. Let me also assume that the words 'any claim by any person' mean 'any claim by any third person'. Still, in my opinion, the ingredients necessary for success exist in the present case. The term 'third party' must, I think, take its meaning from the words in collocation with which it is used. No doubt any claim by any third party when used in a case where the policy holder is herself liable would exclude any recovery by her both because she cannot sue herself and because she is not a third party in a claim which she herself makes. but, in my opinion, she is a third party in reference to her authorised driver. For the purposes of a claim made by her against him, he is the insured, the company are the insurers and she is the third party."

2. Damage to property.

"(b) *Damage to property other than property belonging to the assured or held in trust by or in the custody or control of the assured.*"—Only one question of practical difficulty arises under this part of the clause. It is, What is the position of luggage and other belongings of a passenger carried in the insured car at the same time as the owner thereof? Is such property in the custody or control of the assured or of the passenger to whom it belongs? It is submitted that this must be treated as a question of fact in each case (u). In most cases it would be found that the owner of the luggage, etc., had parted with its custody or control where such luggage was attached to or placed in a special part of the car, as, for example, on the roof on a luggage grid or in a car trunk or other special luggage compartment (a). On the other hand, personal belongings such as handbags, jewellery, etc., kept in the physical possession of the owner would not be under the custody or

(f) *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121, at pp. 122, 123; [1942] 2 All E. R. 319, at pp. 331, 332.

(u) For cases on "custody and control" see *Stroud's Judicial Dictionary*, 2nd Edn., and Supplement, and see 1 *Halsbury's Laws*, 2nd Edn. 723 *et seq.*

(a) *Provided the assured or his servant was in charge of the vehicle.*

control of the assured (b). It should be noted, however, that property will be in the custody or control of the assured if it is in the custody or control of his agent or servant, such as a chauffeur (c).

It should also be noted that the above clauses must, as must every other part of the specimen policy, be read subject to the General Exceptions Clause (d) and subject to the Conditions printed at the foot of the policy (e).

As has been indicated, liability to third parties may be incurred both by negligence at common law (f) or under some statute without negligence (g).

3. Costs.

"The insurers will pay all costs and expenses incurred with their written consent."—This makes it clear that the insurers are under no obligation to pay the assured's costs of defending any proceedings brought against him by a third party unless they choose (g) to do so, or unless they defend the proceedings themselves (h). Oral consent (i) will as a rule, however, be enough in spite of the express requirement of written consent (h). On the other hand, it is the assured's duty to minimise the loss, and he ought therefore to defend any proceedings (l) brought against him (m) if he is not clearly liable to the third party (n). The question as to the respective rights and liabilities of the parties in regard to costs when insurers take over the conduct of proceedings on behalf of the assured is considered later (o). In practice insurers would refuse their written consent only in the following circumstances (p):

(1) Where in the opinion of the insurers there was no defence to the third party proceedings;

(2) Where the insurers repudiate liability under the policy or seek to avoid it (q).

Some policies providing that the insurers will pay costs incurred with their consent contain the additional words "such consent not to be unreasonably withheld." In *Hulton (E.) & Co., Ltd. v. Mountain* (a) a newspaper libel policy contained such a clause. BANKES, L.J., held that the effect of it was:

"the words mean that at every important stage of the proceedings the consent of the underwriters must be applied for and obtained—it is a

(b) Difficult questions might arise where a friend was driving the insured vehicle on behalf of the assured and the friend's luggage was being carried in a fixed luggage container on the vehicle.

(c) See 1 Halsbury's Laws, 2nd Edn. 745.

(d) *Post*, p. 561.

(e) *Post*, p. 580.

(f) See chapter I, *ante*, p. 16.

(g) It might be argued that the words "such consent not to be unreasonably withheld" must be implied. It is submitted that this cannot be supported. See *Xenos v. Fox* (1869), L. R. 4 C. P. 665, and see *Hulton (E.) & Co., Ltd. v. Mountain* (1921), 37 T. L. R. 809, where a newspaper libel policy expressly so provided. The question is, however, doubtful. See chapter X, *post*.

(h) See *post*, p. 580, and *Allen v. London Guarantee and Accident Insurance Co., Ltd.* (1912), 28 T. L. R. 254; and see generally chapter X, *post*.

(i) And in some cases the insurers will be liable without consent; see *ante*, p. 518, and *post*, chapter X.

(j) See *McConnell v. Poland* (1926), 23 Ll. L. R. 77.

(l) See *Jamie v. British General Insurance Co.*, [1927] 2 K. B. 311.

(m) If his liability is doubtful he may settle the claim. See further, *post*, chapter X, and *cf. ante*, chapter III, p. 153.

(n) As to the position of the assured in these circumstances, see *post*, chapters IX and X.

(p) In the rare case where insurers simply withhold their consent without repudiating liability, the assured may find that he is saddled with costs, since it will not be safe for him in all cases to allow judgment to go by default. See further on this point, *post*, chapter X.

(q) *Post*, chapter IX.

- " condition precedent, unless the necessity for consent is waived or implied.
- " Where consent is given for defending an action, and the action results in
- " favour of the assured and there is an appeal, the assured must apply and
- " obtain consent to resist the appeal. If the appeal results in a new trial,
- " he must obtain further consent before proceeding with the new trial."

It sometimes happens, when the assured is covered by his policy only in respect of third party liability, or only in respect of liability for death or bodily injury, that he insists (b) on contesting the third party proceedings because he desires to prosecute a counterclaim against the third party or because he does not wish to pay out of his own pocket in respect of damage to his own or the third party's property (c). In such a case, although if the assured is successful in his defence the insurers obtain the benefit of his success inasmuch as their obligation to pay him an indemnity under the policy does not arise, they are under no liability for the assured's costs unless they have given their written consent, which they need not do (d). The difficulties which may arise in such a case when the insurers desire to settle with the third party whilst the assured wishes to fight him are explained later (e). The question as to who is liable to pay the costs due to a solicitor who has been instructed to act for the assured are considered in the same place (f). It is submitted that apart from those expressly undertaken in the next part of this clause, the insurers can never be liable to pay any costs or expenses in connection with criminal proceedings if incurred without their consent. The position in cases where the insurers have wrongly repudiated liability under the policy or have wrongly declared that it is void has been outlined in a previous chapter (g) and will be considered more fully in a later when dealing with the question of repudiation generally (h). But it may be stated here that in certain circumstances insurers might be liable to pay costs incurred without their consent, as, for example, where they have wrongfully purported to avoid the policy and the assured, in a justifiable attempt to minimise the loss or damage, defends the third party proceedings but fails in the result (i).

Although not expressly limited thereto, in practice the only costs or expenses for the incurring of which the insurers would give their consent would be costs and expenses incidental to legal proceedings by the third party against the assured. There are, however, other costs and expenses which, it is submitted, the assured might be held entitled in certain circumstances to incur without the consent of the insurers and apart from this

(a) (1921), 37 T. L. R. 869. See also *British General Insurance Co v. Mountain* (1919), 36 T. L. R. 171; *Daily Express* (1908), *Ltd v. Mountain* (1916), 32 T. L. R. 592.

(b) As to when he can so insist, see *post*, pp. 506 *et seq.*

(c) *I.e.* where his policy does not cover such liability.

(d) Since, if, as is proved by the result of the proceedings, there is no liability, there is no obligation on the insurers to indemnify. See *Xenos v. Fox* (1869), L. R. 4 C. P. 665. (e) *Post*, chapter X.

(f) Cf. *Page v. Scottish Insurance Corporation* (1920), 45 T. L. R. 250; 33 Ll. L. R. 134, as to liability for costs of repairs. And see *McConnell v. Poland*, *ante*, p. 512.

(g) Chapter III, *ante*, pp. 152 *et seq.*

(h) *Post*, chapter X.

(i) The question is, however, very doubtful. See *post*, chapter X. The position in regard to the costs incidental to coroner's inquests and criminal proceedings under the next part of this clause would be substantially similar. See *James v. British General Insurance Co.*, [1927] 2 K. B. 311. And see further, *post*, p. 526. As by the M. I. B. Agreements insurers have undertaken to satisfy the judgment for personal injuries and the costs of a third party obtained against an "assured" who cannot or who does not himself pay that sum forthwith, insurers will now normally undertake the defence of the "assured" in such cases. But facilities will no doubt be afforded to the "assured" only on the express understanding that thereby the insurers' right to seek repayment from the "assured" is not prejudiced. See chapter VI, *ante*.

clause or the costs which, as will be seen (j), may be incurred under the succeeding part of this clause without consent. Thus, where the assured runs down a third party, he will be justified (as is indeed his duty to the insurers (k)) in taking all reasonable steps to minimise the damage thereby done (l). Examples of expenses which might be so incurred would be the hire of a conveyance to remove the injured third party to the nearest hospital (m); and the payment of medical fees for emergency treatment (apart from or in addition to those which he is statutorily liable to pay under section 16 of the Road Traffic Act, 1934) (n).

"The insurers will pay the solicitor's fee for representation at any coroner's inquest or fatal inquiry in respect of any death which may be the subject of indemnity under this section or for defending in any Court of Summary Jurisdiction any proceedings in respect of any act causing or relating to any event which may be the subject of indemnity under this section."—It is submitted that the expenses referred to in this part of the clause must be paid although incurred without the written or any consent of the insurers. This follows from the wording of the previous clause (o), which says that the insurers will pay all costs incurred with their written consent, but does not say that they will not pay any costs in respect of which they have not given consent.

If this be so, only two questions of possible difficulty arise under this part of this clause.

The first of these is: What solicitor's fees do the insurers undertake to pay? A solicitor can appear at coroner's inquests and in a Court of Summary Jurisdiction. In proceedings in the latter court it may sometimes be desirable to employ counsel. The fees of counsel so employed are paid by the solicitor, who in turn is paid his costs, which include a sum to cover such fees. Strictly speaking, "solicitor's fee" does not include counsel's fee, and it is apprehended that even in cases where the employment of counsel was reasonably necessary the insurers would not be liable therefor under this clause.

The second question is whether the assured is entitled to incur such costs in respect of proceedings arising out of an accident in which no third party's person or property was injured by his fault. The relevant words are:

"proceedings in respect of any act . . . relating to any event which may be the subject of indemnity."

It is submitted that this means that such costs may be incurred provided there is a reasonable possibility that a third party claim arising out of the same event may be made against the assured (p).

In connection with the various indemnities given by this clause just considered, the case of *James v. British General Insurance Co.* (q) should be noted. In that case the assured whilst drunk ran down and killed a man. His policy contained a clause similar to the above, under which the

(j) See note (i), p. 525, *ante*.

(k) Under the express clause to that effect found in most policies or under his implied duty; see *post*, p. 607, and chapter IX.

(l) And under an implied term to that effect; see chapter IX, *post*.

(m) It is doubtful how far such expenses are recoverable. There appears to be no express authority on the point. See Wellford on Accident Insurance, 2nd Edn., p. 191, and see *Marsden v. City and County Assurance Co.* (1865), L. R. 1 C. P. 232.

(n) As to these, see *ante*, chapter IV, p. 189, and chapter V, p. 341.

(o) And the application thereto of the maxim *expressio unius est exclusio alterius*, as to which see *ante*, p. 483.

(p) If this be correct, it is not necessary that such a claim should ever be made, or, if made, be successful.

(q) [1927] 2 K. B. 311.

insurers undertook to pay for his representation at an inquest and for the defence of proceedings in the police court. The insurers repudiated liability under the policy on the ground, amongst others, that in so far as the policy covered the assured in respect of the consequences of his criminal acts it was void as against public policy. (This aspect of the case is considered elsewhere) (r). The dependants of the dead man and another person injured in the same accident brought an action against the assured and recovered damages therein in respect of such death and bodily injuries. The assured was also prosecuted in the police court and at the Assizes, and was there convicted of manslaughter. In an action against the insurers on the policy, the assured claimed to be entitled to recover :

- (i) The damages and costs awarded against him in the third party proceedings and his own costs in those proceedings ;
- (ii) The legal costs of his representation at a coroner's inquest ;
- (iii) The legal costs of his defence in the police court ;
- (iv) The legal costs of his defence at the Assizes (s).

It was held that :

- (i) The third party liability insurance, although covering the consequences of a criminal act, was not against public policy (r) ;
- (ii) The assured was entitled to recover the costs at the inquest ;
- (iii) He was also entitled to recover his costs in the police court ;
- (iv) He was not entitled to recover his costs at the Assizes (s) since there was no clause in the policy which covered these.

The legality of clauses such as that just considered is discussed elsewhere (t).

VII.—FRIEND'S DRIVING CLAUSE

" In terms of and subject to the limitations of and for the purposes of " this section—

" 1. The Company will indemnify any person who is driving such motor " car on the assured's order or with his permission, provided

- " (a) That such person is not entitled to indemnity under any other " policy.
- " (b) That such person shall as though he were the assured observe " fulfil and be subject to the terms exceptions and conditions of " this policy in so far as they can apply.
- " (c) That such person holds a licence to drive such motor car or has " held and is not disqualified by order of a Court of Law or by " reason of age or disease or physical disability for obtaining such " a licence.

The meaning and effect of clauses such as that printed above have been considered fully in various other parts of this book (u), as have the requirements and provisions in connection therewith of section 36 (v) of the Road Traffic Act, 1930 (w). The conclusions elsewhere arrived at may be briefly summarised as follows :

1. This clause together with subsection 36 (4) of the Road Traffic Act, 1930, makes any person driving the car with the assured's consent a party to

(r) See fully, *ante*, chapter II, p. 107, and *post*, chapter IX.

(s) *I.e.* the costs in the criminal proceedings

(t) *Post*, chapter IX.

(u) *Ante*, chapter II, pp. 96 *et seq.*; chapter IV, pp. 211 *et seq.*

(v) *Ante*, chapter IV, p. 188.

(w) 23 Halsbury's Statutes 607.

the policy and gives him a statutory right to sue the insurers for an indemnity thereunder (x).

2. Such person driving with the assured's consent is, unless he is acting as the assured's servant or agent so as to make the assured vicariously liable in respect of any death or injury caused by him (y), required by sections 35 (1) and 36 (1) (b) to be insured against the liability specified in the latter section under a policy to which he is a party and which he can as such enforce against the insurers, and therefore commits an offence (z) unless there is such a policy in force.

3. The assured can in certain circumstances enforce the indemnity given by this clause in favour of a person driving with his consent as trustee for such person, as was done in *Williams v. Baltic Insurance, etc.* (a).

The expression "any person on his order or with his permission" is very wide, and in most cases would include, for example, driving by the chauffeur of the friend to whom the car is lent (b). An example of the person to whom it would not apply is given in *Pailor's Case* (c), of which an account is given later (d).

In *Burton v. Road Transport and General Insurance Co.* (e) a claim was made under a Motor Traders' policy issued by the defendant insurers which covered the policy holder "or any person in the employ of the policy holder who is driving on his order or with his permission." The policy holder engaged one Westwood in the hope that he would be able to procure a contract for the sale of the insured car to a prospective buyer. While driving the car for that purpose, Westwood had an accident and injured the plaintiff, who obtained a judgment against Westwood and the policy holder for personal injuries. The judgment being unsatisfied, the plaintiff claimed under section 10 (1) of the Road Traffic Act, 1930, to be indemnified by the defendant insurers. BRANSON, J., held that in the circumstances Westwood was driving at the time of the accident on the assured's order and with his permission for the purpose of the assured's business, and in that sense was a person in the assured's employ. The insurers were therefore liable (e).

"(a) *Provided that such person is not entitled to indemnity under any other policy.*"—Where the "other policy" contains a similar proviso, an inextricable circle results (f), comparable to the *renvoi* in the Conflict of Laws (g).

(x) See *ante*, chapter II, pp. 96 *et seq.*, and *Tattersall v. Drysdale*, [1935] 2 K. B. 174; *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319; *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 1 All E. R. 243; affirmed, [1945] K. B. 250; [1945] 1 All E. R. 316.

(y) See *ante*, chapter IV, p. 190.

(z) Under s. 35 of the Road Traffic Act, 1930. See *ante*, p. 242.

(a) [1924] 2 K. B. 282.

(b) Although it is doubtful whether permission given after the event—e.g. to a son who had had an accident whilst making forbidden use of the car—would satisfy the clause, it would in most cases be very difficult to prove that permission had only been so given.

(c) *Pailor v. Co-operative Insurance Society* (1930), 38 Ll. L. R. 237. A servant who is employed to drive the assured's car but who uses it for his own purposes is not on that occasion driving with the permission of the assured (*Ellis (John T.), Ltd. v. Hinds*, [1947] K. B. 475; [1947] 1 All E. R. 337).

(d) *Post*, p. 534, and see also *Page v. Poland* (1947), 80 Ll. L. R. 283, where a general permission given by the assured to her daughter to use the insured car was held not to extend cover to a driver who, though permitted by the daughter to drive, had been expressly forbidden to do so by the assured.

(e) (1939), 63 Ll. L. R. 253. Cf. also *Morgan v. Parr*, [1921] 2 K. B. 379. Cf. also *Lester Brothers v. Aron Insurance Co.* (1942), 72 Ll. L. R. 109, *post*, p. 535.

(f) "One would reach the absurd result that whichever policy one looks at it is always the other one which is effective," *per ROWLATT, J.*, in *Waddell v. Road Transport and General Insurance Co.*, [1932] 2 K. B. 563, at p. 568; see also *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243; affirmed, [1945] K. B. 250; [1945] 1 All E. R. 316.

(g) See *Dicey, Conflict of Laws*, 18th Edn.

The meaning and effect of a similar exception in such circumstances came into question in the cases of *Gale v. Motor Union Insurance Co.* and *Loyst v. General Accident, Fire and Life Assurance Corporation (h)*.

In these cases, which were consolidated, Gale was insured under a motor policy with the Motor Union. His policy contained the following clauses :

(a) "The Company shall indemnify the assured or any relation or friend of the assured driving with the assured's consent against the payment of all sums which they shall become legally liable to pay in respect of accidents . . . to any third person."

(b) "Condition 6.—The extension of the indemnity to friends or relatives of the assured is conditional upon such friend or relative . . . not being insured under any other policy."

(c) "Condition 10.—If at the time of the happening of any accident . . . etc. covered by the policy, there shall be any other insurance or indemnity of any nature whatsoever covering the same whether effected by the assured or any other person . . . the Company shall not be liable to pay or contribute to any such damage or loss more than a rateable proportion of any sum or sums payable in respect thereof for compensation."

Gale lent the insured car to his friend Loyst. Loyst was insured with the Accident Corporation in respect of a car owned by him. His policy contained, *inter alia*, the following clauses :

Clause 1 :

"(1) The Corporation will indemnify the assured against all sums which the assured shall become legally liable to pay . . ."

"(2) The assured will also be indemnified hereunder whilst personally driving a car not belonging to him provided . . . that there is no other insurance in respect of such car whereby the assured may be indemnified."

"Condition 6.—If at the time of the occurrence of any accident, etc., there shall be any other indemnity or insurance subsisting whether effected by the assured or any other person the Corporation shall not be liable to pay or contribute more than a rateable proportion of any sums payable in respect of such damage."

Whilst Loyst was driving Gale's car he collided with a third party. The third party brought an action against Loyst and recovered the sum of £154 damages and costs. Loyst paid this sum himself, since both his and Gale's insurers repudiated liability, each maintaining that the other was liable. In an arbitration Gale claimed against his insurers payment under his policy of an indemnity for Loyst, as trustee for Loyst. Loyst claimed in the same arbitration against his insurers on his own behalf.

On a case stated the Court held that in each policy the condition relating to rateable contribution must be read as qualifying the clause excluding liability if the car was covered by any other insurance, and that therefore each insurer must pay half of the indemnity in respect of Loyst's liability to the third party. The following extract from the judgment of ROCHE, J.(i), explains the ratio of the decision :

"It is conceded by counsel for the Motor Union Company that in construing condition 6 the words 'not being insured under any other policy' must be taken to mean, 'not being covered against the risk in question under any other policy'; and the real effect of his argument is, not that the Motor Union Company is not liable at all, but that the liability is a liability to be shared rateably with the Accident Corporation. He further contended that upon the proper construction of clause 2, sub-clause 2, of the Accident Corporation's policy it meant the same as condition 6 of the Motor Union Company's policy; that it limited the indemnity granted to Loyst while he was personally driving some other car to cases

(A) [1928] 1 K. B. 359.

(i) [1928] 1 K.B. 359, at p. 362.

"where he had not an indemnity from anybody else, meaning thereby a full indemnity. It was said on behalf of the Accident Corporation that the words 'whereby the insured may be indemnified' substantially add nothing, except that they make more forcible the conclusion which ought to be drawn from the rest of clause 2, subclause 2—namely, that it is a provision that Loyst will be indemnified only if he is driving an uninsured car. In my judgment there is nothing in the subclause which justifies that conclusion. The words 'whereby the insured may be indemnified' do not allude to a possible or contingent or partial indemnity. Upon the true construction of these various clauses the assured is not deprived of the indemnity altogether, which would be the result if condition 6 of the Motor Union Company's policy (k) and clause 2, subclause 2 (k), of the Accident Corporation's policy stood alone. The provision as to rateable contribution qualifies and explains the preceding clause negating liability."

In this case, it will be noticed, ROCHE, J., apparently held that where both policies contained an exclusion of co-existing cover, and neither contained a rateable contribution clause, the assured (and the friend) is deprived of indemnity altogether.

In the case of *Weddell v. Road Transport and General Insurance Co. (l)*, Justin Weddell was insured with the Road Transport Company. His policy contained the following clauses :

"(a) The Company will indemnify the assured against third party claims :

"(b) Section II. In terms of and subject to the limitations of and for the purposes of this section the Company will at the request of the assured treat as though he were the assured any relative or friend of the assured whilst driving the assured's car with the assured's consent, provided :

"that such relative or friend is not entitled to indemnity under any other policy.

"(c) If at any time any claim arises under this policy there is any other existing insurance covering the same liability the Company shall not be liable . . . to pay or contribute more than its rateable proportion of any damage, etc. *Provided* always that nothing in this condition shall impose on the Company any liability from which but for this condition it would have been relieved under Section II of this policy" (m).

Justin Weddell lent his car to his brother Laurens Weddell. Laurens Weddell was insured in respect of another car with the Cornhill Insurance Company under a policy which contained, besides the usual indemnity against third party liability, the following clause :

"The indemnity granted is hereby extended to cover the assured whilst driving any private motor car not belonging to him . . . if no indemnity is afforded the assured by any other insurance."

Laurens Weddell's policy contained no rateable contribution clause such as was contained in his brother's policy, and in both the policies in the *Gale* and *Loyst* Cases (n). But it contained a term to the effect that it was a condition precedent to the Cornhill Company's liability in respect of any claim that notice thereof should be given to the Company within three days of the accident. Whilst Laurens Weddell was driving his brother's car he collided with and injured a third party. This third party made a

(k) See above.

(l) [1932] 2 K. B. 563.

(m) This part of this clause seems to have been designed with an eye on *Gale's* and *Loyst's* Cases (*supra*).

(n) As to the effect of this proviso and the rateable contribution clause generally, see *post*, pp. 604 *et seq.*

claim against Laurens in respect of his injuries. Laurens, however, failed to give notice thereof to the Cornhill Company within three days, and that Company repudiated liability on that ground. Justin Weddell claimed against his insurers, the Road Transport Company, as trustee for his brother, but that Company repudiated liability on the ground that Laurens was expressly excluded from the cover of the policy, since he was at the time of the accident covered by his own insurance. In arbitration proceedings against the Road Transport Company in which Justin Weddell claimed as trustee for his brother Laurens (who also claimed on his own behalf) it was held by the arbitrator that the Road Transport Company was liable to indemnify Laurens against *one half* of all sums which he might become liable to pay the third party. The Court approved this view, and the following extracts from the judgment of ROWLATT, J. (o), show upon what grounds :

"The first point made was that the Cornhill policy was not 'other' 'existing insurance,' because, owing to the omission to give notice of the 'accident, liability under it could not be enforced. This in my view is too 'obviously unsound to require further notice. The position is to be 'regarded as at before the time for giving notice expired (p).

"The second point made, as I understood it, was that the Road Transport Company were liable notwithstanding the proviso relating to collateral insurance, but only on the footing that, according to the decision 'of ROCHE, J., in *Gale v. Motor Union Insurance Co.* (q), that proviso was 'cut down by the operation of the rateable proportion clause; and that 'the Cornhill Company were not liable, because in their case there was no 'rateable contribution clause. Therefore, the argument concluded, the 'Road Transport Company being alone liable, there was no other existing 'insurance, and they were liable in full

"It is to be borne in mind that the risk covered by the clause as to a 'relative or friend is an extension of the scope of the policy. It gives protection to a person other than the assured. So, too, the clause in the 'Cornhill Company's policy covering the assured when driving a car not 'belonging to him is an extension of the primary purpose of the policy, 'which is to cover risks to and in connection with a particular car or cars 'of the assured mentioned in the schedule (r). The general purpose of the 'proviso seems to be to make such extensions operate only as secondary 'cover, available only in the absence of other insurance regarded as primary, 'not including, one would suppose, other insurance also of a secondary 'character. In my judgment it is unreasonable to suppose that it was 'intended that clauses such as these should cancel each other (by neglecting 'in each case the proviso in the other policy) with the result that, on the 'ground in each case that the loss is covered elsewhere, it is covered 'nowhere. On the contrary the reasonable construction is to exclude from 'the category of co-existing cover any cover which is expressed to be itself 'cancelled by such co-existence, and to hold in such cases that both companies are liable, subject of course in both cases to any rateable proportion 'clause which there may be.

"In these circumstances I come to the conclusion that the Cornhill 'Company (apart from the omission to give the notice) (s) were liable notwithstanding that their policy contained no rateable proportion clause, 'and I confirm the decision of the arbitrator."

(o) *Weddell v. Road Transport and General Insurance Co.* [1932] 2 K. B. 563, at p. 566.

(p) *Sed quære* : see *post*, pp. 532, 590 *et seq.*, and chapter X.

(q) [1928] 1 K. B. 359.

(r) Cf. *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1930), 47 T. L. R. 46.

(s) It should be noted that this case, like many others, was fought only to test the legal position, and the Cornhill Company paid their half immediately after judgment, waiving the point on the late claim.

In the case of *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.* (f), the facts were as follows :

On May 23, 1938, the plaintiff Austin was driving a Lincoln Zephyr car, the property of one Henry Aldridge, when he met with an accident. At the time of the accident Aldridge and one Nicholson were passengers in the car and they both received injuries, from which Aldridge died two days later. Austin was driving with Aldridge's permission. Thereafter, actions were brought against Austin by Nicholson and the executrices of Aldridge. Austin was insured with the Bell Association by a policy issued in respect of his 8 h.p. Ford motor car and which covered him while personally driving any other private car (not belonging or hired to him) for pleasure purposes. He called upon the Bell to defend these actions, and they thereupon undertook the conduct thereof and settled them. Austin agreed to the settlement terms and agreed also to allow the Bell in his name to proceed against the Zurich Insurance Company to recover the whole or any part of the sums paid to the plaintiffs in the running down actions by the Bell. Austin's claim to be indemnified by the Bell was based on the terms of a policy issued to Aldridge by the Zurich, which covered Aldridge against third party claims caused in connection with his Lincoln Zephyr car, and extended this cover to any person driving this car with the insured's permission. The defendants alleged that by the terms of the two policies, read together, the only liability to indemnify Austin was to be found in the Bell policy. The Zurich policy's extension clause provided cover to the permitted driver in the usual form, provided that (a) such person (i.e., the permitted driver) was not entitled to indemnity under any other policy. Under general Condition 5, the rateable contribution clause, the company was not to be liable to pay or contribute more than its rateable proportion of any loss or damage,

" Provided always that nothing in this condition shall impose on the company any liability from which but for this condition it would have been relieved under the provisions of paragraph 1 (a) of section 1 " (u).

The Bell policy extended cover to Austin while driving any other car, as stated above, in respect of which no indemnity is afforded the assured by any other insurance applying to such car. General Condition 2, the rateable contribution clause, read :

" If at the time of the occurrence of any . . . loss or damage, there shall be any other indemnity or insurance of any nature subsisting wholly or partly covering the same, the underwriters shall not be liable to pay or contribute towards any such loss or damage except in excess of the sums actually recovered or recoverable under such other insurance."

The defendants alleged that as the Bell were the primary insurers, they should have the whole liability placed upon them, but TUCKER, J., in a judgment which was affirmed *in toto* by the Court of Appeal (v), held that the case was indistinguishable on this point from *Weddell's Case*, and that therefore each company was liable to indemnify the assured to the extent of 50 per cent. of his total loss.

1. No indemnity for damage to car.

Finally, it should be noted that whatever may be the rights of a person driving with the assured's consent in regard to the third party liability indemnity, he has not necessarily any further rights to an indemnity in

(f) [1944] 2 All E. R. 243; affirmed, [1945] K. B. 240; [1945] 1 All E. R. 316.

(u) This proviso is identical with that contained in the Road Transport Company's policy in *Weddell's Case*. See note (m), p. 530, *ante*.

(v) *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250; [1945] 1 All E. R. 316.

respect of damage resulting from his misuse of the car. Thus in *Page v. Scottish Insurance Corporation (w)* (a case which is important in another topic and is more fully considered later), Page whilst driving his friend Foster's car collided with the car of a third party and caused damage to both. Foster's policy contained the following clause :

" The corporation agree to indemnify the assured in respect of all sums
 " for which the assured (or any licensed personal friend or relative of the
 " assured while driving the car with the assured's general knowledge and
 " consent) shall become legally liable in compensation for loss of life or
 " accidental bodily injury caused to any person . . . or for accidental
 " damage to property (other than property owned by . . . or in the care
 " of the assured) and caused by any motor vehicle belonging to the assured
 " described in the schedule hereto. . . ."

The third party recovered damages against both Page and Foster. The insurers claimed that Page was liable to Foster for the damage done to Foster's car, and brought an action against Page in Foster's name in respect thereof. It was held by the Court of Appeal that the action was premature, since the insurers had not yet become subrogated to Foster's rights. But it was nowhere suggested that if the action had not been premature, it could have been maintained. It should be emphasised, however, that in this case the policy did not contain a clause to the effect that the person driving with the assured's consent would be " treated as though he were the assured " such as is found in many policies. The property damaged—namely, Foster's car—was therefore the property of the assured and as such expressly excluded from the indemnity in respect of property damage by the policy. Nevertheless, on the authority of *Digby v. General Accident, Fire and Life Assurance Corporation, Ltd. (a)*, if a friend were to be driving the car with the assured's permission, where the policy states that " such person will be treated for all purposes as though he were the assured," probably, although it depends on the terms of the policy, he would not be able to recover from the insurers for any damage he might do to the insured car by his negligence. While driving, he would be *pro hac vice* the assured, and the insured car would be " in the care of the assured," i.e., himself, and therefore excluded from cover. But the point is not free from doubt.

" (b) That such person shall as though he were the assured observe fulfil and be subject to the terms exceptions and conditions of this policy in so far as they can apply."—The difficulty in construing this clause is to determine how far the terms, etc., can apply to a person driving with the assured's consent. The terms in or relating to the proposal form clearly cannot apply, save in so far as they apply to the real assured (b). It would seem, therefore, that the insurers undertake to indemnify persons whose proposals they might never accept. Thus the friend driving with the assured's consent may have a hopeless record as a driver, and may have been refused insurance by countless insurers (c), and yet if he is not disqualified for holding a licence he is apparently covered by the policy. On the other hand, if the real assured has obtained his policy by non-disclosure, or if for some other reason (d)

(w) (1929), 45 T. L. R. 250; 33 Ll. L. R. 134.

(a) [1943] A. C. 121; [1942] 2 All E. R. 310.

(b) I.e. if the real assured has broken them, the friend or, etc., will be fixed with the breach.

(c) Though a great many policies expressly exclude a relative or friend who has been refused motor insurance as in the case cited in the text below. Cf. in this respect the remarks of Goddard, J., as he then was, in *Peters v. General Accident Assurance Corporation*, [1938] 2 All E. R. 267.

(d) For example, that the vehicle is in an unsafe condition.

the insurers are entitled to repudiate it, or liability under it (e) to him, the friend cannot recover (f).

The following case illustrates the effect of this clause. In *Pailor v. Co-operative Insurance Society* (g), Mrs. Pailor, the plaintiff, was insured with the defendant society under a policy which gave her the usual indemnity against third party liability and contained the following clauses :

" (a) The Society will also similarly indemnify any relation or friend of the assured (who is licensed and competent to drive and has not been declined for motor insurance) whilst driving any motor car described in the Schedule hereto with the assured's knowledge and consent.

" (b) The Society shall not be liable if the insured car is being used for other than private pleasure or professional purposes or for driving to and from the assured's place of business or for making personal business calls (excluding commercial travelling) or personal visits to the scene of his business operations."

Mrs. Pailor lent the insured car to her husband, who lent it with her consent to one Mrs. Brearley, in order that one Oakes, the servant of Mrs. Brearley's husband, might drive it for the purposes of his employer's (Mr. Brearley's) business. Whilst the car was being so used by Oakes it ran down and injured a third party. The third party brought an action against Oakes and Mr. Brearley and recovered judgment therein against them. Mrs. Pailor sought to obtain a declaration that the insurers were liable under the policy to indemnify Oakes in respect of the judgment obtained by the third party against him. It was argued on her behalf that in order correctly to carry out the policy you should substitute as the person insured, so far as liability to third parties is concerned, the friend who is driving on the occasion in question, and if, treating such friend as the assured, you find that he is within the policy and not within the exceptions, because he is driving for purposes that are within the policy and not for purposes other than those which are mentioned in the exceptions, then the company are liable just to the same extent and in the same degree as they would have been liable to the assured if the assured had been driving when the accident happened which gave rise to the claim in respect of which indemnity is asked. On behalf of the insurance society it was contended that the references in the clause above set out to " business premises " and " personal business " were only applicable to business premises and to personal business of the assured.

This latter contention was upheld by the Court of Appeal, who held that a friend was covered by the policy only when driving either for his own private pleasure or to the business premises of the assured for the assured, or for the personal business of the assured. As Oakes was driving on the business of his employer Mr. Brearley he did not come within the terms of the policy.

It must be stressed that the policy in the above case contained no term such as that in the clause considered in this section to the effect that the friend " shall as though he were the assured . . . be subject to the terms of the policy," nor any term such as is frequently found in other policies to the effect that the friend " will be treated as though he were the assured." It is apprehended that the presence of such clauses in policies sought to be enforced in circumstances similar to those above described would materially complicate the position, and would no doubt in some cases make the decision

(e) As to the distinction between avoiding the policy and repudiating liability under it, see *ante*, chapter V, pp. 281, 282, and *post*, pp. 613 *et seq.*

(f) *Cl. Tailorsall v. Drysdale*, (1935) 2 K. B. 174; *Zurich General Accident Insurance Co. v. Buck* (1939), 64 Ll. L. R. 115.

(g) (1930), 38 Ll. L. R. 237.

in *Pailor's Case* inapplicable although all other relevant clauses were similar to those in that case.

On the other hand, there was no limitation in the policy in *Pailor's Case* to use "for the private pleasure purposes of the assured." Such limitations are frequently found in motor policies (*h*), and where they are difficulties may arise in deciding whether a friend to whom the car has been lent can be said to be driving for the private pleasure purposes of the assured (*h*). It is clear, however, that the general exceptions and all the conditions of the policy apply to the friend or relative driving. Thus if he is using the car for business purposes, he is not covered under a policy which insures only use for private pleasure; if driving the vehicle in an unsafe condition, an express clause or implied term (*i*) excluding the insurers' liability in that case will apply. Moreover, it is possible that in some cases the friend's or relative's failure to observe the conditions or exceptions of the contract may preclude the assured from recovering—as for example in respect of damage to the car occurring whilst being driven in an unsafe condition by a friend to whom it was lent. Every such case must, however, be considered upon the exact words to be found in the policy and upon its own peculiar facts (*h*). In the judgment of Lord WRIGHT in *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.* (*l*), the position was considered in relation to a policy in which the permitted driver was bound "to observe and fulfil the conditions and terms of the policy as far as applicable to him." In *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.* (*m*), the permitted driver was also required to observe the terms of the policy he had never seen, and, as he failed to give notice of impending prosecution to insurers, his claim to indemnity against them failed.

"(c) That such person holds a licence to drive such motor car or has held and is not disqualified by a Court of Law or by reason of age or disease or physical disability for obtaining such a licence."—This clause should be compared with clauses (*b*) and (*c*) of the General Exceptions Clause (*n*), which make similar exclusions in case the insured car is driven by the assured or by some person on his behalf. This form of clause was the outcome of an arrangement made between insurers and the Ministry of Transport (*o*), superseding in some cases a clause which excluded liability in any case (*p*) when the vehicle was being driven by an *unlicensed* (*o*) driver. It should be observed that in some policies exclusions of the above type only apply if the assured *knows* of the disqualification or incapacity of the driver (*q*).

In *Lester Brothers, Ltd. v. Aron Insurance Co.* (*r*) the respondent insurance company's policy which covered the claimant firm provided that the insurers should not be liable while the insured vehicles were

"(b) being driven by the insured unless he (i) holds a licence to drive a vehicle or (ii) has held or is not disqualified from holding a licence to drive

(*h*) See further, *post*, pp. 570 *et seq.*

(*i*) *I.e.* the implied condition that the vehicle shall be roadworthy. See *post*, pp. 606 *et seq.*

(*h*) See, e.g., *Pailor v. Co-operative Insurance Society* (*supra*) and *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.* (*infra*).

(*l*) [1943] A. C. 121; [1942] 2 All E. R. 319. See p. 520, *ante*.

(*m*) [1944] 2 All E. R. 243, affirmed, [1945] K. B. 250; [1945] 1 All E. R. 316.

(*n*) See *post*, pp. 561 *et seq.*

(*o*) Made shortly after the 1930 Road Traffic Act came into force.

(*p*) *I.e.* under any clause in the policy.

(*q*) *E.g.* the car is not insured "if driven by any person who to the knowledge of the assured does not hold a licence or, etc." Cf. *Ellis (John T.), Ltd. v. Hinds*, [1947] K. B. 475; [1947] 1 All E. R. 337, p. 175, *ante*.

(*r*) [1942], 72 Ll. L. R. 109.

"such vehicle, (c) being driven with the general consent of the insured or
 "his representative by any person who to the knowledge of the insured
 "or such representative does not hold a licence to drive such vehicle,
 "unless such person has held and is not disqualified for holding or obtaining
 "such a licence."

In September, 1939, the claimants desired one Richards, who was then employed as a lorry driver's mate, to obtain a driving licence. He had not previously held a licence to drive. On September 12, 1939, he applied to the proper licensing authorities for such a licence, and five days later he received a form of recommendation for the issue of a National Service driving licence (which, under Emergency Regulations then current, would enable him to drive without first passing a test).

This form was duly filled up by one Davison, a director of the claimant firm, and on September 17 posted to the licensing authorities. The National Service driving licence was not in fact issued to Richards until October 12. On October 9, Richards, who had started to drive lorries without a licence, had an accident, and injured a cyclist, in the course of his employment. The claimant firm paid the damages and costs to the cyclist (s) and then claimed an indemnity from the insurers in an arbitration. The arbitrator found as a fact that on October 9 the firm's representatives did not know that Richards had no licence to drive, and that proviso (c) quoted above did not therefore apply to exclude liability of the insurers. ATKINSON, J., on the other hand, held that proviso (c) did not apply, for the expression "General consent" was not apt to describe the relationship between a master and his servant. He held further that the words in proviso (b) "being driven by the insured" must, in order to give effect to the intentions of the parties, be construed as meaning "being driven by or on behalf of the insured," and that proviso (b) therefore applied. As Richards admittedly had no licence to drive (f) on the date of the accident, the insurers were not liable.

VIII—ASSURED'S DRIVING OTHER CARS CLAUSE

"2. *The Company will also indemnify the assured while personally driving a motor car or motor cycle not belonging to him and not hired to him under a hire-purchase agreement.*" *Provided (u)*—This obligation is undertaken by insurers "in terms of and subject to the limitations of and for the purposes of this section." Subject to the proviso hereafter to be considered, the company's indemnity thus formulated covers legal liability incurred by the assured in respect of death or bodily injury to any third party or of damage to the property of such persons. It extends to the payment of legal costs and fees in the circumstances and under the conditions which have previously been examined (a).

It should be observed that this clause must be read together with the rateable contribution clause, found later (b), in this specimen policy. The

(s) The policy contained a proviso that insurers would only be liable for the assured's costs incurred in a running-down action "with the written consent of the insurers." The learned judge felt that insurers were not therefore liable for these costs, for no written consent had been incurred. See on this point, chapter X, *post*, pp. 731 *et seq.*

(f) It seems quite clear that the words "licence to drive" must mean a licence granted by a competent authority under the provisions of the Road Traffic Act, 1930. A permission to drive a motor vehicle on a thoroughfare other than a "road" as defined in *O'Brien v. Trafalgar Insurance Co.* (1945), 78 Ll. L. R. 223, is not sufficient, if such permission does not constitute a licence as envisaged by the Road Traffic Act, 1930.

(u) For the proviso see *post*, p. 539.

(a) *Ante*, p. 524.

(b) *Post*, p. 604.

effect of it so read has been explained and illustrated by *Gale v. Motor Union Insurance Co.* and *Loyst v. General Accident Fire and Life Assurance Corporation (c)*, by *Weddell v. Road Transport and General Insurance Co. (d)* and by *Austin v. Zurich General Accident and Liability Insurance Co., Ltd. (e)*. An account of these is given elsewhere (f).

The operation of this clause may be illustrated by the case of *Bullock v. Bellamy (g)*. The plaintiff had insured his Morris car with the defendant underwriter, and the policy contained a clause extending indemnity to the assured "while personally driving any other car not belonging or hired to the assured for pleasure purposes." During the currency of the policy, negotiations were initiated by Mr. Bullock for the purchase of a Chrysler car from a garage proprietor. The Chrysler car was brought round to Mr. Bullock's house by a garage employee for a trial run, before which £10 deposit was paid at the employee's request. During the trial run an accident occurred, and the persons injured thereby obtained a judgment, which was not satisfied, against Mr. Bullock. The question arose whether the Chrysler car belonged to Mr. Bullock at the time of the trial run, and evidence was adduced as to whether the property therein had passed to Mr. Bullock. Application had been made by Mr. Bullock to the insurance brokers to transfer the insurance from the Morris to the Chrysler, and he had made certain admissions to the police officer at the scene of the accident that the Chrysler was his car.

Later, the Chrysler was returned to the garage as being unsuitable for his needs. CASSELS, J., found on the facts that at the time of the accident the property in the Chrysler had not passed to Mr. Bullock, and that he was therefore driving a car not belonging to him. The insurers were liable to indemnify him in respect of the third party's judgment.

The right to this indemnity cannot be met by the objection that the assured has no "insurable interest" (h) in the subject matter of the insurance. Provided that he has such an interest in the vehicle insured as will support the policy, the question of the validity from that aspect of this subsidiary term of the policy will not arise. In any case, however, there is now no need for "insurable" interest in regard to liability to third persons arising out of the use of any vehicle, but if such were necessary it is submitted that there would be sufficient interest in the assured's driving, since he is given no cover in respect to the damage to the vehicle itself (i).

In this connection it is submitted that the dictum of BANKES, L.J., in *Bell Assurance Association v. Licenses and General Insurance Co., Ltd. (k)*, that

"It is quite plain that there is no such thing in law as an 'insured' 'vehicle.' What is insured is some person in respect of his interest in 'the vehicle,'"

although not strictly apt (l), may be applied. It is not, however, to be thought that the question of insurable interest never did arise in relation to this type of indemnity (m).

(c) [1928] 1 K. B. 359.

(d) [1932] 2 K. B. 563.

(e) [1944] 2 All E. R. 243, affirmed, [1945] K. B. 250, [1945] 1 All E. R. 310.

(f) *Ante*, pp. 528-532.

(g) [1941], 67 Ll. L. R. 392.

(h) As to how far insurable interest is still necessary in motor policies, see *ante*, chapter II, pp. 87 *et seq.*, and chapter IV, p. 211.

(i) See chapter II, *ante*, p. 88.

(k) [1923], 17 Ll. L. R. 100.

(l) Since what is now insured is primarily "some person in respect of his driving a particular vehicle or vehicles," and under this clause what is insured is "some person in respect of his driving of the vehicle or vehicles specified in the policy."

(m) See *ante*, chapter II, pp. 87 *et seq.*

In *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (n), the policy referred in the usual way to the car described in the schedule, and to "the insured car." It contained the following clause:

"This insurance shall cover the legal liability as aforesaid of the assured in respect of the use by the assured of any motor car (other than a hired car) provided that such car is at the time of the accident being used instead of the insured car."

The assured exchanged the insured car for a new car of a similar type. The insurers repudiated liability in respect of a claim arising out of the use of the new car, and it was held by the House of Lords (o) that they were right, on the grounds:

(1) That upon his parting with the original car the assured's policy came to an end (p);

(2) That the new car did not come within the meaning of the phrase used "instead of," but was being used "in succession to" the car described in the schedule;

(3) That the assured had no insurable interest in the new car at the time of effecting the policy (q).

In so far as the decision in *Rogerson's Case* rested upon the third ground set out above it probably (q) could not now be supported, since lack of insurable interest cannot be pleaded in answer to a claim in respect of third party liability (r), at any rate if the liability is such as is required to be covered by the Road Traffic Act, 1930 (s). But the second ground still remains, and in all cases where the assured finally parts with his interest in the insured vehicle the policy automatically comes to an end (t), as between insurers and assured.

Under the wording of this clause in general use insurers may apparently incur a double liability. Where the assured lends his own car to a friend and borrows another car for his own use at the same time the insurers purport to be bound not only to indemnify the assured against claims and losses incurred by himself, but also to indemnify the assured's friend or relative against similar liabilities arising from the use of the insured vehicle and the assured against damage to the vehicle. The insurers may thereby become exposed to a double risk mitigated in practice by the existence in such case of rights to indemnity under other policies, insuring the assured's "friends or relatives" in similar terms. In such cases the double risk which an insurer may bear through the simultaneous use by two persons of two vehicles under the terms of the same policy is alleviated by rights to contribution (u) arising either from the express terms of the policy or by the general principles of the law of insurance (a).

(n) (1931), 48 T. L. R. 17, 38 Ll. L. R. 142.

(o) Affirming the Court of Appeal, *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1930), 47 T. L. R. 46.

(p) *Per* Lord BUCKMASTER, *ibid.*, at p. 18, and as to the termination of insurable interest see *post* chapter X, and *per* SCRUTTON, L. J., in the Court of Appeal, *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1930), 47 T. L. R. 46.

(q) *Ante*, pp. 87 *et seq.*

(r) See chapter II, *ante*, pp. 87 *et seq.*, and chapter IV, pp. 211 *et seq.*

(s) By s. 36 (1) (b), *ante*, p. 188.

(t) See also *Tattersall v. Drysdale*, [1935] 2 K. B. 174; *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1935] 2 All E. R. 267.

(u) *Loyd v. General Accident Fire and Life Assurance Corporation*, [1928] 1 K. B. 359; *Gale v. Motor Union Insurance Co.*, [1928] 1 K. B. 359; *Weddell v. Road Transport and General Insurance Co.*, [1932] 2 K. B. 563.

(a) Chapter II, *ante*, p. 103, and see *post*, chapter X. Also *ante*, pp. 528 *et seq.*

Many policies contain an express term excluding this cover of the assured's driving another vehicle when the insured vehicle is being used at the same time (b). It might be submitted that without any express words the exclusion could be implied (c). It seems clear that the policy is issued to cover only the driving of one person at one time (d), and if the exclusion is not implied it will be possible for the assured to lend his car to an uninsured friend whilst he drives that friend's car, thus obtaining insurance for two cars at the premium payable for one. The reason for the exclusion of liabilities arising from the assured's use of a vehicle hired by him under a hire-purchase agreement (e) from the indemnity under the present clause is that if such were not excluded the assured might use his policy issued primarily to cover his driving of any number of vehicles in his possession under such agreements, since they would be vehicles "not belonging to him." On the other hand, vehicles "hired by the assured" are not excluded.

It should be noted that the assured is only covered *when driving* another vehicle. Thus, if he hires a car and chauffeur in circumstances such as to make him liable to a third party for the chauffeur's negligent driving (f), it is doubtful whether he would be covered.

"Provided always that the Company shall not be liable in respect of the death of or bodily injury to any person being conveyed by such motor cycle otherwise than in a side-car attached thereto unless such person is being carried by reason of or in pursuance of a contract of employment."

The object of this proviso is, save in the one instance excepted, to exclude liability incurred in respect of pillion passengers carried on motor cycles from the scope of the indemnity to the assured. The legal position of motor cyclists carrying pillion passengers has already been discussed (g), as have been the points which are specially dealt with in proposals for motor cycle insurance (h). By reason of the exceptional position which a pillion passenger occupies in insurance practice, and to a certain extent in law (i), the assured person's liability towards him is one the risks of which are of so doubtful a nature as to remove it from the category of an ordinary risk.

The saving to the proviso is difficult to comprehend. It is no doubt inserted with a view to complying with proviso (ii) to subsection 1 (b) of section 36 of the Road Traffic Act, 1930 (k), although, as has been since held in *Bright v. Ashfold* (l), there is nothing in that section to prevent the issue of a motor cycle policy excluding from the risk covered by the policy the use of the cycle when carrying pillion passengers.

(b) See, e.g., *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 669.

(c) See *ante*, chapter II, p. 87, and see subsection (4) of s. 36 of the Road Traffic Act, 1930, *ante*, chapter IV, p. 211.

(d) The judgments in the Court of Appeal in *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (*supra*) seem to rest more on this basis than do those in the House of Lords. See (1930), 47 T. L. R. 46 (C. A.); affirmed (1931), 48 T. L. R. 17 (H. L.).

(e) As to what is a hire-purchase agreement, see *ante*, chapter II, p. 82.

(f) E.g. if he hires the car for a month for a tour in Scotland. As to the circumstances when one person will be responsible for another's driving, see *ante*, chapter I, p. 48, and see *Ellis (John T.), Ltd. v. Hinds*, [1947] K. B. 475; [1947] 1 All E. R. 337.

(g) Chapter IV, *ante*, p. 183; and see *Bright v. Ashfold*, [1932] 2 K. B. 153.

(h) Chapter VI *ante*, pp. 465 *et seq.*

(i) *I.s.* under the Road Traffic Act, 1930, s. 16.

(k) S. 36 (1) (b) (23 Halsbury's Statutes 637); see chapter IV, *ante*, p. 188.

(l) [1932] 2 K. B. 153; see also *Gray v. Blackmore*, [1934] 1 K. B. 95.

IX.—INJURY TO OWNER CLAUSE

"If the assured shall sustain ~~in~~ direct connection with any motor car described in the Schedule hereto ~~or whilst mounting on to dismounting from~~ or travelling in any private motor car not belonging to the assured any bodily injury caused by violent accidental external and visible means the Company will pay to the assured or to his legal personal representatives the compensation herein specified provided such injury shall solely and independently of any other cause (excepting medical or surgical treatment consequent upon such injury) within three calendar months of the accident result in—"

The heading of this section is to some degree a misnomer. It should properly be called "injury to assured," as its language indicates. The body of the clause raises many important questions which, although properly falling within the law relating to accident and life insurance, must be dealt with in some detail in this chapter.

(1) *"If the assured shall sustain in direct connection with any motor car described in the schedule hereto or whilst mounting on to dismounting from or travelling in any private motor car not belonging to the assured."*—Bodily injury sustained by the assured and resulting in one of the disabilities recited in the clause (m) entitles him to the benefit of the indemnity therein defined whether such injury arises from using the insured vehicle or any other person's private motor car. The conditions governing the assured's rights in the respective cases are not, however, the same and must therefore be separately examined.

(a) *The insured vehicle.*—Any injury, subject to the provisions of the clause, sustained by the assured in direct connection with a vehicle described in the schedule of the policy, whether he be the owner or hirer of the vehicle, entitles the assured to indemnity. The important words of the part of the section governing this right are "in direct connection." The injury sustained must be susceptible of being immediately linked up with the scheduled vehicle; provided then that the injury has been sustained from some association of the assured and the vehicle, there can be said to be such "direct connection." Thus, where the assured whilst driving is injured in a collision by the negligence of another driver (n) he will be entitled to the benefits secured by the policy. If, however, the assured is run down by another vehicle whilst he is making his way to a garage where the insured vehicle is lodged, he would not, it is submitted, be entitled to the benefits provided by the clause under discussion. While "direct connection" implies the results of association between the assured and the vehicle, it does not, it is submitted, involve a causal connection between the insured vehicle and the injury (o). Injuries sustained by the assured in a collision between his and another's car may be caused solely, employing the expression in its usual legal significance, by the negligence of the other party. It cannot, however, be doubted that such injuries are sustained by the assured "in direct connection with" the insured vehicle so as to entitle him to the benefits of this clause of the policy. "Direct connection" must be interpreted in a descriptive rather than a definitive sense, as implying association rather than causation (p). In many cases considerable difficulty will be experienced in applying the test of "direct connection" in whatever sense it is interpreted. Whilst the

(m) See *post*, p. 549.

(n) *I.e.* sustains one of the provided types of injury.

(o) The cause of the injury is dealt with expressly in the section at a later point, *s.e.* "by violent, accidental, external and visible means." See *post*, p. 543.

(p) The wording of the section indicates that "connection" is different from "causation." See note (e), *supra*.

two examples given may be reasonably regarded as falling within and without its scope respectively, it may be well asked, what is the position when the assured having left his vehicle is injured whilst walking to the pavement, either by being run down or by slipping on orange peel? In such cases there is, of course, no causative link between the injury and the assured's association with his vehicle; on the other hand, had it not been for using the vehicle the assured would probably not have been in the position and circumstances in which he sustained his injury. The latter line of reasoning must, however, be rejected as fallacious, inasmuch as there is no less an association between the assured and any event of his life, more or less remotely past, of which the same could be said. Thus, if he had eaten one egg for breakfast instead of two on the day on which the accident occurred he would probably have escaped injury by some minutes, but it could hardly be argued that his injuries were sustained in direct connection with his unfortunate hunger or greed. It is submitted, not without hesitation, that the true interpretation of "direct connection" is that it implies a physical association between the assured and his vehicle *at the time when his injury is sustained* (g). When the assured whilst using his vehicle sustains injury by "violent, accidental, external and visible means" (r), the resultant disability entitles him to compensation under the terms of this clause whether or not there is any causal connection between the injury and his use of the motor car, and however his injuries are sustained.

The following examples may be submitted as being sustained "in direct connection" with the insured vehicle:

- (i) The assured is injured in a collision between his car and another person's;
- (ii) The assured is injured by a brick being thrown accidentally or intentionally into his car whilst he is in it;
- (iii) The assured is injured by his car being overturned by an unfriendly crowd (s), or by a skid, or by a mighty wind;
- (iv) The assured injures himself accidentally whilst using or repairing or driving his car, e.g. scratches his hand which causes blood poisoning, necessitating the loss of his arm;
- (v) The assured, whilst alighting from his car and before he has actually left it, is knocked down by a passing vehicle;
- (vi) The assured, while attempting to start the car by means of the starting-handle, is struck by the recoil of the handle, and breaks his wrist (t).

It is doubtful if the following cases would come within the clause:

- (i) The assured injures himself whilst repairing a part of the car which he has taken off it, or whilst cleaning the car (u);
- (ii) The assured, standing outside the car, is leaning on the door of it talking to his wife, who is about to drive away without him, when he is injured by a passing vehicle.

(b) *Another vehicle.*—With respect to injuries sustained in the use of other vehicles three main points require consideration.

(g) Cf. POLLOCK, C.B., in *Theobald v. Railway Passengers Assurance Co.* (1854), 10 Exch. 45.

(r) See *post*, p. 543.

(s) Subject in this instance to the terms of any exception excluding loss or damage or injury through riot or civil commotion. See *post*, pp. 566 *et seq.*

(t) Cf. *Jonas v. Livermore* (1946), 90 Sol. Jo. 540 (Bromsgrove County Court).

(u) See *Theobald v. Railway Passengers Assurance Co.* (1854), 10 Exch. 45. But cf. the dicta in *Seaton v. London General Insurance Co.* (1932), 48 T.L.R. 574. See *ante*, p. 502.

Firstly, "*whilst travelling in.*"—This means that the assured must be using such other vehicle as a mode of transport, whether as a driver or passenger, and the assured must, it is submitted, be deemed to be travelling in the vehicle even though it is temporarily stationary, provided his journey is not at an end (v).

Secondly, such other vehicles are limited to private motor cars belonging to some other persons. Thus, injuries sustained during the use of other vehicles owned by the assured, or of public service vehicles, or hackney carriages or private hire cars (w) are not covered by the section in any circumstances.

Thirdly, for the difficult expression "direct connection" (a) is substituted the more easily comprehended phrase "whilst mounting on to, dismounting from or travelling in." Not only does this clearly indicate which injuries may fall within the section, but it also bears out the accuracy of that interpretation of "direct connection" which has been preferred, insisting as it does upon a physical association of the assured and any other vehicle and disregarding any question of causation (b). Thus, in the example given above, if the assured is leaning on the door of a car not belonging to him and is struck by a passing vehicle, he is not covered, unless he is in the act of mounting on to or alighting from that car.

Any injury with the prescribed results caused by "violent, accidental, external and visible means" (c) to the assured whilst mounting on to, dismounting from or travelling in another person's private motor car is within the benefit of the section, however it may be caused, whether by acts of third parties, negligent or otherwise, or otherwise than by human agency (d).

(2) "*Any bodily injury.*"—No bodily injury sustained by the assured in the circumstances described falls within the scope of the section unless it results in one of the consequences specified (e). On the other hand, when the injury is attended by such consequences, the fact that it does not result in any disablement of the assured from following his usual and ordinary avocations is immaterial. The benefits which the present section gives are not dependent upon financial damage being sustained by the assured, nor are they measured by any loss or suffering which he may have sustained (f).

Thus if he loses a limb in a motor accident the assured may recover :

- (i) £x as damages from the third party who is responsible for the accident ;
- (ii) £v from another, or any number of other insurers who have issued policies to him covering the same injuries ;
- (iii) The sum insured by this policy.

Every one of the consequences provided for must in some degree constitute a disablement in the sense of rendering the assured who suffers it less able physically than previously, and it is to compensate him against this general disability, which may or may not incommode him in fact, that the policy provides the benefits under consideration. The injury sustained

(v) *Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A. C. 592.

(w) Cf. the third party liability indemnity which does cover the assured when driving a hired car.

(a) See *ante*, p. 540.

(b) *Theobald v. Railway Passengers Assurance Co.* (1854), 10 Exch. 45 ; *Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A. C. 592. See *ante*, p. 197.

(c) As to this see fully, *post*, p. 543.

(d) See *ante*, chapter II, p. 73, as to how far this kind of insurance is speculation.

(e) See *post*, p. 549.

(f) See chapter II, *ante*, p. 73.

may consist in shock (g) without other physical harm, provided such injury results in one of the specified consequences (h).

Not only must the bodily injury be "caused by violent, accidental, external and visible means", but it must also result in one of specified types of "disability" (including death), and such consequence must be the sole result of the injury sustained (apart from surgical or medical treatment therefor) (j).

(3) "*Caused by violent accidental external and visible means.*"—These words are perhaps the most important and the most difficult of interpretation in the present clause of the policy. It is necessary, in the first place, briefly to examine the meaning of "caused," and then to proceed to the discussion of the various "means" indicated.

(a) "*Caused.*"—The meaning of the word "caused" has been discussed in relation to the Road Traffic Act, 1930 (k), and also where it occurs previously in the policy (l). The means indicated and the assured's bodily injury must stand in relation to each other as cause and effect (m). Throughout insurance law "cause," in relation to loss or liability, is construed as meaning the proximate and immediate cause, and not the distant or remote cause of the loss of liability (n). Occasion may arise in which the insured person sustains injury as a result of the combined operation of several causes, in which case the question arises as to which single cause can be regarded as the direct or proximate cause of the injury (n). Whilst in other branches of insurance (e.g. life or marine) such circumstances give rise to nice distinctions of logic and complex considerations of facts, in motor insurance, at least where the formula under consideration is employed, the problem is much simplified. The precise allocation of the "cause" is assisted by the distinction specifically made by the terms of the section between the injury sustained by the assured and the results of that injury. The injury, if one may adopt the general terminology of insurance law, is the "event" to which the risk borne by the insurers attaches, whilst the results of the injury are the "loss" upon which the liability of the insurers accrues. This separation of "event" and "loss" of the "injury" and its "results" necessitates the distinction of the causes of the injury from the causes of its results (o). Thus circumstances which may contribute to the "results" of the injury without having any connection with the "injury" itself must be disregarded in any inquiry as to the cause of the injury alone. Further, in ascertaining the "cause" of the injury the conditions within which that cause must be found are defined and delimited by two criteria, one as to "means," the other as to actual circumstances.

The two phrases "by violent, accidental, external and visible means" and "in direct connection with" the insured vehicle (or another private

(g) See chapter IV, *ante*, p. 197; *Pugh v. London, Brighton and South Coast Rail. Co.*, [1896] 2 Q. B. 248; *Dulieu v. White & Sons*, [1901] 2 K. B. 609; *Hambrook v. Stokes Brothers*, [1925] 1 K. B. 141; *Queens v. Liverpool Corporation*, [1939] 1 K. B. 394; [1938] 4 All E. R. 727; *Hay (or Bourhill) v. Young*, [1943] A. C. 92 (H. L.); [1942] 2 All E. R. 306.

(h) *Post*, p. 549.

(j) *Post*, p. 547.

(k) S. 36 (23 Halsbury's Statutes 637); chapter IV, *ante*, p. 197.

(l) *Ante*, p. 516.

(m) *Isitt v. Railway Passengers Assurance Co.* (1880), 22 Q. B. D. 504.

(n) *Laurence v. Accidental Insurance Co., Ltd.* (1881), 7 Q. B. D. 210; *Marsden v. City and County Assurance Co.* (1805), L. R. 1 C. P. 232; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K. B. 591; *Becker, Gray & Co. v. London Assurance Corporation*, [1918] A. C. 101.

(o) For example, where an assured sustains injury but subsequently contracts a disease from the combined effects of which he dies.

motor car (p)) supply the only requirements with which a "cause" must comply. Any "cause" of injury, whether the negligence of the assured himself or his servants (q), the negligent or wilful act of a third party (r) or an "act of God" (s), which falls within the description of such means and which arises whilst the assured is physically associated with a private motor car will constitute such a cause of injury as to bring the benefits of this section into operation. Again, the allocation of "cause" is simplified by the absence of all save two "excepted perils" (t).

As far as the causation of the injury is concerned it must be sought in some act or occurrence, not being expressly or impliedly excepted (u), which possesses the following consequences:

- (i) taking effect at a time when the assured is physically associated with a motor car and whether or not it is causally connected with such association (v);
- (ii) operating by violent, accidental, external and visible means (w);
- (iii) disregarding, at this stage, anything subsequent in time to the actual injury, i.e. its results and the causes of its results (x).

The operation of these principles is shown in the case of *Smith v. Cornhill Insurance Co., Ltd.* (xx). The plaintiff, as executrix of D, claimed against the insurance company the sum of £1,000 as owing under a policy of insurance taken out by D. The policy among other things secured to D the sum of £1,000 in the event of death.

- "provided that death occurs within six weeks from the date of the accident
- "and as a result solely of bodily injury caused by violent accidental external
- "and visible means sustained by the assured while riding in, mounting into
- "or dismounting from the insured car."

D left Bristol driving her car and early next morning the car was found in the neighbourhood of Nailsworth lying on its side some 10 yards from the road, badly damaged. In the river, not far off, D was found with her feet stuck in the mud, in an upright position but a little bent, with the water a few inches over her head. A post-mortem examination showed that D had not been drowned, but that she had a severe head injury which seriously injured the brain.

The insurers contended that there were two accidents, namely that to the car and secondly that which occurred when D stepped into the water, and that as it could not be determined to what extent the injury from the first accident contributed, if at all, to the death, it could not be said that death was caused solely by the bodily injury.

ATKINSON, J., held that death resulted solely from bodily injury caused

(p) See *ante*, p. 541.

(q) *Cornish v. Accident Insurance Co.* (1889), 23 Q. B. D. 453; *All-Gen. v. Adelaide S.S. Co.*, [1923] A. C. 292; *James v. British General Insurance Co.*, [1927] 1 K. B. 311.

(r) *Midland Insurance Co. v. Smith* (1881), 6 Q. B. D. 561; *Samuel (P.) & Co. v. Dumas*, [1924] A. C. 431; *Gordon v. Rimmington* (1807), 1 Camp. 123; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K. B. 591; *Mardorf v. Accident Insurance Co.*, [1903] 1 K. B. 584.

(s) *Sinclair v. Maritime Passengers' Assurance Co.* (1861), 3 E. & E. 478.

(t) See *post*, p. 561. There is also an implied exception—wilful act of the assured. See *post*, chapter X, as to this.

(u) For express exceptions, see General Exceptions Clause, *post*, p. 561, and for implied exceptions, *post*, chapter X.

(v) *Ante*, p. 541.

(w) *Hamlyn v. Crown Accidental Insurance Co., Ltd.*, [1893] 1 Q. B. 750, at p. 753; *Re United London and Scottish Insurance Co., Ltd., Brown's Claim*, [1915] 2 Ch. 167.

(x) *Post*, p. 547.

(xx) [1938] 3 All E. R. 145; 61 Ll. L. R. 122.

by the accident to the car. Although death was in fact due to shock on entering the water and was neither the natural nor the probable consequence of the accident to the car, the entry into the water did not amount to *novus actus interveniens* breaking the chain of causation starting with the accident and leading up to the death.

(b) "*Violent accidental external and visible means.*"—It is necessary to examine separately the meaning of each of the adjectives employed to qualify "means."

(i) "*violent.*"—The injury must not be due to natural causes, such as bodily weakness or disease (y). There must be some element of force, whether human or natural, operating upon the assured so as to injure him. He may himself, though unintentionally, be the author of the force, as when by undue physical exertion he causes himself injury (z). Again, the act which causes injury may be the negligent or wilful act of a third person, or of an animal (a), or some external impersonal cause, such as drowning from whatever reason (b).

(ii) "*accidental.*"—This word is sometimes employed in life and accident insurance policies in contrast with "violent." It appears that where the expression "violent" is omitted from the phrase it will be construed in exactly the same manner (c), and it may therefore be said that in the common case "accidental" involves an element of force (d). The definition of "accident" as an "unlooked-for mishap which is not designed nor expected" (e) contains the essential features of the meaning of "accidental" used in relation to injuries in insurance policies. There must be something fortuitous and unexpected about the occurrence, considered from the assured's viewpoint, before it can be designated "accidental" (f). It must not be thought, however, that the factual circumstances of the occurrence must always be fortuitous and unexpected (g); on the contrary, an occurrence must be considered as involving not only the factual circumstances but also the injury that results from them, so that although there is nothing fortuitous and unexpected in the conditions in which the injury was sustained, as by normal physical exertion (h), yet where the result of such

(y) *Hamlyn v. Crown Accidental Insurance Co., Ltd.*, [1893] 1 Q. B. 750; *Sinclair v. Maritime Passengers' Assurance Co.* (1861), 3 E. & E. 478.

(z) *Hamlyn v. Crown Accidental Insurance Co., Ltd.*, [1893] 1 Q. B. 750; *Re Scarr and General Accident Assurance Corporation*, [1905] 1 K. B. 387, or where he slips or falls *Theobald v. Railway Passengers Assurance Co.* (1854), 10 Exch. 45; *Hooper v. Accidental Death Insurance Co.* (1860), 5 H. & N. 546.

(a) *Mardon v. Accident Insurance Co.*, [1903] 1 K. B. 584, at p. 588.

(b) *Re United London and Scottish Insurance Co., Ltd., Brown's Claim*, [1915] 2 Ch. 167; *Trew v. Railway Passengers' Assurance Co.* (1860), 5 H. & N. 211; reversed (1861), 6 H. & N. 839; *Reynolds v. Accidental Insurance Co.* (1870), 22 L. T. 820.

(c) *Burridge & Son v. Haznes (F. H.) & Sons, Ltd.* (1918), 118 L. T. 681—where a van fell upon and suffocated a horse.

(d) As in the long line of authorities as to the meaning of "injury by accident" within the Workmen's Compensation Act, 1925, 15 & 16 Geo. 5, c. 48, s. 1.

(e) *Fenton v. Thorley & Co., Ltd.*, [1903] A. C. 443, at p. 448, and see *Trim Joint District School Board of Management v. Kelly*, [1914] A. C. 667. Both workmen's compensation cases.

(f) *Sinclair v. Maritime Passengers' Assurance Co.* (1861), 3 E. & E. 478; *Re Scarr and General Accident Assurance Corporation*, [1905] 1 K. B. 387.

(g) Although this is the more common type of case. *Theobald v. Railway Passengers Assurance Co.* (1854), 10 Exch. 45; *Fitton v. Accidental Death Insurance Co.* (1864) 17 C. B. (N. S.) 121; *Lawrence v. Accidental Insurance Co., Ltd.* (1881), 7 Q. B. D. 216; *Cornish v. Accident Insurance Co.* (1889), 23 Q. B. D. 453; *Re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K. B. 591.

(h) E.g. raising a weight; playing a game; picking up a marble; *Martin v. Travellers Insurance Co.* (1859), 1 F. & F. 505; *Hamlyn v. Crown Accidental Insurance Co., Ltd.*, [1893] 1 Q. B. 750.

conditions is fortuitous and unexpected, there is "accidental" cause (i). An occurrence, therefore, consisting of an act and its immediate consequences, is "accidental" wherever either the act or its consequences, or both, are fortuitous and unexpected.

Although commonly regarded as an implied exception from policies, injuries caused by the deliberate and wilful act of the assured (j) as a direct or natural consequence thereof, are not accidentally caused and do not, in fact, fall within the perils insured against (k). Injuries caused by the acts of third persons, lawful, negligent even to the point of criminality, or designed and wilful, are "accidental" provided that either they or their consequences are from the viewpoint of the assured fortuitous and unexpected (l). If, however, the injury is the natural consequence of the action of a third party to which the assured was fully consenting, then it cannot be said to be "accidental"; thus, to take an extreme case, the assured who when a passenger urges his driver into a collision (m) and sustains injury thereby is not injured by "accidental means," but if he merely urges the driver to proceed recklessly and at an excessive speed and in such conditions, owing to the latter's negligence, an accident occurs, any injuries sustained by the assured would, it is submitted, be accidentally caused so as to entitle him to the benefits of this section of the policy (n).

(iii) "external."—This refers to the source of the cause of the injury and not to the location of the injury itself. There must be a cause operating outside the body of the assured. Injury which arises solely within the assured's body is not due to an external cause (o). But it is not necessary that the injury resulting wholly or partly from the external cause should itself be external; it may, on the contrary, be purely internal, unaccompanied by any visible trace (p).

(iv) "visible."—It is doubtful whether this word adds anything to the meaning of "external." In *Hamlyn v. Crown Accidental Insurance Co., Ltd.* (q), LOPES, L J., said: "Once admit that there is an external cause, it is plain that it was a visible one and that condition also of the policy is satisfied."

Of the meaning of the whole phrase under consideration it may be said that, although sanctified as it may be by long user and by a chain of authorities, every qualification beyond "accidental" is, strictly speaking, unnecessary (r). This is the more so as no injury can fall within the benefits of the "injury to owner" section unless it is sustained at a time when there is a physical association between the assured and a motor car (s).

(i) *Re Scarr and General Accident Assurance Corporation (supra)*, *aliter*, where the injury is the natural result of a natural cause: *Sinclair v. Maritime Passengers' Assurance Co. (supra)*.

(j) But not by his negligent act: *Shaw v. Robberds* (1837), 6 Ad. & El. 75; *Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co.*, [1898] 2 Q. B. 114.

(k) E.g. *felo de se*; cf. *Bressford v. Royal Insurance Co., Ltd.*, [1938] A.C. 586, [1938] 2 All E.R. 602; or murder resulting in execution by process of law.

(l) *Re Scarr and General Accident Assurance Corporation*, [1905] 1 K.B. 387; *Letts v. Excess Insurance Co.* (1916), 32 T.L.R. 301; *Midland Insurance Co. v. Smith* (1881), 6 Q.B.D. 561; *Cleaver v. Mutual Reserve Fund Life Association*, [1891] 1 Q.B. 147.

(m) Or, it is submitted, into conduct naturally productive of a collision; e.g. to pass on the crown of a hill in face of approaching traffic.

(n) Cf. *Midland Insurance Co. v. Smith* (1881), 6 Q.B.D. 561; *Passmore v. Vulcan Boiler and General Insurance Co.* (1936), 54 Ll.L.R. 92.

(o) *Hamlyn v. Crown Accidental Insurance Co., Ltd.*, [1893] 1 Q.B. 750.

(p) *Filton v. Accidental Death Insurance Co.* (1864), 17 C.B. (N.S.) 122; *Trow v. Railway Passengers' Assurance Co.* (1861), 6 H. & N. 839; *Martin v. Travellers' Insurance Co.* (1859), 1 F. & F. 505.

(q) [1893] 1 Q.B. 750.

(r) *Hamlyn v. Crown Accidental Insurance Co., Ltd. (supra)*.

(s) As to whether any other than his personal representatives could enforce payments due under this clause, see *post*, chapter IX.

(4) "*The Company will pay to the assured or to his legal personal representatives the compensation herein specified.*"—This does not imply that where the injury results in one of the specified consequences, other than death, payment is only to be made to the assured. On the contrary, it supplies the obligation of the Company to pay to the assured, or to those standing in his shoes (t) in the event of inability to make payment to him, upon whatever ground that payment is based. Then if he sustains the loss of one eye or one hand and subsequently dies from some other cause unconnected with the injury it is submitted that the assured's personal representatives are entitled to receive the sum which the policy provides for. Where, however, he first sustains an injury insured against, as, for instance, the loss of both eyes, and then dies as a result of the same accident, his personal representatives cannot recover both the sum specified for the loss of both eyes and that for death. The rights of both the assured and those representing him to receive payment are, of course, subject to and limited by the provisos to the section as to maximum sums recoverable (v). The effect of the assured's bankruptcy upon his rights under this clause have already been explained (u).

(5) "*Provided such injury shall solely and independently of any other cause (excepting medical or surgical treatment consequent upon such injury) within three calendar months of the accident result in . . .*"—Earlier in the discussion of this section the necessary distinction has been made between the injury sustained by the assured and the results in respect whereof he would be entitled to compensation (w). A further distinction must now be drawn between the cause of the injury and that of the results of the injury. To substantiate a claim for benefit the assured must prove, firstly, that he has sustained bodily injury in connection, etc., with a motor car by violent, accidental, external and visible means (x), and, secondly, that his resultant disability (one of the six types scheduled (y)) is the sole and unaided result of the injury. It is with the latter circumstance that it is now necessary to deal.

When death or disablement follows upon an injury these results may be due wholly and solely to the injury or they may be, and often are, caused by a conjunction of other factors. Such other factors, unconnected with the injury sustained, may be either other external causes or causes special to the individual concerned. Where the assured having sustained an injury subsequently loses his life, his sight or a limb from some other external cause, such as being run over by a motor car after the first injury, such results do not flow from the original injury and are in no way causally connected with it (z). Unless the specified disability flows from an injury falling within the section (a) it cannot be said to be the result of such injury. More difficulty is experienced in dealing with cases where the death or other disability of the assured is in some way caused or contributed to by a disease either subsisting at the time of the injury or subsequently contracted.

In such a case, whether there is disease subsisting at the time of the injury (b), the subsequent death or other disability may have nothing at all to do with the injury, but may be solely caused by the disease. This will be the

(t) As to the meaning of personal representative, see *post*.

(v) See *post*, p. 550.

(w) See *ante*, pp. 540 *et seq.*

(y) See Schedule reproduced at p. 549, *post*.

(z) As far as results are concerned—*s. s.* the basis of a claim to benefit—causal connection must be insisted upon. See *Smith v. Cornhill Insurance Co., Ltd.*, [1938] 3 All E. R. 145, *ante*, p. 197.

(x) See *ante*, pp. 543 *et seq.*

(a) See *ante*, pp. 540 *et seq.*

(b) But where the subsisting disease is latent and does not really operate until after and by reason of the injury, there is a case for compensation: *Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A. C. 592.

case even if the subsisting disease was first made manifest by the accident sustained by the insured, such as where a hernia first discovered after an accident was in fact congenital (c). In these cases, where the occurrence of the accident has nothing to do with the injury from which the disability has flowed, the fact that they were contemporaneous does not amount to any connection between them (d). Conversely, where a man suffering from a disease sustains injury in the manner prescribed from which there is resultant disability unconnected with the disease, its existence at the time of the accident must be disregarded (e). There may, again, be cases in which the disease causes the accident, but where the resultant disability flows from the accident alone. In such cases, although the disease is causally connected with the accident, it is not connected with the results of the accident. Thus where an assured has a seizure whilst driving and an accident resulting in fatal injury or disablement ensues, such consequence is directly due not to the disease but to the accident, and must be regarded as irrelevant to the death or disability (f).

The most difficult cases in which subsisting disease is involved are those where the accidental injury and the disease co-operate to produce fatal or disabling results, as where the injury aggravates the disease, or the disease aggravates the consequences of the injury (g). Although as a general rule such results could be attributed to the injury, as without the injury there would have been no aggravation or disablement (h), yet the wording of the phrase now under consideration, "solely and independently of any other cause," seems to exclude the consequences of co-existing causes (both the injury and the disease being causes in law) from the benefits of this clause.

Where a disease intervenes after the occurrence of the injury and then aggravates the consequences of the injury, so as to lead to death or disablement, other considerations from the above have to be applied. Where the subsequent disease is the direct result or a natural consequence of the injury the conjoint results of such injury and disease can be said to be the sole and unaided cause of the disability (i). Such were the cases of *Isitt v. Railway Passengers Assurance Co.* (j), where the assured's death from pneumonia following a cold caught by him as a result of the change in his physical conditions made by the injury sustained in an accident was held to be caused by the original injury, and of *Re Etherington and Lancashire and Yorkshire Accident Insurance Co.* (k), the facts of which should be examined (l).

There may, however, be cases in which a subsequent disease intervenes without connection with the injury by accident. If such disease results in the death or disablement of the assured, independently of the accidental injury, then the benefits of the present section are inapplicable (m). Where, however, such subsequent disease aggravates the effects of the injury and

(c) *Fitton v. Accidental Death Insurance Co.* (1864), 17 C. B. (N. S.) 122.

(d) *Lawrence v. Accidental Insurance Co., Ltd.* (1881), 7 Q. B. D. 216.

(e) *Smith v. Accident Insurance Co.* (1870), L. R. 5 Exch. 302.

(f) *Trew v. Railway Passengers' Assurance Co.* (1861), 6 H. & N. 839; *Reynolds v. Accidental Insurance Co.* (1870), 22 L. T. 820; *Winspear v. Accident Insurance Co.* (1880), 6 Q. B. D. 42.

(g) As, e.g., where the assured suffers from a disease which aggravates after the accident but not necessarily and solely as a result thereof.

(h) *Lawrence v. Accidental Insurance Co., Ltd.* (1881), 7 Q. B. D. 216; *Reischer v. Borwick*, [1894] 2 Q. B. 548.

(i) *Fitton v. Accidental Death Insurance Co.* (1864), 17 C. B. (N. S.) 122.

(j) (1889), 22 Q. B. D. 504, and see also *Mardorf v. Accident Insurance Co.*, [1903] 1 K. B. 584.

(k) [1909] 1 K. B. 591.

(l) Since every case of this type depends on the particular facts thereof.

(m) *Isitt v. Railway Passengers Assurance Co.* (1889), 22 Q. B. D. 504.

so causes death or disablement, whether or not such case falls within the benefits provided depends upon the construction of the wording of the clause under consideration. Where, however, the present words "solely and independently of any other cause" are used it is submitted that death or disablement of the assured, not due to the results of the injury unaggravated by any subsequent cause, such as supervening disease or a further accident, will not entitle the assured or his representatives to compensation. Cases where the injury and its results are linked up by an unbroken chain of causation, as where the assured is injured, from the results catches a cold, which leads to pneumonia from which he dies, where the death is due to the injury "solely and independently" of another cause (n), must be carefully distinguished from cases of intervening cause, such as disease unconnected with the injury, which are excluded (o). Any "cause" which is attributable to the original injury cannot be such a cause as to render ensuing death or disability too remote from the original injury (p). It should, however, be noted that the words of the clause make one express exception from their general import excluding the results of causes other than the injury and its sequelæ from the benefits of the policy. The majority of injuries receive medical or surgical treatment, which proceeding from an external source, as the act of a third party to which the insured voluntarily submits himself, might ordinarily be considered as intervening causes (q). For obvious reasons, however, the policy provides that when medical or surgical treatment, consequent upon the injury and its sequelæ, results in death or disability, the assured shall be entitled to benefit under the policy despite the incidence of a new and supervening cause, i.e. the results of such treatment (r). It is submitted that this will be so whether or not the assured is treated properly in respect of his injuries and that negligence by the doctor or surgeon in attendance upon him will not make a resultant death or injury too remote (s). This special consideration of medical and surgical treatment must, however, be confined, as the words of the policy clearly show, to such treatment as is consequent upon the injury.

LIST OF INJURIES COVERED AND BENEFITS GIVEN.

(1) Death	£ 1,000
(2) Total and irrecoverable loss of sight of both eyes	500
(3) Total loss by physical severance at or above the wrist or ankle of both hands or both feet or of one hand together with one foot	500
(4) Total loss by physical severance at or above the wrist or ankle of one hand or one foot together with the total and irrecoverable loss of sight of one eye	500
(5) Total and irrecoverable loss of sight of one eye	250
(6) Total loss by physical severance at or above the wrist or ankle of one hand or one foot	250

- (n) *Isitt v. Railway Passengers Assurance Co* (1880), 22 Q. B. D. 504.
(o) *Fillon v. Accidental Death Insurance Co.* (1804), 17 C. B. (N. S.) 122.
(p) *Re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K. B. 391. (q) *Anle*, p. 546.
(r) *Isitt v. Railway Passengers Assurance Co* (1880), 22 Q. B. D. 504; *Shirt v. Calico Printers Association*, [1909] 2 K. B. 51.
(s) This would seem to depend upon the degree of negligence. The point has been raised on several occasions in workmen's compensation cases. *Humber Towing Co., Ltd. v. Barclay* (1911), 5 B. W. C. C. 142; *Mocca v. Stanley Jones & Co.* (1914), 7 B. W. C. C. 101.

The list of disabilities with their respective benefits requires but little comment. No claim can arise under any item included therein unless it is the result of either :

- (i) any injury sustained by the assured in direct connection with the scheduled vehicle (etc.) (t) ; or
- (ii) of such injury and the medical or surgical treatment consequent thereon (u) ; AND
- (iii) it occurs within three calendar months of the injury.

The wording of the various items in the schedule prevents the arising of questions as to which of the benefits a one-eyed or one-legged assured who sustains a further disablement may lay claim. It is clear that a one-eyed assured who loses his remaining eye as a result of injury within the section cannot validly claim benefit for "total and irrecoverable loss of sight of both eyes" under the schedule, since the benefits provided only apply to such disablement as follows upon the relevant injury ; in such a case the injury will only result in the loss of sight of *one* eye ; although after its occurrence the assured is totally blind he will be unable to attribute such condition to the sole and unaided results of the injury, for there is no causal link whatever between them.

"Payment shall be made under one only of subsections (1) to (6) in respect of any one occurrence and the total liability of the Company shall not in the aggregate exceed the sum of £1,000 during any one period of insurance."

This clause of the section provides a double limitation upon the benefits to which the assured may lay claim.

These limitations are of two types : (a) restricting the insurers' liability in respect of any one occurrence, and (b) restricting the total liability of the insurers during the currency of the policy.

Little comment is necessary, save that the word "occurrence" applies, it is submitted, to the accident in which the injury was sustained by the means provided and not to the results of such injury (v). In the general case no difficulty arises in the application of this limitation, but where one of the disabilities in (2) to (6) is sustained by the assured and the benefit in respect thereto paid, and thereafter but within the three months' period the assured dies as a result of his injuries, it is submitted that no further claim can be made under item (1) of the schedule. If "occurrence" were to be taken as applying to the results of the injury, then the assured's representatives would be entitled to put forward a valid claim in the above circumstances (w).

As to (b) the only point necessitating discussion is the meaning of "in any one period of insurance." The limits of such period will in practice be found particularised in the schedule incorporated in the policy and referred to hereafter. The "period of insurance" will be, at any moment, the period of time for which the subsisting insurance will remain in force, being either the period for which the contract of insurance was originally effected or the period for which it was last renewed (x).

"In the event of the assured being the holder of any policy or policies with the Company in respect of any other motor car or motor cars compensation shall be recoverable under one policy only."

This proviso to the clause is, it is apprehended, inserted to make clear, in specific terms, what would even without it be the effect of an assured

(t) *Auto*, pp. 541 *et seq.* (u) *Auto*, p. 547. (v) *I.e.* death, etc. See *auto*, p. 547.

(w) *I.e.* the results of the injury could in such case only flow from one occurrence.

(x) As to renewals, see chapter VII, *auto*, p. 468.

being twice insured with the same insurers (y). The examination of the wording of the section shows that its benefits apply to injuries sustained in two circumstances : firstly, in connection with the insured vehicle ; secondly, in connection with any other private motor car not belonging to the assured. The assured who sustains injuries in connection with the driving of his own motor car *not* being the insured vehicle is not entitled to the benefits of this section at all. Thus, where he is covered by another policy in respect of his second car he will be able, by the very terms of his contract, to claim only such benefits as one policy gives. Injuries sustained in connection with other cars, not being his property, are in a different case. Each policy effected in the same terms by an assured with the same insurers entitles him to benefits in respect of injuries sustained in connection with *all other motor cars* (not belonging to him). The insurers, that is, are under exactly the same liability to the assured in respect of these injuries both in its nature and in its quantity.

The assured's position in relation to this term, which whether or not it adds to the normal consequences of the existence of two contracts of insurance between the same parties is invariably found in policies, is that he must elect as to which of the two concurrent benefits he will lay claim (z). Once he makes claim and receives benefits under one policy he will be bound by his choice. Assume, therefore, that the assured is covered by policy " A " in respect of " A " car and policy " B " in respect of " B " car. He sustains injuries within the benefit provisions in respect of a stranger's car and claims under policy " A," receiving, say, £500 as benefit thereunder ; he then receives fatal injuries in connection with car " A." His representatives' rights are limited to making a claim of £500 under policy " A " and have no recourse to the benefits provided by policy " B " at all ; they are concluded by the election of the deceased to claim in respect of " A " policy for the first injuries sustained (a). The principles of " election " would, it is submitted, also apply to cases in which an assured covered by several policies claims benefits under one of these which is subsequently avoided by the insurers upon the grounds of non-disclosure, misrepresentation or otherwise.

1. Personal injury benefits for assured's wife.—Some policies provide benefits similar to those specified above (b) for the assured's wife in respect of any accident to insured car. Although such benefits cannot be claimed by the wife directly from the insurers, since she is not a party to the contract (c), it is submitted that there is no difficulty here in showing that the assured constituted himself a trustee for his wife (d). Moreover, apart from any question of trusteeship, the assured has, it is submitted, an insurable interest in his wife's health (e) and would therefore claim the injury benefits for himself, just as he could claim the sum payable on her death (f).

" Provided always that the Company shall not be liable under this section in respect of bodily injury—

" (a) Consequent upon suicide (whether felonious or not) or attempts thereat, or

" (b) Sustained outside Great Britain Ireland the Isle of Man or the Channel Islands."

(y) The matter is in practice specifically dealt with in the rateable contribution condition, which is considered elsewhere. See p. 528, *ante*, and p. 604, *post*.

(z) See further, the effect of the rateable contribution clause, *post* pp. 604 *et seq*.

(a) The point being that the first injury might have been claimed under either " A " or " B " ; the second only under " A ". The insurers' liability under " A " is limited to £1,000.

(b) *I.e.* in the clause considered in this section. (c) See further, *post*, chapter IX.

(d) See *ante*, chapter II, p. 83, and see *Royal Exchange Assurance v. Hope*, [1928] Ch. 179. (e) *Ante*, chapter II, p. 79.

(f) As he has an insurable interest in her life—*ante*, chapter II, p. 79.

It should be noticed that whilst the above are the express exceptions included in this clause the whole clause, like other clauses, is also subject to the exceptions contained in the General Exceptions clauses and to the conditions of the policy.

The paucity of the express exceptions to the "injury to owners" clause in motor insurance policies is mainly attributable to the close definition of the circumstances and types of injury with respect to which the assured's rights to compensation arise. When the three conditions are satisfied :

- (i) injury in direct connection with a motor car (g) ;
- (ii) caused by violent, accidental, external and visible means (h) ;
- (iii) and resulting in one of the specified types of injury (i).

little room remains for exceptions from liability. The two express exceptions must, however, be considered in some detail.

"(a) *Consequent upon suicide (whether felonious or not) or attempts thereat.*" Comparison may be made with most life insurance policies, which exclude suicide only if committed within a short period—e.g. 2 years—from the issue of the policy, and often make no reference to felonious suicide, which, however, is impliedly excluded (j).

It should first be noted that this exception comprises only injuries "consequent upon suicide." So that where suicide actual or attempted is a consequence of the injuries sustained by the assured (k), death or disablement thereby sustained would not, it is apprehended, be excluded from benefits. In such a case the liability of the insurers would not be "in respect of bodily injury consequent upon suicide" but in respect of bodily injury from the accident resulting in death or disablement ; the suicide, that is, would be considered just as one link in the chain of sequelæ of the original injury (l). The position would, on this reasoning, be exactly the contrary where the suicide, actual or attempted, is in no way due to the original injury. There it operates just as any other cause intervening between the time of the first injury and of the death, to render too remote from the accident the death or disablement of the assured due to "suicide."

In so far as the exception under consideration purports to exclude felonious suicide from the benefits of insurance it would appear to be redundant. Felonious suicide is a deliberate, wilful criminal act which can give rise to no claim to an indemnity against its consequences (m). A stipulation in a policy which provided for benefits to accrue to the assured or those standing in his shoes in the event of his committing a wilful criminal act, such as suicide, would be void as against public policy and unenforceable (n). The express exclusion of bodily injury consequent on felonious suicide or attempts thereat (nn) is therefore meaningless and appears to be inserted in the policy merely "*ex abundanti cautela*" (o).

(g) *Ante*, pp. 540 *et seq.*

(h) *Ante*, pp. 543 *et seq.*

(i) *Ante*, p. 549.

(j) See *Amicable Society v. Bolland* (1830), 4 Bth. (N. S.) 194 ; *In the Estate of Croppin*, [1911] P. 108.

(k) E.g. where the assured is driven mad by the injuries of the accident. *See quære.*

(l) This would be a matter of fact in every case, but the necessary proof might be difficult to obtain. The onus of proving the exception would, as in every case, be upon the insurers.

(m) Cf. chapter II, *ante*, p. 110, note (u). Also cases cited in note (j) above, and *Beresford v. Royal Insurance Co., Ltd.*, [1938] A.C. 586 ; [1938] 2 All E.R. 602.

(n) *Moore v. Woolsey* (1854), 4 E. & B. 243 ; *Thompson v. Hopper* (1858), E. B. & E. 1038.

(nn) Since this would be excluded by an implied term, see *post*, chapter IX.

(o) *Borradale v. Hunter* (1843), 5 Man. & G. 639 ; *Cole v. Accident Insurance Co., Ltd.* (1889), 5 T. L. R. 736 ; *Curtis & Sons v. Matthews*, [1916] 2 K. B. 825.

The same cannot, however, be said of non-felonious suicide attempted or accomplished (o). Accordingly, the express exclusion of bodily injuries consequent thereupon from the benefits provided under the policy does subtract to some degree from such death or disablements as would otherwise be within its terms. Such cases would not, however, be common since bodily injury within the conditions of the clause could but rarely be consequent upon suicide or attempts thereat.

It should also be noted that the consequence of suicide is excluded only under this clause. Third party liability and damage to the vehicle may be caused by suicide or attempts thereat (p), but under the policy here considered these will be covered except, perhaps, if the suicide is felonious (q); some policies contain an exclusion against the consequences of suicide or attempts thereat in the General Exceptions clause, which exclusion therefore applies to third party liability. In so far as third party liability if a result of suicide is excluded, it seems doubtful whether such policies satisfy the requirements of section 36 (1) (b) of the Road Traffic Act, 1930 (r).

"(b) Sustained outside Great Britain Ireland the Isle of Man or the Channel Islands."—The second expressed exception to the operation of this clause may be shortly dealt with. Injury to the assured is one of the four types of risk against which the insurers have undertaken indemnity. Three of these—loss of or damage to the insured vehicle, liability to third parties, and medical expenses—are expressly limited by the terms of Clauses 1, 2 and 4, under which they respectively arise, to loss, liability, or damage resulting from occurrences within Great Britain, Ireland, the Isle of Man and the Channel Islands. The difficulty of framing clause 3, now under discussion, in the same terms is that this clause necessarily involves a consideration of two matters—the injury received on the one hand and the results of that injury on the other (s). The application of territorial limits to the occurrence of the results of the injury—and it is against such results that the policy insures benefits—would not be appropriate, for injured persons frequently travel abroad in order to obtain treatment for injuries received in this country or other purposes. No insurer would therefore wish to exclude from the purview of benefits under the "Injury to Assured" clause cases in which fatal or disabling results flow from an injury received in this country (or within Ireland or the other specified places) merely because the assured happened to depart abroad before sustaining the results which have given rise to a claim for benefit. The exception under consideration makes it clear that whenever injury is sustained within the conditions provided by the clause within the normal geographical limits of operation of the risks clauses the insurers will compensate the assured who sustains results of the character indicated from such injury, wherever (t) he may be when those results become apparent or effective. The questions as to injury or death sustained abroad are considered later (u).

2. Medical Expenses Clause.

"If the assured or his driver or any occupant of any motor car described in the Schedule hereto shall in direct connection with such motor car sustain within Great Britain Ireland the Isle of Man or the Channel

(p) E.g. driving the car over a cliff—the assured dies, the car is smashed, and a third party on the beach injured.

(q) See *post*, chapter IX, as to this.

(r) *Anle*, chapter IV, p. 188, and see *anle*, p. 110, and *post*, chapter IX.

(s) *Anle*, p. 549.

(t) But not whenever; see *anle*, p. 544.

(u) The questions of driving and use and injury sustained abroad are considered, *post*, pp. 555 *et seq.*

"Islands any bodily injury by violent accidental external and visible
 "means the Company will pay to the assured the medical expenses in
 "connection with such injury up to the sum of Ten Guineas in respect of
 "each person injured."

It should be observed that this clause, unlike that extending the third party liability indemnity to persons driving with the assured's consent, stipulates that the indemnity shall be paid to the assured direct. It is clear, therefore, that the passengers have no direct rights enforceable by them against the insurers (u), whilst the doubts as to the assured's right to claim as trustee on their behalf is just as great under this clause as under the former (v). The question as to when the assured may be unable to claim the expenses, although incurred, is discussed below.

At the outset it should be noted that the liability of the insurers under this head is limited to cases in which injury has been sustained by the persons described in direct connection (w) with the insured vehicle. The meaning of the phrase "sustain any bodily injury by violent accidental external and visible means" has been fully discussed in a previous context (x); it is therefore unnecessary to re-examine its purport. The liability of the insurers is expressly subjected to certain territorial limits, but these will be excluded when a case arises for the application of the clause dealing generally with foreign use to be later examined (y).

The insurers' liability extends, *pro tanto*, to cover such expenses as are entailed by bodily injury as defined to the assured or his driver or any occupant of the insured vehicle. Any injury of the specified character sustained by the assured or his driver in direct connection with the insured vehicle gives rise to liability on the insurers, whether or not the injured person happens to be inside the vehicle at the time his injury is sustained (z). The injuries sustained by other persons, mere passengers, do not create any liability in insurers under this section of the policy unless they come within the definition of an occupant. It is submitted that a person can be said to be an "occupant" notwithstanding that he is not within the insured vehicle, but that he is alighting or mounting the vehicle or preparing to do so, provided there is direct physical contact between him and the vehicle (a). Whilst it is easy to identify the assured there may be some difficulty in defining who may be described as his "driver" (b). It is submitted that any person undertaking to drive the insured vehicle at the request or with the consent of the assured can be so described, and that subject to the terms of this clause the insurers are liable *pro tanto* for medical expenses in respect of injuries sustained by such person (c).

The last, and most important, point requiring comment under this clause is the conditions which govern the incidence of the insurers' liability. In the first place, it is clear that they are only liable to pay the assured; whereas he may neither have paid nor be under liability to anyone to pay such medical expenses (d). The section presents the aspect of a conundrum

(u) Cf *ante*, as to the assured's wife, p. 551.

(v) As to whether they have any rights at all, or whether the assured himself can claim in respect of these benefits, see *ante*, chapter II, pp. 96 *et seq.*, and chapter IV, pp. 211 *et seq.*

(w) For discussion of meaning of this, see *ante*, p. 540.

(x) *Ante*, p. 543.

(y) *Post*, p. 555.

(z) *Ante*, p. 541.

(a) See *ante*, p. 541. *Fidelity and Casualty Co. of New York v. Mitchell*, [1917] A.C. 392.

(b) See *post*, p. 570, as to "description of use" clauses.

(c) Cf as to third party indemnity covering the driver, *ante*, p. 527. *Sed quare*, unless the driver was using the car for the benefit of or for the purposes of the assured.

(d) See chapter IV, p. 207 and chapter V, p. 341, as to "medical expenses" generally and under the Road Traffic Acts, 1930-34.

in this respect, the solution of which, it is suggested, may be found in the following channels :

(i) Where the assured has actually paid medical expenses in respect of injuries within the clause, the insurers' liability accrues.

(ii) Where the assured is under a liability to pay such expenses, either because he has been negligent, or because he has broken a duty to his passenger to carry him safely and uninjured (e), or because the expenses have been incurred by a servant or agent driving or in pursuance of his employment, or because he has subsequently undertaken liability towards the injured party or the doctor, if any, concerned, then the insurers are liable to pay him.

(iii) But if the assured has neither paid nor become liable by duty, undertaking, or promise, to pay for medical expenses, then the insurers are not liable to pay under the section.

The interpretation is borne out, it is submitted, by the use of the phrase "the medical expenses" which, used in connection with "the assured" gives a definitive sense, connected with him, to the expenses in relation to which the insurers' liability arises. If the phrase was worded "any medical expenses," it would be clear that the insurers, subject to any overriding objection of lack of insurable interest (f), would be liable to pay the assured independently of his own loss or liability.

In concluding the observations upon this section it should be noted that it has no bearing whatever upon the statutory liability of the user of a motor vehicle to pay for emergency treatment to injured third parties (g), or upon the insurers' liability to pay hospital charges under the Road Traffic Act, 1930 (h).

X.—FOREIGN USE CLAUSE

" Provided prior notice in writing shall have been given to the Company
" of each proposed journey this policy shall notwithstanding any territorial
" limits in any section but subject otherwise to the terms exceptions and
" conditions of this policy extend to apply for a total period not exceeding
" one-fourth of its current period to accident loss or damage occurring :

" (a) On the Continent of Europe or in Algeria or Tunisia while any
" motor car described in the Schedule hereto is temporarily on the
" Continent of Europe or in Algeria or Tunisia.

" (b) In direct connection with the transit (including the processes of
" loading and unloading incidental to such transit) of any such
" motor car between any ports on the Continent of Europe or
" between any such port and Great Britain Ireland the Isle of
" Man and/or the Channel Islands provided always that the
" transit above mentioned shall be by any recognised sea passage
" of not longer duration under normal conditions than 65 hours.

" In case of disablement of the motor car by reason of loss or damage
" the liability of the Company in respect of cost of delivery to the assured
" after repair shall be limited to the cost of delivery in the country where
" the loss or damage was sustained."

Before proceeding to the detailed consideration of the contents of this clause it is necessary briefly to consider what is the meaning of the expression "Foreign Use" which heads it. As has been previously indicated (i), the policy insures against some four (or may be less or more) types of risks

(e) But note that carriage of passengers for hire or reward is usually an excluded risk under private motor car insurance policies. See *post*, pp. 561 *et seq.*

(f) Chapter II, *ante*, pp. 70 *et seq.*

(g) Road Traffic Act, 1934, ss. 16 & 17. See chapter V, *ante*, pp. 341 *et seq.*

(h) S. 36 (2), as amended. Chapter IV, *ante*, p. 267.

(i) *Ante*, p. 553.

which may be incurred by the assured, and that such risks to be incurred, of which the insurers have undertaken indemnity, are in all cases, though not in the same terms (j), limited to such as may arise from occurrences within Great Britain, Ireland, the Channel Islands and the Isle of Man. It is submitted that any use not within these geographical limits is properly described as "foreign," that is, that expression must be interpreted with reference not to delicate questions of Constitutional Law or international usage but to the terms of the policy. As regards the contents of the policy and the indemnity therein undertaken by the insurers, any use not within the geographical limits therein delineated may be aptly said to be "foreign." Unless the terms of the policy are looked at to supply the meaning of the word "foreign," the task of defining the scope of its application is attended by the utmost confusion, if not by insuperable difficulty. This may be illustrated by brief reference to the type of problems which such extrinsic interpretation would involve: to the constitutional purist, "foreign" implies outside the domain of the Crown—but the policy does not extend to use within the greater part of the King's Dominions, in fact, to all such use which is not within Great Britain, Ireland, the Isle of Man and the Channel Islands; to the Unionist the inclusion of Northern Ireland within the term "Ireland" is abominable, yet there is no doubt that such is the interpretation which the policy requires to be placed upon the term Ireland (k) (this is borne out, it is submitted, by the wording of the second part of the third general exception (l)); on the other hand, the Separatist, apparently according with the insurers' intentions in this respect, will regard any suggestion that Great Britain includes Northern Ireland with suspicion. To the specialist in Private International Law the word "foreign" means "not English" (m). Since there is justification and a certain amount of authority for all of these contending opinions, amongst others (n), it is obvious that the only solution possible is to have regard to the terms of the policy without more outside aid than is indispensable. It may be mentioned for the sake of completeness that the requirements of the Road Traffic Acts, 1930-1934, do not extend to Northern Ireland, where the provisions of different statutes are applicable (o).

The extension of the liability of the insurers to losses or liabilities arising through the use of the insured vehicle abroad as defined and limited by this section only accrues where notice in writing is served by the assured upon his insurers of his intention to take and use the car concerned abroad, or to cause or allow such use. The requirement of a prior written notice of intention to go abroad is one sometimes to be found in life insurance policies (p). Notice of intention must, in accordance with the general principles of the law of contract, be given in a reasonable time, and what is reasonable will be determined according to the circumstances of every case (q). In practice difficulties will not frequently arise upon this point, since the prudent owner who is desirous of taking the insured vehicle abroad or of allowing it to be so taken or used will at the same time take good care

(j) There are necessary differences in the formulae employed. See, e.g., *ante*, PP 514, 540.

(k) Southern Ireland is properly described as the "Irish Free State."

(l) See *post*, p. 561.

(m) See Dacey, *Conflict of Laws*, 18th Edn., pp. 50 *et seq*.

(n) E.g. that "foreign" means outside the British Empire.

(o) See chapter IV, p. 168, *ante*, and chapter V, *ante*, p. 276.

(p) Not, however, so commonly to-day as was formerly the case.

(q) Frequently the insurers assent to foreign use, and generally where there is no clause in the policy providing for it, it is signified by an endorsement. As to which, see *post*, chapter IX.

to secure his protection against the potential difficulties which may attend his foreign travel. Prior notice in writing is required with respect to each separate proposed journey which the assured desires to make or have made with the vehicle insured.

The general effect of this section is to remove the territorial qualifications contained in the several preceding sections of the policy and to which the assured's rights thereunder were respectively subject (r). This the section expresses by the formula that the insurers undertake liability in respect of "any accident loss or damage"—occurring during a properly notified foreign use of the insured vehicle.

1. Foreign liability.—This policy, like most, makes no provision for the assured's driving other cars abroad when he does not take his own car with him (a).

It should be noted that in regard to the third party liability, the assured may incur liability abroad by the law of the country in which he is driving which would not arise in similar circumstances in England (b). Some policies, as has been pointed out, cover only liability at "Common Law" and under certain English statutes, etc. This limitation will, it is apprehended, in some cases preclude the assured from recovering under his policy in respect of a liability incurred abroad which would not have arisen in England in the same circumstances (c).

It should also be noted that the law of a foreign country may require insurance of a different type from that required in the United Kingdom. The liability of insurers to third parties in respect of an accident which takes place abroad is a question too vague to be dealt with in this work (d), and the position of both assured and insurers in Northern Ireland is substantially the same as it is in England (e). But it may be said here that an assured contemplating the use of his vehicle abroad [including in this term Ireland (f)] should consider carefully—

(1) Whether his policy covers all third party liability which he may incur abroad;

(2) Whether his policy conforms to the requirements in respect of motor insurance of the law of the country in which he desires to travel (g);

(3) What his position *vis-à-vis* his own insurers may be in regard to any sums which they become obliged under the foreign law to pay to third parties (h).

The liability of the insurers is, however, subject to further limitations under this type of clause which must be briefly considered.

(1) *Limits of use.*—It should be noted that the clause applies, of necessity, with different limitations in respect of the insurers' liability whilst the vehicle is actually in use abroad, and of their liability whilst the vehicle is in transit.

(2) *Limits of time.*—The period of time by which the insurers' liability is governed is subject to two special limitations. Not only must the accident,

(r) *Auto*, pp. 503, 553.

(a) Presumably a special arrangement to be effected by endorsement on the policy would be necessary.

(b) Or Scotland. The assured's potential liabilities in Scotland differ from those in England. For an example, see *auto*, p. 209.

(c) See *auto*, p. 492.

(d) Since it depends so much on the law of the particular country in each case.

(e) Since the Northern Ireland Acts resemble closely our statutes. The M.I.B. Agreements, also, are applicable to Northern Ireland.

(f) *I.e.* Northern Ireland or the Irish Free State.

(g) *E.g.* see the Irish Free State, where stringent provisions prevail.

(h) *E.g.* under the Irish Free State or Northern Ireland Motor Insurance Statutes.

loss or damage with respect to which indemnity or compensation is sought have occurred during the period of currency of the policy (or a proper renewal thereof), but also :

(i) at the time of the event in respect of which indemnity is sought the insured vehicle must not have been used abroad for more than one-quarter altogether (i) of the current period ; AND

(ii) at the time of such event the vehicle insured must be temporarily (k) in use abroad—the owner, that is, must intend that the vehicle shall return or be returned to Great Britain.

(3) *Other limitations.*—The only effect of the Foreign Use clause upon the other provisions of the policy is to include within their respective benefits such accidents, losses and damage sustained abroad (within the territorial limitations) as otherwise fall without the terms and conditions of each section (l). When a case arises, therefore, for a claim to be made in respect of foreign use and the initial conditions of such claim, as outlined above, are satisfied, the question must invariably be asked as to whether such loss, etc., otherwise falls within the provisions of the particular section under which claim is made. Thus, to take only one example, limitations of use contained expressly or by implication will continue to take effect notwithstanding that the insured vehicle is being used outside the British Isles (m).

In the case of loss or damage occasioning disablement to the insured vehicle the section under consideration makes a special provision, the effect of which is to qualify in the case of a vehicle damaged abroad the provision which is made in a preceding section (n) under which the insurers undertake to bear certain costs of re-delivery to the assured.

In conclusion, it remains to stress the fact that the foreign use section applies only where the insured vehicle is taken and used abroad, and not to loss or damage arising from the use abroad of any other vehicle.

The insurers' liability in respect of " foreign use " may be appropriately illustrated by reference to the case of *Verelst's Administratrix v. Motor Union Insurance Co.* (o), where the policy contained the following clauses :

" (a) If the assured shall sustain in direct connection with the insured car or whilst . . . travelling in any other private car any bodily injury . . . causing the death of the assured the company shall pay to the assured's legal personal representatives the sum of £1,000.

" (b) (3) The company shall not be liable . . . for any accident whilst the said motor car is . . . used other than for the private pleasure purposes of the assured, nor . . . outside the United Kingdom excepting for a period or periods not exceeding in all three months in any one year . . . and then only in respect of accidents arising within the limits of the Continent of Europe and/or Algeria and Tunis, the assured to give written notice to the company of his intention to take the car abroad."

The assured was killed whilst being driven by her brother in his private car in India. Her personal representative claimed under the policy, and the insurers resisted payment on the grounds, *inter alia* (p), that condition (p) excluded liability for an accident occurring outside the United Kingdom or the specified geographical limits.

(i) The limitation of one-quarter of the current period will, *i.e.*, be exceeded when the vehicle is used altogether, on several visits abroad, more than one-quarter of such time.

(k) Not, *i.e.*, permanently, as where the assured takes up residence abroad and intends never to return to England to live.

(l) *Auto*, pp. 503, 553, 557

(m) See *post*, as to " description of use " clause

(n) *Auto*, p. 511.

(o) [1925] 2 K. B. 137.

(p) As to other points decided in this case, see *post*, pp. 591 *et seq.*

ROCHE, J., disposed of this point as follows :

" For the company it is said that by that condition they are not liable for anything happening outside the United Kingdom, except as specifically mentioned, and that as the accident in question happened in India, which is beyond the specified limits, the claim is not maintainable. I am satisfied that this condition cannot be relied upon by the company, for I hold that it relates only to accidents in connection with the use of the motor car insured. My reasons for so holding are that three times in condition 3, at the beginning, in the middle and at the end, the actual motor car is referred to and stipulations are made with regard to it. Further, I am unable to read grammatically the condition as counsel for the company asks me to read it. He argues that the condition, omitting immaterial words, should read as follows : ' The company shall not be liable for any accident arising whilst the motor car is used for other than private purposes of the assured nor arising, except as specifically provided, outside the United Kingdom.' That would be a possible construction if regard were not paid to the words ' for a period or periods not exceeding in all three months in any one year.' An accident cannot arise ' for ' a period, although it may arise ' during ' a period. The proper and natural construction of the condition is to read it as providing that the company shall not be liable for any accident arising whilst the said motor car is used for other than private purposes of the assured, nor whilst it is used outside the United Kingdom except for a period or periods not exceeding three months. For these reasons I hold that the condition does not avail the company."

The judgment and passages quoted from *Verelst's Administratrix v. Motor Union Insurance Co.* may be appropriately used as a commentary upon the preceding observations concerning the scope and limits of the clause of the policy insuring against foreign use.

XI.—NO CLAIMS REBATE CLAUSE

" In the event of no claim being made or arising under the policy during a period of insurance specified below immediately preceding the renewal of the policy the renewal premium in such part of the insurance as is renewed shall be reduced as follows :

Period of Insurance.	Reduction.
The preceding year	10 per cent.
The preceding two consecutive years	15 "
The preceding three consecutive years	20 "

" Should the company consent to a transfer of interest in this policy the period during which the interest was in the transferor shall not accrue to the benefit of the transferee. If more than one motor car is described in the Schedule to this policy the No Claim Rebate shall be applied as if a separate policy had been issued in respect of each such car."

This clause is one difficult to construe. Does it entitle the assured to renewal of the whole policy at the same premium as the old, less the reductions specified, or does it merely give him the right to demand a reduction of the premium then current, if the insurers agree to renew? If the latter, the right is barren, and the clause a mere pious expression of intention (q).

The phrase " no claim being made " calls for no explanation. A claim which is " made " under any particular policy will be such claim as the insurers have under the provision of the policy undertaken to the assured

(q) The whole question is too complicated for discussion here, but it is submitted that the clause must be given a business meaning, and, if it is ambiguous, construed *contra proferentes*.

to meet, and liability in respect of which they are called upon to satisfy. What is a claim "*arising under the policy*" requires a little more consideration. The word "claim" in the common parlance has a cognate meaning; it is commonly understood as denoting an expressed demand, in which sense it appears in the present section as a claim which is "made" upon the insurers. In its later context "*arising under the policy*," the word claim is, it is submitted, used to denote any incident or occurrence with respect to which the assured would be entitled to call upon the insurers to indemnify him under the terms of his policy, whether in fact he does so or not (r). The assured, thus, who is involved in an accident, but who not wishing to imperil his premium rebate or renewal of insurance makes no claim, nevertheless loses his right under the policy to a rebate if such occurrence is one in respect of which he might validly have sought indemnity or compensation under the policy, even though he forbore from making a claim on his insurers. This interpretation might be thought too strict, and since there is some ambiguity in the clause, it might be contended as precluded by application of the rule of construction *contra proferentem* (s). It is submitted, however, that this might not be applied. Insurers grant a reduced premium primarily because they regard the assured as a "good risk"; the reduction is *not* in the nature of a bonus returned on a sum previously paid, out of the insurers' profit from having had no losses to pay. If the assured has had accidents—whether he claims in respect of them or not—he is thereby shown to be a bad risk. Moreover, he would in any case be obliged to disclose such on renewal, whereupon the insurers could refuse the renewal (t) except at an increased premium (a). This interpretation of the expression "*made or arising under this policy*" may have a different effect when accidents and losses to a specified figure are borne by the assured under an "excess" clause under the terms of any policy (b). If the assured is himself liable, *vis-à-vis* his insurers, to bear these losses, they cannot be said to constitute claims "*arising under the policy*," since, in effect, they are altogether excluded from the operation of the terms of the contract of insurance (c). On the other hand, they are equally material to the risk and presumably must be disclosed.

The hardship which sometimes is produced by the insurers' "knock for knock" arrangements when the assured is obliged to make a claim in respect of damage for which a third party is solely responsible, is considered in a later place (d). Some policies expressly exclude the "knock for knock" agreement from operation on the assured's right to rebate under this clause. As will be seen later, the policy under consideration in this chapter (unlike some others) contains no express terms prohibiting assignment (e). On the other hand a motor policy is in its nature incapable of assignment without the consent of the insurers (f).

(r) See more fully the discussion of the insurers' liability under each relevant clause, *ante*, pp. 501, 514, 527, 540.

(s) *Ante*, p. 484.

(t) See chapter VII, *ante*, pp. 468 *et seq.*

(a) This interpretation depends largely upon whether the clause gives the assured a right to renewal of the policy with the same terms and at the same premium (less reductions) as the original. In practice, so long as the accidents are disclosed, insurers do not take them into account, if the assured has made no express claim in respect of them, in allowing a "No claim rebate."

(b) See *post*, chapter IX.

(c) *Ante*, p. 551.

(d) Chapter X, *post*.

(e) *Post*, chapter IX.

(f) *Peters v General Accident Fire and Life Assurance Corporation, Ltd.*, [1938] 2 All E. R. 267. See chapter II, p. 93, *ante*.

XII.—GENERAL EXCEPTIONS CLAUSE

" The Company shall not be liable in respect of :

" 1. Any accident injury loss damage and/or liability caused
" sustained or incurred while any motor vehicle in respect of or
" in connection with which insurance and/or indemnity is
" granted under this policy is :

" (a) Being used otherwise than in accordance with the
" 'Description of Use' contained in this policy.

" (b) Being driven by the assured unless he (i) holds a
" licence to drive such vehicle or (ii) has held and is
" not disqualified by order of a Court of Law or by
" reason of age or disease or physical disability for
" obtaining such a licence.

" (c) Being driven with the general consent of the assured
" by any person who to the assured's knowledge does
" not hold a licence to drive such vehicle unless such
" person has held and is not disqualified by order of a
" Court of Law or by reason of age or disease or
" physical disability for obtaining such a licence.

" 2. Any contractual liability.

" 3. Any accident injury loss or damage arising during (unless it
" be proved by the assured that the loss or damage was not
" occasioned thereby) or in consequence of (a) Earthquake
" War Invasion Military or Usurped Power or (b) Riot and/or
" Civil Commotion occurring elsewhere than in Great Britain
" the Isle of Man or the Channel Islands."

1. Burden of proof under Exceptions Clauses.—Before considering any exceptions in a motor policy it must always be remembered that the burden of proof is upon the insurers to show that they come within the exception (g). A clear distinction must be drawn between exceptions which exclude—

(i) causes of loss (h) ;

(ii) types of loss (i) ;

(iii) loss however caused occurring during a specified use of (k) the vehicle, or at a particular time (l) or in a particular area (m).

No special difficulty occurs in regard to the first two types. But in regard to the last, difficulties of construction occur where the exception, as in the case set out above, states that the insurers shall not be liable for any loss, etc., occurring during a particular time or in particular circumstances. It might be thought that insurers could discharge the onus of bringing themselves within this exception by proving that the loss did occur during such

(g) See *per* GODDARD, L.C.J., in *Ellis (John T), Ltd v. Hinds*, [1947] K. B. 475; [1947] 1 All E. R. 337.

(h) E.g. no loss or damage caused by the vehicle being in an unsafe condition. See *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39, for an example.

(i) E.g. electrical failures, loss of use, etc.; see *ante*, pp. 504, 506.

(k) E.g. use for pleasure purposes; see *Roberts v. Anglo-Saxon Insurance Association* (1927), 43 T. L. R. 359; cf. *Levering v. Licenses and General Insurance Co.* (1936), 54 Ll. L. R. 68; *Passmore v. Vulcan Boiler and General Insurance Co.* (1936), 54 Ll. L. R. 92; *Jones v. Welsh Insurance Corporation, Ltd.*, [1937] 4 All E. R. 149; *Stone v. Licenses and General Insurance Co.* (1942), 71 Ll. L. R. 256.

(l) See, for example, *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 669.

(m) See, for examples, *Bonney v. Cornhill Insurance Co.* (*supra*) and *Re Morgan and Provincial Insurance Co.*, [1932] 2 K. B. 70, *per* SCRUTTON, L.J., at p. 82; *Palmer v. Cornhill Insurance Co.* (1935), 52 Ll. L. R. 78; *Baker v. Provident Accident and White Cross Insurance Co.*, [1939] 2 All E. R. 690.

excluded time or circumstance (n). But considerable doubt is thrown upon this construction by the judgments in the House of Lords in *Motor Union Insurance Co. v. Boggan* (o). A full account of that case is given below, but it should be noticed that Lord BIRKENHEAD appears to have held that the insurers do not bring themselves within the exception unless they can show that the loss was caused by the time or circumstance excluded. The true effect of his judgment on this point is the more difficult to understand in that the exception there considered contained an exception to the exception—namely, that the exception did not apply if the assured proves that the loss or, etc., was not caused by the matters excluded. It would therefore seem that the true effect of this judgment is that—

(i) Where there is a mere general exclusion of this kind without any exception the insurers bring themselves within the exclusion by showing that the loss occurred during the time or circumstances excluded, and there the matter ends (p).

(ii) Where, however, there is an exception (q) to the exclusion (r) permitting the assured to recover if he can prove that the loss or, etc., was not caused by the matters excluded (s), the exclusion (r) is to be interpreted by reference to the exception to it, as meaning "caused by" and that the exception to the exception does not take effect, as it purports to do, to shift the onus of proof, but on the contrary the insurers' burden is increased in that they must prove not only that the loss or, etc., occurred during the time or circumstances excluded, but also that it was caused thereby.

In approaching the consideration of the General Exceptions clause of every motor insurance policy three matters of importance must be borne in mind. First, that no claim may be validly made or arise under a policy unless the precise limitations and conditions of that particular clause under which it arises have been fulfilled and observed; secondly, that the circumstances under review in any particular case must not be excluded (t) by reason of any implied exception (u) proper to the particular clause which it is sought to enforce, and thirdly, that all the conditions necessary to effectuate the liability of the insurers under the policy have been observed by the assured. It is only when all these three conditions are satisfied that a case arises for the possible application of the General Exceptions clause (b). It is necessary to examine the effect of this clause in the threefold division within which the policy confines it.

2. Exclusion of unlicensed drivers.—(1) The first general exception relieving the insurers from liability under the policy is where loss or damage or liability arises whilst the insured vehicle is being used in one of three sets

(n) See, e.g., *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39; *Roberts v. Anglo-Saxon Insurance Association* (1927), 43 T. L. R. 359.

(o) (1923), 130 l. T. 588.

(p) See *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 46 T. L. R. 71, and *Bonney v. Cornhill Insurance Co.* (1931).

(q) I.e. an exception to the exception. The object of such is to shift the burden of proof.

(r) The word "exclusion" is here used as describing the main exception in order to avoid the tautologous phrase "exception to the exception."

(s) E.g. war, being driven by an unlicensed driver, or, etc.

(t) But the assured is not obliged to prove this. *Aliter* in the case of some conditions precedent clauses, as to which see *post*, p. 623.

(u) As to implied exceptions, see *post*, chapter IX.

(b) The onus of setting up the application of an exception to any particular case rests upon the insurers. See, e.g., *post*, pp. 568, 569, and *Ellis (John T.), Ltd. v. Hinds*, [1947] K. B. 475; [1947] 1 All E. R. 337.

of circumstances. The second and third of these may be considered together. The exception applies in the following cases :

(i) Where the assured is driving whilst he is disqualified by order of Court (c) or by reason of age or disease or physical disability from obtaining a licence (even if he has at one time held a licence) or when he has never held a driving licence (d).

(ii) Where some other person is driving with the assured's general consent (e) who is disqualified either by order of Court or by age, (f) disease or physical disability from obtaining a licence, or a further licence, or who has never held a driving licence.

The subject of unlicensed drivers has already been considered (g).

In *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison* (h) the matter before the Court was, *inter alia*, to decide whether a failure to disclose the fact that Morrison, the proposer for motor insurance, was the holder of only a provisional driving licence who on being given a driving test had failed to pass such test was a material non-disclosure within the meaning of that phrase used in section 10 (3) of the Road Traffic Act, 1934, so that thereby, if certain other conditions were fulfilled, the insurers could obtain a declaration that the policy had never come into effect and that they were therefore not liable to indemnify Morrison for insurance in respect of judgment obtained against him for personal injuries in a running down action (i). After notice had been served on the third parties by insurers of the grounds on which insurers relied to show that the policy had been obtained by non-disclosure, it was discovered that Morrison had been, prior to the motor accident, disqualified from holding a licence to drive as a result of a conviction under section 15 (1) of the Road Traffic Act, 1930 (k). It was not disputed that as against the "assured" the non-disclosure of the disqualification entitled the insurers to avoid the policy, but the Court of Appeal held that the non-disclosure of the failure to pass a driving test was not material, for in fact a £5 excess clause had been imposed on the defendant Morrison, as he was an inexperienced driver, and the same condition would have been imposed upon him had disclosure been made of the failure to pass the test. Here one is not concerned to consider whether the absence of a licence to drive is a material consideration which affects the risk in the eyes of insurers, for this matter has been dealt with in chapter V (kk). As between insurer and assured, however, almost invariably the truth of answers in the proposal form is warranted, and an untruthful answer to the question "How long have you held a licence to drive?" will enable insurers to repudiate liability under the policy (l), whether the question is a material one or not (m). Insurers by this exclusion of unlicensed drivers state that when the insured vehicle is being driven by an unqualified driver, the vehicle is not on risk, as far as the assured is concerned. It is surmised that the words "driving

(c) Cf. *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

(d) See Road Traffic Act, 1930, s. 5; Road Traffic Act, 1934, s. 6.

(e) *I.e.* by knowledge and absence of prohibition.

(f) Cf. *Broad v. Waland* (1942), 73 Ll. L. R. 203; *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne*, [1941] 1 K. B. 295; [1941] 1 All E. R. 123.

(g) See *ante*, p. 535.

(h) [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

(i) See *ante*, chapter V, p. 303.

(k) For driving the car while under the influence of alcohol. (kk) *Ante*, pp. 303 *et seq.*

(l) See chapter VII, *ante*, pp. 387 *et seq.*

(m) Where the failure to hold a licence is due to the youth of the driver, the failure to disclose it will probably be held material. See *Broad v. Waland* (1942), 73 Ll. L. R. 203.

licence " mean a licence to drive granted by a competent authority under the provisions of the Road Traffic Act, 1930 (w). In some policies the second instance of this exclusion, relating to the authorised driver, only excludes the unlicensed driver if the assured knew that he had no licence to drive, as in *Lester Brothers v. Avon Insurance Co. (o)* and *Ellis (John T.), Ltd. v. Hinds (p)*, which have already been fully discussed. This latter case shows that there is no doctrine of "constructive knowledge" in motor insurance law, so that the assured is assumed to have that knowledge of his drivers' qualifications which diligent inquiry would produce, yet it is submitted that where the assured deliberately closed his mind to the receipt of information that his driver is unlicensed, he might well be considered to have knowledge of that fact. But each case must depend upon its own circumstances, and no general rule can be laid down.

3. Use outside Description of Use.—The remaining circumstance falling within the scope of the first exception refers to the "description of use" of the insured vehicle, which is one of the governing clauses of every motor insurance policy. It is elementary in motor insurance practice that insurers will not undertake liability to the assured in undefined and unlimited circumstances otherwise than upon extraordinary conditions (q). Hence every policy contains, in one or more of its parts, a description of the use in respect of which risks arising from the insured vehicle are covered by insurance, and which, at the same time, effects a limitation of the insurance and of the risks to be borne by the insurers in relation to the vehicle to be covered, by excluding all types of use outside the description applicable to any particular case (r). Although commonly expressly inserted as a general exception, it is doubtful whether this subtracts to any extent from the liabilities resting upon insurers, who in the common case only undertake liability to insure a vehicle whilst it is being used for the purposes described and limited in the policy (s). The only case in which the express exception might have some effect would be where the description of use was held to be general in its effect, extending therefore to losses not strictly falling within its scope, where an exception could be interpreted so as to relieve the insurers of liability (t). The exception as to user may be summarised as amounting to the exclusion of any liability by the insurers when the insured vehicle is being used otherwise than for its described purposes, although, as will be shown, this is by no means the only manner in which insurers may make such use of the "description of use" clauses of the policy (u).

It should be noted that the exception last dealt with extends to exclude the liability of insurers in respect of any motor vehicle, not only that which is insured, which is being used otherwise than in accordance with the "description of use" clause of the policy (b) under which such claim is made (a).

(w) *Broad v. Weland* (1942), 73 Ll. L. R. 263. See Road Traffic Act, 1930, s. 4, and Motor Vehicles (Driving Licences) Regulations, 1937, S. R. & O. 1937, No. 438 and Motor Vehicles (Driving Licences) (Amendment) Regulations, 1948, S. I. 1948, No. 48. International driving permits, and licences granted by a competent authority of another country are deemed to be licences (S. R. & O. 1937, No. 438, rule 15). Defence Regulations permitting the driving of military vehicles without a driving licence have been revoked as from December 31, 1947.

(o) (1942), 72 Ll. L. R. 109, *ante*, p. 535.

(p) [1947] K. B. 475. [1947] 1 All E. R. 337, *see* chapter IV, *ante*, p. 175.

(q) *Ante*, p. 493, and chapter VII, *ante*, pp. 411, 412.

(r) *See post*, p. 570, and chapter VII, *ante*, p. 431.

(s) *See post*, pp. 570 *et seq.*

(t) But insurers alleging an exception must always prove it so as to displace liability. *See ante*, p. 561.

(u) *Post*, p. 570.

(b) The commonest instance would be the inability of an assured to recover from his own insurers when he sustains injuries whilst riding in a public service vehicle or whilst driving a friend's car for purposes of the motor trade.

This provision extends the application of the "description of use" clause of the policy to any motor vehicle in relation or with respect to which a claim is made upon the insurers under the policy, even though such other vehicle is being properly used according to the terms of such other policy. Thus, for example, when an assured, covered in respect of private pleasure purposes only, sustains personal injury whilst a passenger in a vehicle which is being used for business purposes, he will be prevented from making any claim against his own insurers under the "private pleasure purposes" policy, by reason of the exception now being considered (c).

4. Exclusion of contractual liability.—(2) The second general exception is that which excludes any claim made by the assured in respect of losses or liabilities incurred by reason of contractual liability (d). The exclusion of contractual liability from the risks in relation to third parties required to be insured against by the Road Traffic Act, 1930 (e), has already been discussed. Contractual liability of the assured towards third parties may arise in one of four ways :

- (i) under a contract for the conveyance of such third party ;
- (ii) under a contract for the conveyance of goods of a third party ;
- (iii) under a contract of employment (f) ;
- (iv) under a contract of indemnity (g).

The effect of this general exception will be to exclude any claim by the assured for indemnity against liabilities incurred by virtue of such contracts. As far as liabilities under (iii) above are concerned, which may be either direct common law liabilities or liabilities incumbent upon employers by statutes, such as the Workmen's Compensation Act, 1925(h), or the Employers' Liability Act, 1880 (i), it should be recalled that the section of the policy whereunder the insurers undertake to indemnify the assured against third party liability excepts from the scope of this indemnity liability incurred

(c) For instance, the following limitations of use have been considered in the Courts :

(i) At certain times in certain areas . see *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 600, *Bonnev v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39; *Provincial Insurance Co. v. Morgan*, [1933, A. C. 240; *Palmer v. Cornhill Insurance Co.* (1935), 52 Ll. L. R. 78

(ii) For carriage of goods of certain weight or physical characteristics ; see *Roberts v. Anglo-Saxon Insurance Association* (1927), 43 T. L. R. 359; *Jenkins v. Deane* (1933), 47 Ll. L. R. 342

(iii) For the carriage of any particular apparatus ; see *Jenkins v. Deane* (supra),

(iv) For the carriage of more than a specified number of persons. *Bright v. Ashfold*, [1932] 2 K. B. 153

(v) For business of the assured only . see *Passmore v. Vulcan Boiler and General Insurance Co.* (1936), 54 Ll. L. R. 92, *Levinger v. Licenses and General Insurance Co.* (1936), 54 Ll. L. R. 68; *Stone v. Licenses and General Insurance Co.* (1942), 71 Ll. L. R. 256; *Jones v. Welsh Insurance Corporation, Ltd.*, [1937] 4 All E. R. 149; *Egan v. Bowler* (1939), 63 Ll. L. R. 200, *Zurich General Accident Insurance Co. v. Buck* (1939), 64 Ll. L. R. 115.

(vi) Hire excluded . see *Wyllt v. Guildhall Insurance Co.*, [1937] 1 K. B. 653; [1937] 1 All E. R. 792; *McCarthy v. British Oak Insurance Co.*, [1938] 3 All E. R. 1; *Bonham v. Zurich General Accident and Liability Insurance Co.*, [1945] K. B. 292; [1945] 1 All E. R. 427; *East Midland Traffic Area Traffic Comrs. v. Tyler*, [1933] 3 All E. R. 39

(d) Chapter IV, ante, p. 209.

(e) S. 36 (1) (23 Halsbury's Statutes 637). See chapter IV, ante, p. 188.

(f) See chapter IV, ante, p. 209, as to effect of Road Traffic Act, 1930, s. 36 (1), upon such cases.

(g) Cf. *Furness Withy & Co., Ltd. v. Duder*, [1936] 2 K. B. 461; [1936] 2 All E. R. 119. This may arise when the assured delivers his car to a motor dealer and undertakes to be responsible for all risks. See this subject discussed in chapter IX, post.

(h) 11 Halsbury's Statutes 513; see ante, p. 210. Repealed and replaced by the National Insurance (Industrial Injuries) Act, 1946.

(i) 11 Halsbury's Statutes 499; see, ante, p. 35. This Act has now been repealed.

arising out of and in the course of such third party's employment with the assured (h). A servant who in these circumstances suffers bodily injury will be entitled to claim compensation under the statute first mentioned above. His employer will not, however, apart from the general exception, be entitled to claim indemnity from his insurers; unless perhaps, under the particular policy now under review, in the special case of a motor cycle, which has been discussed above (i).

The liability of master to servant is, however, only one type of "contractual liability" which the assured may incur towards third parties, and the general exception, whilst redundant from the former aspect, is necessary and effective to exclude other types of contractual liability from indemnity.

(3) The third general exception, excluding from indemnity claims based upon accident, injury, loss or damage arising during or in consequence of earthquake, war, invasion, military or usurped power *anywhere*, or riot and/or civil commotion occurring *elsewhere* than in Great Britain or its appendages (m), needs a short discussion.

The various terms employed in these exceptions have been subject from time to time to interpretation in the Courts, and the effect of the authorities may be conveniently summarised as follows:

(i) "*War or invasion*."—This implies the existence of a state of belligerency between states and covers acts committed by invading forces, and also by those resisting invasion (n).

(ii) "*Military or usurped power*."—These words comprise both foreign invasion (o) and internal rebellion (p). But no acts fall within these terms unless they are committed under some superior authority, legal or illegal (q). There must be some power set up in conflict with the lawful authority of the state, so that those exercising it are guilty of treason, and not of mere riot or disorder (r).

(iii) "*Riot*."—The five elements in the making of a riot have been laid down by authority and followed in insurance cases with regularity (s). What constitutes riot will clearly emerge from the quotations set out below (t).

(iv) "*Civil commotion*."—This is something less than usurped power and something more than a mere common law riot (u). The acts amounting to the commotion or tumult from which the loss arose must be done in concert, they must also be acts done for the attainment of some general purpose (v).

As far as (iii) and (iv) are concerned it should be noted that a claim based upon loss or damage sustained by reason of riot and/or civil commotion in

(h) *Ante*, p. 202, and see notes (e) and (f) *supra*.

(i) *Ante*, p. 540; chapter VII, *ante*, p. 405.

(m) *Not, nota bene, Ireland.*

(n) *Janson v Driefontein Consolidated Mines, Ltd.*, [1901] A C 484, *Robinson Gold Mining Co. v. Alliance Assurance Co.*, [1904] A C 350, *British India Steam Navigation Co. v. Liverpool and London War Risk Insurance Association*, [1921] 1 A C 99.

(o) *Rogers v Whittaker*, [1917] 1 K B 942.

(p) *Drinkwater v. London Assurance Corporation* (1767), 1 Wils. 363, *Langdale v. Mason* (1780), 2 Park 145.

(q) *Curtis & Sons v. Mathews*, [1919] 1 K B 415.

(r) *Drinkwater v. London Assurance* (*supra*), *Curtis & Sons v. Mathews* (*supra*).

(s) *Field v. Metropolitan Police Receiver*, [1907] 2 K B 853, cited at p. 568, *post*, and see *London and Lancashire Fire Insurance Co. v. Bolands, Ltd.*, [1924] A C 836.

(t) *Post*, p. 568.

(u) *Langdale v. Mason* (*supra*), *London and Manchester Plate Glass Co., Ltd. v. Heath*, [1913] 3 K B 411. See note (s), *supra*. The definition of civil commotion in *Wellord and Otter-Barry's Fire Insurance* (4th Edn.), at p. 64, was approved by the Privy Council in *Ley v. Assurance Generali*, [1940] A C 791; [1940] 3 All E. R. 427. See also *Pesqueras Secadoras de Espana S. A. v. Boer* (1947), 80 Ll. L. R. 318 (C. A.).

(v) *Republic of Bolivia v. Indemnity Mutual Marine Assurance Co., Ltd.*, [1909] 1 K B. 785.

Great Britain, the Channel Islands or the Isle of Man, is not excepted from the obligations of the insurers to indemnify their assured under the policy (w).

When a case for the possible application of the exception arises (a) the onus is on the insurers to prove that the loss in respect of which the assured is claiming under the policy is one which is, in fact, by virtue of a special exception, excluded from the scope of the policy. This onus they satisfy by proving that the loss was "caused" by one of the excepted risks. Thus in *London and Lancashire Fire Insurance Co. v. Bolands, Ltd.* (b), an exception against "riot" was held to apply where the theft of the assured's monies took place in circumstances which were such as to amount to a riot in law.

This proposition is further illustrated by the case of *Crozier v. Thompson* (c), in which the question was whether damage to a car caused by running into a trench dug across a road by Sinn Feiners was a loss directly caused by a risk coming within war, riots, or civil commotion or ordinary peril of the road. It was held by a Divisional Court (d) to be the former, and the argument of the insurers that the existence of the trench, and not the act of the persons who dug it, was the direct cause was rejected.

In the later case of *Cooper v. General Accident Fire and Life Assurance Corporation, Ltd.* (e), a motor policy contained an exception against "Loss or damage occasioned through riot or civil commotion occurring within the land limits of Ireland". The point decided appears clearly from the following extract from the judgment of Lord BIRKENHEAD (f)

"My Lords, the first point taken on behalf of the appellants is this: "That, in order to come within the terms of the exception, it must be "proved that there has been a commotion or tumultuous assemblage at "the time and place where the loss occurred, in other words, that you "must look at the nature, and not the purpose, of the act which is proved. "My Lords with great respect I do not think that is the meaning of the "clause. If the loss is occasioned through—that is, if it took place in consequence of a civil commotion, then it appears to me that the case falls "within the exception, and there is no need to prove a commotion at the "actual time and place where the loss happened."

The *ratio decidendi* in these cases, it is submitted, is lent considerable support by the decision of the House of Lords in *Motor Union Insurance Co. v. Boggan* (g). Extracts from the judgments are set out below.

The decision in this case upon the effect on the burden of proof of the parenthesis "unless it be proved by the assured that the loss or damage was not occasioned thereby" has been considered in an earlier section (h).

In *Motor Union Insurance Co. v. Boggan* (i) the assured's policy contained a "riot and . . . civil commotion" exception.

During the time of rebellion in Ireland the assured was held up by three or four armed men who took the insured car from him. It was held by three Courts in Ireland that the case was one of theft, and that the mere fact that the theft had been committed by four armed men acting in concert did not constitute a riot within the meaning of the policy. On appeal to the House of Lords this decision was reversed upon the grounds shown in

(w) But such loss or damage sustained in Ireland is included within the exception.

(a) As in every case where the insurers seek to set up the application of an exception.

(b) [1924] A. C. 836

(c) (1922), 12 Ll. L. R. 291.

(d) LUSH and BAUMHACHE, JJ

(e) (1923), 39 T. L. R. 113, 13 Ll. L. R. 219.

(f) As reported (1923), 13 Ll. L. R. 219, at p. 220.

(g) (1923), 130 L. T. 588.

(h) *Ante*, p. 561

(i) (1923), 130 L. T. 588; 16 Ll. L. R. 64. Cf. *London and Lancashire Fire Insurance Co., Ltd. v. Bolands, Ltd.*, [1924] A. C. 836, in which the judgment of the Irish Court of Appeal in *Boggan's Case* was disapproved.

the following extracts from the judgments of Lords BIRKENHEAD and WRENBURY:

"Exceptions are, of course, the cases which are not covered by this policy, and the relevant exception is in the following words:

"'Loss or damage arising during (unless it be proved by the assured that the loss or damage was not occasioned thereby) or in consequence of earthquake, war, invasion, riot, civil commotion, military or usurped power.'

"Now the words 'unless it be proved by the assured that the loss or damage was not occasioned thereby' are enclosed within brackets and may be dismissed with the observation that one has not to forget in construing this exception that, as learned counsel for the respondent properly pointed out, the onus is upon the appellants here to show that they fell within it; and I have had that in mind in any observations I am about to make.

"Having made that plain, let me re-read these exceptions omitting those words: 'Loss or damage arising during or in consequence of earthquake, war, invasion, riot, civil commotion, military or usurped power.' It is therefore necessary for the appellants here to satisfy your Lordships, as it was an obligation on them to satisfy the Courts below, that this loss or damage was the result of riot or civil commotion or both"—*per* Lord BIRKENHEAD (h).

"It has been argued that there can be no riot unless there is tumult, noise, violence and rapid movement or something of the kind. I do not assent to that, I confess, at all. It appears to me that in this case all the five elements of riot which were given in *Field v. Metropolitan Police Receiver* (i), were satisfied. There were more than three persons; they had the common purpose of commandeering this car and they executed this purpose and had a revolver which they were going to use if necessary. They threatened force or violence, though actually it was not necessary to use it, but they threatened force or violence; and I have no doubt it was done in such a manner as to give some alarm to the man who was blindfolded and kept for a couple of hours in the cottage while they did it. It appears to me that as regards the construction of this policy Lord Justice O'Connor's judgment was well founded. In that judgment he says:

"I have arrived at the opinion that the riot mentioned in the exception must be something distinct from the theft insured against, and that in this case the riot or alleged riot had no existence except so far as it was involved in the theft which was accomplished by four armed men with threats of violence."

"I think it is well founded. It is shown that these men knew that the ordinary law was incapable under the circumstances of interfering with or of dealing with them, that it was powerless, and that there was a state of commotion and disturbance or riot"—*per* Lord WRENBURY (m).

It is a little difficult to follow the approval given to the above extract from O'CONNOR, L.J.'s, judgment. His words as quoted would seem to lead to the opposite conclusion to that at which he (n) and the House of Lords arrived (o).

5. General exceptions in other policies.—It should be noted that other policies may contain many other exceptions. Moreover, in different policies the general exceptions may contain exclusions which in the specimen policy considered in this chapter are placed either in the particular clauses to which they relate—for example, exclusion of the consequences of suicide or any attempt thereat—or in the general "conditions" governing the whole

(h) 16 Ll. L. R., at p. 65. (i) [1907] 2 K. B. 853. (m) 16 Ll. L. R., at p. 67.

(n) He gave a dissenting judgment in the Irish High Court of Appeal.

(o) O'Connor, L.J.'s, judgment was approved by Lord Carson.

policy (*p*)—for example, such as that in *Bonney v. Cornhill Insurance Co.* (*q*); or (as in the specimen policy) in the "descriptions of use" clause.

Again, the parts of the description of use which exclude certain forms of use are to be found in some policies under the General Exceptions clause, and in others in one or other of the general conditions.

Thus the General Exceptions clause may contain exclusions of some or all of the following matters:

- (i) Driving by a specified class of driver (*r*);
- (ii) Towing any vehicle (*s*);
- (iii) Towing an attached trailer (*t*);
- (iv) Loss, etc., occurring when the vehicle is carrying a load in excess of that for which it is constructed (*u*);
- (v) Loss, etc., caused by the vehicle's being (*v*) in an unsafe condition (*w*).

6. Class of drivers.—The exclusion in some hire-drive policies of driving by persons of a particular race, religion, nationality, profession, or status, which came into question in *Richards v. Port of Manchester Insurance Co.* (*x*), is considered elsewhere (*a*).

7. Towing.—Of the first, an example occurred in *Gray v. Blackmore* (*b*), an account of which has already been given (*c*).

Exceptions of the type of the second and third of those mentioned above were well illustrated in the case of *Jenkins v. Deane* (*d*).

8. Trailing.—In that case a motor policy contained the following clause:

"This policy does not cover loss, damage and/or liability caused during
"or arising whilst the assured vehicle . . . has a trailer attached thereto."

Whilst the insured lorry was towing another an accident occurred in respect of which the insurers repudiated liability on the ground, *inter alia*, that towing was excluded by the above clause.

GODDARD, J., held against this in the following words (*e*):

"The first thing that occurs to one is that, had the defendants meant
"to prohibit towing, it would have been easy to say so, especially when
"everyone knows that lorries are often used to tow a broken-down car or to
"pull one out of a ditch. Thus, the preceding exemption deals with the
"case of a person who is being conveyed in or towed by the insured vehicle,
"clearly showing that it is contemplated that the vehicle may give a tow."

"I think the trailer referred to in the clause is a truck or wagon, com-
"monly referred to as a trailer, used for increasing the space available for
"the conveyance of goods, and that the term cannot be fairly applied to a
"temporarily broken-down motor vehicle which is taken in tow."

(*p*) At the foot or on the back thereof. (*q*) (1931), 40 Ll. L. R. 39.

(*r*) As in *Richards v. Port of Manchester Insurance Co.* (1934), 50 Ll. L. R. 88, fully dealt with *post*, chapter IX, pp. 652 *et seq.*, and *Spraggon v. Dominion Insurance Co.* (1940), 67 Ll. L. R. 529; (*C. A.*) (1941), 69 Ll. L. R. 1.

(*s*) See, e.g., *Gray v. Blackmore*, [1934] 1 K. B. 95; *Jenkins v. Deane* (1933), 47 Ll. L. R. 342; see *post*, p. 570.

(*t*) E.g. as in *Jenkins v. Deane* (*supra*).

(*u*) See, for examples, *Piddington v. Co-operative Insurance Society*, [1934] 2 K. B. 236; and *Jenkins v. Deane* (*supra*).

(*v*) E.g. *Bonney v. Cornhill Insurance Co.* (1931), 40 Ll. L. R. 39. See fully, *post*, pp. 607 *et seq.*

(*w*) Or arising when being driven in that state. Cf. *Jones and James v. Provincial Insurance Co.* (1929), 46 T. L. R. 71; *Barrett v. London General Insurance Co.* (1934), 49 Ll. L. R. 99; *Trickett v. Queensland Insurance Co.*, [1936] A. C. 159 (P. C.).

(*x*) *Richards v. Port of Manchester Insurance Co.* (1934), 50 Ll. L. R. 88.

(*a*) *Post*, chapter IX, pp. 652 *et seq.*

(*b*) [1934] 1 K. B. 95.

(*c*) *Ante*, chapter V, p. 272, note (*ll*).

(*d*) (1933), 103 L. J. K. B. 250.

(*e*) As reported 47 Ll. L. R., at pp. 345, 346.

It should be noted that although an exception excluding trailing does not prohibit towing, the converse would not apply, and an exclusion of towing must, it is submitted, exclude trailing as well. It is suggested also that where the policy does not expressly exclude trailing, an implied term to that effect must be inserted, unless both insurers and assured must have been taken to have included trailing as being a use to which the insured vehicle would normally be put.

9. Carrying an excessive load.—In *Jenkins v. Deane* (f), the firm who owned the Ford lorry which was insured under the policy in question also owned another lorry insured under a different policy with other insurers. Whilst the Ford lorry was towing the other lorry with a defective chain, the chain broke, causing the other lorry to run down and kill a third party. The policy contained the following clause:

"The insurers shall not be liable for loss, damage and/or liability caused
"or arising whilst the insured vehicle is . . . conveying any load in excess
"of that for which it was constructed."

It was pleaded by the insurers that towing another vehicle was conveying an excessive load, but held by GODDARD, J., that:

"I do not so read that clause. It has not in my opinion anything to do
"with towing, but merely with the weight superimposed on the vehicle
"itself. Giving the ordinary meaning to the words, I am unable to see
"how it can be said that in giving a tow a vehicle or a vessel is conveying
"a load. The words do not appear to me appropriate. Nor does the reason
"for the insertion of the condition apply to a tow. Weight that can be
"carried has no relation to weight that can be drawn. No one, I suppose,
"could carry a garden roller, but most people can draw one" (g).

In *Piddington v. Co-operative Insurance Society* (h) it was pleaded that carrying laths for garden fencing on a private car constituted a "load in excess of that for which the vehicle was constructed," but the plea was abandoned (i).

XIII—DESCRIPTION OF USE CLAUSE.

The classes of risks contained by way of express inclusion or exclusion in the Description of Use clause of the policy have been discussed at some length in preceding chapters, and particularly in dealing with the effect of the various clauses of the proposal form commonly in use. The limits of the Description of Use clause contained in every motor insurance policy will be based upon the assured's statements as to the use to which the vehicle is intended to be put, found in the proposal form (k). Whilst it is unnecessary to reiterate the previous discussion, it is not inapposite at this state to summarise its results.

1. As a general rule the description of use terms in a policy operate as limitations of the risks which the insurers have undertaken to insure (l). That is to say, that should any accident, loss or liability occur or arise whilst the insured vehicle is being used for purposes not within the description of use of the policy, the assured is not entitled to indemnity with respect thereto (m).

(f) (1933), 103 L. J. K. B. 250.

(g) See *Jenkins v. Deane* (1933), 47 Ll. L. R. 342.

(h) *Piddington v. Co-operative Insurance Society*, [1934] 2 K. B. 236. See *ante*, p. 272, note (ii).

(i) For a full account of this case see *post*, p. 575.

(k) See Chapter VII, *ante*, pp. 431 *et seq.*

(l) See Chapter VII, *ante*, pp. 431 *et seq.* *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240.

(m) *Ibid.*, *ante*, p. 434.

2. Description of Use clauses may, however, operate as terms of the policy, in which case use of the vehicle by the assured for a purpose other than those defined in the policy may amount to such a breach of the fundamental stipulations of the policy as entitles the insurers to be released entirely from any obligations thereunder (n).

3. The third construction which may be applied to description of use terms in proposal forms, that they amount to representations (o), cannot apply to such clauses as are contained in the policy, since by such inclusion they become terms of the policy, for a breach whereof the insurers are entitled to exercise such remedy as may be available to them in the circumstance (p).

With these alternative constructions in mind it is necessary to proceed to a brief examination of the three Description of Use clauses which are commonly found in private motor car insurance policies (q). A summary of the chief differences between them will be found later (r).

1. Class A Risks.

"Use for social, domestic and pleasure purposes and use by the assured in person in connection with his business or profession as stated in the Schedule.

"Excluding use for hiring, commercial travelling, racing, pacemaking, speed testing, the carriage of goods or samples in connection with any trade or business and use for any purposes in connection with the motor trade."

Within this class there are comprised two main types of risks which the insurance covers. These are (i) use for the social, domestic and pleasure purposes of *anyone*, and (ii) use by the assured personally, whether he is driving or merely a passenger, in connection with his specified profession or business (s). The risks falling within (i) are sometimes confined to the purposes of the assured or his friends, but in practice it is doubtful whether such a limitation materially affects the scope of the class, since under the general terms of the policy no indemnity thereunder arises unless the insured vehicle is being driven by the assured or by some other person with his general permission or consent (t). These risks are covered in language sufficiently wide to include within the scope of the policy accidents, losses and liabilities accruing whilst the assured is neither driving nor being carried in the insured vehicle, or whilst it is being used for anyone's social, domestic or pleasure purposes with the assured's consent, subject to the risks expressly excluded (u).

The second type of risk falling within "Class A" [which is more conveniently taken first] is expressly limited in character. Use for business or professional purposes is only covered by insurance when both

- (i) the assured in person is using the vehicle, and
- (ii) none of the risks specifically excluded are present.

(a) "Use by the assured in person."—The expression "use by the assured in person" must be strictly construed, and in a sense which is necessarily entailed by the weight which should be given to each part of the phrase. The assured, it is submitted, must be personally using the insured

(n) *Ibid.*, ante, pp. 433-9. *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590.

(o) Chapter VII, ante, p. 433.

(p) *Ibid.*, ante, p. 405.

(q) See these clauses also discussed in chapter VII, ante, p. 431.

(r) *Post*, p. 581.

(s) *I.e.* in the Schedule, *post*, p. 582.

(t) See ante, pp. 527 et seq.

(u) Personal presence of the assured is not necessary in such case, unless the policy so specifies.

vehicle, either as driver or as passenger. Personal presence is, it is apprehended, made necessary by the addition to the general words "use of the assured" of the restrictive expression "in person." Use of the vehicle by any other person, even for the assured's business or for his own business, being the same as that of the assured, will not fall within the risks covered by a "Class A" description of use (v). For instance, in *Herbert v. Railway Passengers Assurance Co.* (a) the policy contained a condition that "the company shall not be liable in respect of any accident incurred while any motor-cycle is being driven by him or is for the purpose of being driven by him in the charge of any person other than the assured." An accident occurred while the insured was being carried in the sidecar, while his friend drove. The defendant company were not therefore liable (b).

The wide scope of the specific exclusions from "Class A" should be carefully noted by practitioners. Their effect is to cut down the risks covered by the general Description of Use clause, particularly as far as business or professional use is concerned. Where the insured business is that of a commercial traveller or motor trader the exclusion will effectively exclude him under a "Class A" insurance from the benefits of indemnity so far as business use is concerned (c). This is illustrated by the case of *Gray v. Blackmore* (d), where the policy excluded use of the insured vehicle for the purposes of the motor trade.

(b) "In connection with his business or profession."—Provided that the assured is making personal use of the insured vehicle for the purposes of his profession or business, and that none of the expressly excluded risks are attendant upon such use, the liability of the insurers to indemnify him under the second type of "Class A" risks arises. This liability is, however, limited to the business or profession of the assured as described in the Schedule to the policy (f). The risks attaching to business or professional use of the vehicle by the assured will only be covered by the policy if the nature of the business or profession has been accurately described to the insurers by their assured, and if such user falls within the limits of the business or profession made known to them (g). If the assured changes his profession, subject to any later agreed variation of the policy, the insurers will by such change be freed from liability to indemnify in respect of risks attaching to the use of the insured vehicle for the purposes of the assured's new business or profession, whatever it be. This is made quite clear by the express terms of the Schedule to be later discussed (h).

This clause, restricting cover to the use of the insured vehicle to the business of the assured, has been considered in the following cases :

(1) In *Levinger v. Licenses and General Insurance Co.* (i) the plaintiff claimed a declaration that under an insurance policy the defendants were liable to indemnify a millinery company, B., Ltd., in respect of a judgment and costs obtained against it by a third party as a result of a

(v) Cf. *Parlor v. Co-operative Insurance* (1930), 37 Ll. L. R. 301; on appeal, 38 Ll. L. R. 237.

(a) [1938] 1 All E. R. 650.

(b) This case is important also in relation to the form of notice required to be given to the insurance company of an accident. See *post*, p. 590.

(c) *Ante*, p. 570, and see chapter VII, *ante*, p. 427.

(d) [1934] 1 K. B. 95.

(f) *Post*, p. 582.

(g) Chapter VII, *ante*, p. 427. See *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240; and cf. *Robert v. Anglo-Saxon Insurance Association* (1927), 96 J. K. B. 590, and *Jones v. Welsh Insurance Corporation*, [1937] 4 All E. R. 140.

(h) *Post*, p. 582.

(i) [1936], 54 Ll. L. R. 66.

motor accident. The plaintiff owned a car which she placed at the disposal of B., Ltd., and which while being driven by a servant of B., Ltd., was involved in a collision with the third party. The plaintiff's insurance policy only covered the car for "social and domestic and pleasure purposes and use for the business of the assured as described in the Schedule hereto." The Schedule described the business as "carrying on the business or profession of millinery." The plaintiff owned a millinery business which at the time of the accident had recently been formed into a limited liability company, B., Ltd., in which she had the controlling interest. It was held that the business insured was the plaintiff's business, which had ceased to exist in every respect when the company was formed. The insurers were therefore not liable.

(2) In *Passmore v. Vulcan Boiler, etc., Insurance Co.* (k) there was this clause in the plaintiff's insurance policy with the defendants excluding liability when the car was used "otherwise than for the business of the assured." In February 1934, when Miss Passmore and a friend, who was employed by the same firm, were travelling in the car on their employer's business, an accident occurred. Although the friend was driving the car, the accident was caused by the interference of Miss Passmore with the driving, with the result that the friend recovered damages against Miss Passmore. In arbitration proceedings by Miss Passmore against her insurers for an indemnity, the insurers contended that they were liable only if the car was being used at the time of the accident solely for Miss Passmore's business. DU PARCQ, J., as he then was, upheld the arbitrator's award that the car was being used otherwise than for the business of the assured, since it was also being used for the business of the friend (l).

(3) In *Jones v. Welsh Insurance Corporation* (m) the plaintiff was injured in an accident with T.'s car while the car was being driven by T.'s brother, and used in conveying sheep belonging to T., who engaged in sheep farming as a spare time occupation. The plaintiff successfully sued T., but, the judgment remaining unsatisfied, he brought an action against insurers under section 10 (1) of the Road Traffic Act, 1930, for an indemnity. GODDARD, J., as he then was, held that the evidence showed that the insured T. was engaged in the business of sheep farming although on a small scale: that the car at the time of the accident was not being used in connection with his business of a motor-engineer, as stated in the Schedule, but in connection with his business of sheep farming. As the policy only gave cover to the assured, *inter alia*, in connection with his business as stated in the Schedule, the defendant company was not liable.

The case of *Egan v. Bowler* (n) has already been discussed earlier (o), and the reader is referred to the facts of this prosecution under section 35 (1) of the Road Traffic Act, 1930, for an example of the non-liability of the insurance company as a result of the use of the vehicle insured outside the limits of the cover provided by the policy.

(k) (1936), 54 Ll. L. R. 92.

(l) This was a decision on special facts. The judge was of the opinion that if the insured, as a matter of kindness, gave a lift to someone who happened to be on business on his own, the proper view would have been that the car was, for the time being, being used for a social purpose. But here the car was being used first for Miss Passmore's business and secondly for the purpose of the friend's business.

(m) [1937], 4 All E. R. 149.

(n) (1939), 63 Ll. L. R. 266.

(o) *Ante*, p. 112.

For a case of misrepresentation in the proposal form as to the use of the assured vehicle in the proposer's business, see *Zurich, etc., Insurance Co. v. Buck* (p).

(4) In *Stone v. Licenses and General Insurance Co., Ltd.* (q), an endorsement to a policy warranted that the insured lorry "whilst being used for hire or reward is used exclusively for the purpose of H. L. Cabinet Works." On May 16, 1939, the lorry, whilst being used for hire, caught fire and was totally destroyed. At the time of the accident the lorry was not being used exclusively for the purpose of H. L. Cabinet Works, in so far as the driver, without the knowledge of the insured company, had taken on load a large number of plimsoll rubber shoes, which he intended to deliver for his own personal profit. On May 17, 1939, the insurers learnt of this additional load of rubber shoes, but on May 23, 1939, sold the debris of the lorry for £1 to a third party. On June 7, 1939, the insurers for the first time repudiated liability for the loss of the lorry, and sent a cheque for £1 to the assured.

BIRKETT, J., found that there had been a breach of warranty of user by the assured, but that that breach had been waived by the insurers (r). As to a breach of condition as to user by a servant who acts outside the scope of his employment, see *Sutch v. Burns* (s) and the comments made thereon in *Ellis (John T.), Ltd. v. Hinds* (t).

The results of the application of the above remarks to the second type of risks, i.e. "business use," covered by "Class A" descriptions of use, may be summarised as follows:

(i) The business or professional use must be that which is described in the policy or incorporated therein.

(ii) Such use must not be such as to place the vehicle within the class of excepted risks (e.g. use for hiring or for the purposes of the motor trade (u)).

(iii) Such use must be for the purposes of the assured's business or profession, and not that of any other person (v).

(iv) Such use must be by the assured personally—that is, he must be personally present whilst the vehicle is being used for business or professional purposes, although he need not be driving it (a).

(v) Difficulty arises where the assured, desiring to sell his car, takes a prospective purchaser out on a trial run. While such a case could hardly be described as "use for the motor trade," it is nevertheless doubtful whether it falls within Class A risks. It is clearly not use for the assured's business—can it be use for social, domestic or pleasure purposes? It is submitted not (b).

(vi) If the assured changes his business or profession, use for such new business or profession will not be covered by the policy without express or implied variation (c) of its terms (d).

(p) (1939), 64 Ll. L. R. 115.

(r) For a discussion of waiver, see *post*, p. 691.

(t) 1947, K. B. 475; 1947, 1 All E. R. 337.

(u) *Paulor v. Co-operative Insurance* (1930), 37 Ll. L. R. 301, on appeal, 38 Ll. L. R. 237. But where the assured whilst driving on his own business picks up a friend en route whom he proceeds to drive to that friend's place of business, such use would, it is submitted, be within Class A.

(a) *Ante*, p. 571. A difficult case would be where the assured's car is being driven to fetch him from a business visit.

(b) Cf. *Burton v. Road Transport and General Insurance Co.* (1930), 63 Ll. L. R. 253, p. 528, *ante*.

(c) As to express variation by endorsement, and as to implied variation by waiver, see *post*, chapter IX, p. 691.

(d) *Ante*, p. 570.

(q) (1942), 71 Ll. L. R. 250.

(s) 1943, 2 All E. R. 441.

(u) *Post*, p. 570.

(vii) Use by the assured for any purposes *not* being "social, domestic or pleasurable" and *not* being for the purposes of his own business or profession, OR for any purposes falling within the classes of risks specifically excluded, will (a) free the insurers from liability to indemnify the assured against losses, accidents and liabilities incurred during such user (e), and (b) may, according to the wording of the statements of the assured and the terms of the policy and proposal form, relieve the insurers from all further liability under the policy upon the ground of breach of essential stipulation, entitling them to rescind the contract of insurance (f).

(c) "**Social, domestic and pleasure purposes.**"—In concluding the discussion of "Class A" risks it remains to note that the first class of risks comprised within them are extremely wide. Use of the vehicle for the social, domestic or pleasure purposes of any person is covered by the terms of the "Class A" description of risk, and the presence of the assured, provided he is a consenting party to the use, is unnecessary (g). Whilst it is impracticable to attempt any classification of uses which can be regarded as falling within the above description (h), brief reference may be made to a recent decision in which the meaning of "private pleasure purposes" was discussed.

In *Piddington v. Co-operative Insurance Society, Ltd.* (i), which has been referred to above, the assured was carrying on the car some laths of wood required for his garden, and called to look at some work he was doing with the intention of measuring it with the laths. He looked at the work but did not measure it, and on the return journey ran into a third party. It was held by LAWRENCE, J., that the assured was not using the car at the time the accident occurred otherwise than solely for private purposes (k) or for other than "private pleasure" (l).

"The claimant was merely going, so far as his visit to Stirchley was concerned, to look at a job he might have to do. He was not on a job which he had to do, and it is to be observed that the car was covered while the claimant was driving it to and from his place of business. The idea that crossed his mind of using the laths to measure the work did not, in my view, turn pleasure into business or the laths into goods, nor could it in any event affect the user of the car after the idea had been dismissed from his mind. As the accident happened on the journey home, even if the car had during part of its journey to Stirchley and while there been used for other than private pleasure, it was no longer being so used at the time of the accident, and the principle of *Provincial Insurance Co. v. Morgan and Foxon* (m) would be applicable."

It should be noticed that in this case the policy covered use only for "private pleasure," and it was held that "private pleasure" meant something in contradistinction to "business," and that the carriage of articles which the ordinary users of cars habitually carry home for the adornment or use of their families, homes or gardens did not constitute something which was not pleasure (n). Difficult cases may arise when the assured

(e) *Provincial Insurance Co. v. Morgan and Foxon*, [1933] A. C. 240. See chapter VII, *ante*, pp. 433, 434.

(f) *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590; chapter VII, *ante*, p. 434.

(g) *Ante*, p. 571.

(h) As an example, the carriage of goods may be taken. The carriage of these, if for use in the household, will clearly constitute a domestic purpose.

(i) [1934] 2 K. B. 236. Cf. *Payne v. Allcock*, [1932] 2 K. B. 413.

(k) As set out in the proposal form. (l) As set out on the policy.

(m) [1933] A. C. 240.

(n) *Per* LAWRENCE, J., *ibid.*, at pp. 238, 239.

carries some unusually heavy or bulky object. But each case must be decided on the facts and the particular terms and wording of the policy.

(d) "**Private pleasure purposes of the assured.**"—Some policies provide that the only social, domestic or private pleasure purposes which shall be covered by the policy shall be such purposes *of the assured*. Such a provision materially cuts down the general application of the phrase last discussed, but it is a difficult matter to determine the precise effect and limitation of the exclusion. It cannot be said, for example, that the presence of the assured is necessary to make any given user of the vehicle a use for his "social, domestic or private pleasure purposes," unless "the assured" is qualified by the words "in person," as in the case of Class A business risks. Moreover, the choice which the assured is given between the various classes in the proposal form or elsewhere during the negotiations for insurance may preclude the insurers from alleging that "social, domestic and pleasure purposes" are limited to those of the assured in person, when he has been specifically invited to adopt a class of insurance so expressly limited and has declined to do so (o). The assured who sends his car to meet a guest, himself remaining at home, is using the car for his domestic and social purposes, even though he is not personally present during such case. Hard cases may arise when the limitation of domestic, social and private pleasure use is confined to the assured's own pleasure, and when he lends the insured vehicle to a friend or relation for social or pleasure purposes in which the assured proposed to join, as, for example, for a visit to an entertainment or a pleasure outing, but is precluded from so joining by illness or some other unexpected cause, leaving the friend or relative to carry out the engagement. Each case must, of course, depend upon its own facts—as, for instance, whether in the particular circumstances the execution of a social or domestic enterprise intended to be a joint one by the friend alone could be said to retain its joint character on the ground that the assured enjoyed vicarious pleasure (p).

It should be noted that there is nothing in section 12 of the Road Traffic Act, 1934, to invalidate this form of restriction (q).

From the practical point of view it is undesirable that use for domestic, etc., purposes should be confined to such purposes of the assured alone, since the limitation is bound to give rise to hard cases and disputed liabilities, unprofitable both to insurers and assured.

(e) "**Private pleasure only.**"—It should be noticed that some policies exclude use for any business purpose, whether that of the assured or of anyone else. An example of this, and the effect of such a policy, is well illustrated by *Piddington's Case* (r), of which an account has been given earlier (f). Where there is exclusion of *any* business purpose difficulties of application may often arise. Thus where, as in *Piddington's Case*, the assured uses his car on an isolated occasion (s) to take him to a place where

(o) See further, *ante*, p. 487.

(p) E.g. where the assured agrees to visit friends or attend a social function with his wife or daughter and sends the wife or daughter alone with some other person in his place.

(q) See *ante*, chapter V, pp. 314 *et seq.*

(r) [1934] 2 K. B. 236.

(s) *Ante*, p. 570.

(t) If he use it habitually to take him between home and business it would appear, according to the decision in *Piddington's Case*, that that would not be use for private pleasure. It is submitted, however, that the considerations suggested in the text would be applicable, though with less force, to habitual use.

he has business, it might well be urged that he was using the car substantially for his own pleasure and convenience. It is clear that habitual, if not occasional, use for making business calls is excluded. But where the car is used merely as a conveyance to and from an office, although habitually, it is, it is submitted, doubtful whether this is substantially use for business purposes. Many policies make special provision for this, and also for occasional business calls. Again, suppose the assured has, on an isolated occasion, to travel from London to Manchester in order to transact business there. He prefers to go, and goes, by car rather than by train. Can this be said to be use for a business purpose? Moreover, the assured might combine the business visit to Manchester with a visit of pleasure on the way—as, for example, by spending a week-end *en route*. He might also take a passenger with him for the sole purpose of the joint pleasure of the passenger and himself (b). These and similar instances show that each case must be considered on its peculiar facts and the wording of the particular policy. But the following propositions may be said to be generally applicable.

1. The purpose for which the car is being used must be substantially business rather than pleasure. This, it is submitted, is so even when the clause states “pleasure only” or “solely private pleasure,” as such qualifying adverbs refer to the exclusion of other purposes rather than the degree or independence of the pleasure.

2. The question of interpretation of the description of use must be decided by reference to—

(i) The express exclusions in the policy, and, if there is any ambiguity—

(ii) What alternative clauses were offered to the assured in the way of cover for business use—e.g. if he was offered cover for “occasional business use” and refused it (c).

(f) **Exclusions.**—It is remarkable that of the exclusions discussed below, only one is struck by the provisions of section 12 of the Road Traffic Act, 1934. Since the specimen policy from which these are taken is typical of those generally in use for private cars before 1935, the extent of the reform made by the section may be gauged by this fact.

1. “**Excluding use for hiring.**”—This exclusion is more conveniently considered below, when contrasting it with another of similar type (d).

2. “**Excluding commercial travelling.**”—What is meant by commercial travelling in common language is well understood. Difficulties of application would not in practice arise under this clause, since the carriage of goods and samples in connection with any trade or business is also expressly excluded. Usually a commercial traveller carries such goods or samples. There may be cases, however, where he does not (e). These would, under this particular clause, be hit by the limitation of use to the assured’s own business or profession. Clearly commercial travelling would be outside this.

3. “**Excluding racing, pacemaking or speed testing.**”—It would be fruitless to attempt a definition of the meaning of this phrase. Presumably the three words are to be taken together and the *ejusdem generis* rule applied to them (f). If so, where the assured takes a prospective purchaser for a trial run would not, it is submitted, come within the meaning of “speed

(b) Whether for the week-end or not.

(d) *Post*, p. 580.

(e) E.g. an agent who merely travels to visit old customers and obtain repeat orders, etc.

(f) For this rule, see *ante*, p. 482.

L.M.L.

(c) See *ante*, p. 487.

testing," although the speed of the car was in fact tested. The words, if taken as being *ejusdem generis*, refer to some kind of sporting contest (g).

The only reported case from which assistance in construing this part of the exception can be drawn is an aeroplane insurance case. In *Alliance Aeroplane Co. v. Union Insurance Society of Canton* (h) an aeroplane was insured under a policy which contained a clause excluding "racing or pacemaking." The machine was destroyed by crashing during a prize flight to Australia in which it was competing. The prize was of £10,000 and was to be awarded to the first machine to reach a specified point in Australia provided that it started from Hounslow in England and did not exceed a time limit of 720 hours for the whole flight. It was held that this flight was "racing" within the meaning of the exclusion, and that the loss was therefore not covered. BRAY, J., said (i):

"Giving the word 'race' the ordinary interpretation, this contest was a 'race, and the competitors as soon as they started were racing. Speed, and not only endurance, was of importance. It was said that the word 'racing' means *going at a racing pace*, and that at the time of the loss it was not going, and never would have gone, at its highest speed. That is not the ordinary or natural meaning of the word 'racing.' It means *engaged in a race at the time of the loss* (h)."

4. "**Excluding the carriage of goods or samples in connection with any trade or business.**"—It should be noted that although the assured under this Class A clause is allowed to use the car to a limited extent for his own business, he must not carry any goods or samples in connection therewith. Thus if the assured is a manufacturer he cannot, for example, take home samples of any sort for the purpose of examining them there.

The carriage of goods or samples in connection with any trade or business is another use which is expressly excluded from Class A insurance risks. This is sometimes found in a different form whereby use for the carriage of goods "other than personal luggage" is excluded from the benefits of insurance. Where such a clause is found the words "personal luggage" (m) will be liberally interpreted, as is illustrated by the decision in *Piddington v. Co-operative Insurance Society, Ltd.* (n), of which an account has been given elsewhere (o).

The effect of that decision appears to be that the express inclusion of carrying personal luggage is superfluous in a policy covering use for private pleasure (a), since such carriage is incident to that use, whilst on the other hand it is not struck by such exclusions as the above.

The above words may be difficult of application in some circumstances. For instance, would the carriage by a solicitor of law books or papers come within the exception? It is submitted not (b), as these would not properly

(g) It is therefore doubtful whether a friendly race between two cars on the public roads would come within the exclusion. It is submitted that if it was a pre-arranged contest it would, but if a mere attempt to take or keep the lead produced by a chance encounter on the road it would not.

(h) (1920), 5 Ll L. R. 341, 406.

(i) *Ibid.*, at p. 408.

(j) This interpretation of the word "racing" is important, since it shows that the exclusion could not be applied to furious driving, such as, for example, by an undergraduate anxious to cover 40 miles in 30 minutes in order to reach his college before it closes.

(m) See further as to "personal luggage" clauses, *ante*, p. 514.

(n) [1934] 2 K. B. 236.

(o) *Ante*, p. 575.

(a) *Per LAWRENCE, J.*, [1934] 2 K. B. 236, at pp. 238, 239.

(b) It might be different if the words were "in connection with . . . any profession," as in some policies.

come within the description of merchandise, which, it is submitted, must be applied as the test, on the authority of the dictum of LAWRENCE, J. (c), quoted therein (d). On the other hand, the occasional carriage of a small bag of vegetables by a greengrocer (e), as in *Payne v. Allcock* (f), would be struck by the exception.

It is submitted that the expression "trade or business" would be held to include "profession" (g) and that the character of the goods is the determining factor. Thus a professional golfer carrying his clubs or a doctor his surgical instruments would not come within the phrase, whilst a professional trainer of horses carrying saddlery probably would.

5. "Excluding use for any purpose in connection with the motor trade."—It is submitted that this cannot be confined to some business purpose of the motor trade, since business purposes other than those of the assured are not included in the description of use. The degree of remoteness of connection which is sufficient to bring a use within this exclusion is well illustrated by the case of *Gray v. Blackmore* (h), of which an account was given elsewhere (i).

It is possible that this exclusion might cover use by the assured for a trial run with a potential buyer, assuming that that use came within "social, domestic or pleasure purposes" (j). The term "motor trade" may be difficult to apply in some cases. For example, would a professional racing driver driving his car to Brooklands for the purpose of competing in a race there be engaged in a purpose of the motor trade? The exclusion would apparently hit the driving of the car for testing purposes by a motor trader to whom it had been entrusted for repair (k). It might also exclude participating in a "rally" organised by a firm of motor dealers for advertisement purposes. Nor would this be unreasonable, since such "rallies" often include trick driving and involve other dangers not attendant upon ordinary use.

(g) **Exclusions in other policies.**—These have been mentioned in an earlier context (l).

2. Class B Risks.

"Use for social, domestic and pleasure purposes, and use for the business of the assured as stated in the Schedule hereto.

"Excluding hiring, commercial travelling, racing, pace-making, speed testing and use for any purpose in connection with the motor trade."

The sole differences between Class A (m) and Class B (n) risks are (o), that the use of the insured vehicle for the carriage of goods or samples in connection with any trade or business which is expressly excluded from the former (p) falls within the latter, and that the use of the vehicle for the assured's business, whether or not he is personally present and participating

(c) In *Piddington v. Co-operative Insurance Society, Ltd.*, [1934] 2 K. B. 236.

(d) *Ante*, p. 575.

(e) *I.e.* carriage to a customer—not, *semble*, if being carried home for domestic use.

(f) [1932] 2 K. B. 413. *Cf.* also the facts of *Jones v. Welsh Insurance Corporation*, [1937] 4 All E. R. 149.

(g) The definition of the meaning of the word "profession" is a task too delicate and difficult to attempt here. (h) [1934] 1 K. B. 95.

(i) *Ante*, p. 272, note (ll).

(j) As to which, see *ante*, p. 571.

(k) See *Gray v. Blackmore*, [1934] 1 K. B. 95.

(l) *Ante*, p. 568. As was pointed out, these exclusions of this type may be found in one of several different parts of the policy or scattered amongst many. *Cf. ante*, p. 479.

(m) See *ante*, p. 571.

(n) Apart, of course, from the difference in premium charged.

(o) For a summary, see *post*, p. 582.

(p) As to this exclusion, see *ante*, p. 571.

in such use (q), is covered by Class B risks, whereas the Class A description of use, as has been explained above (r), necessitates the presence of the assured in order that use for his business (s) should fall within the cover of insurance. Although Class B omits any express reference to the assured's profession it is apprehended that this is without significance and that the word "business" as used in the clause under discussion must be interpreted also as referring to "profession" (t), and that it is thus unnecessary to make fine distinctions between diverse callings and occupations in order to determine into which class any particular avocation may fall (u).

It is clear that this clause, unlike Class A, covers the carriage of goods or samples in connection with the assured's business (v).

Having alluded to the above differences it is unnecessary further to discuss Class B risks, to which, the exclusions being, with the exception noted (w), the same, the considerations appropriate to Class A are otherwise applicable.

3. Class C Risks.

"Use for social, domestic and pleasure purposes and use for the business of the assured as stated in the Schedule hereto.

"Excluding racing, pace-making, speed testing and the carriage of passengers for hire or reward"

Within the risks covered by insurance under Class C descriptions of use there fall both hiring and commercial travelling and use in connection with the motor trade, all of which are excluded from cover under Classes A and B. Certain of the exclusions expressly made to the risks under the first two classes—viz. use for racing, pacemaking and speed testing—are still excluded from Class C, and to these is added a further risk, the carriage of passengers for hire or reward, not excluded expressly from the risks covered under Classes A and B (a).

(a) "Hiring" and "carriage of passengers for hire or reward."—To determine the exact significance of this added "excluded risk" is a task rendered more difficult by the fact that use of the insured vehicle for hiring is covered by Class C uses, whereas the preceding classes exclude it (b). The apparent conflict between the inclusion of "hiring" in the uses covered by Class C insurance and the exclusion of "carriage of passengers for hire or reward" therefrom can, it is submitted, be solved only by confining use for "hiring" to cases where the insured vehicle is let out on hire according to the common practice of "hire-drive" business (bb). Where the hirer himself undertakes the driving of the vehicle it is submitted that such use falls within Class C insurance; where, however, a user of the vehicle is carried as a fare-paying passenger, it is submitted that liabilities incurred by him during such use of the vehicle will fall within the excepted risk "the carriage of passengers for hire or reward" and will thus be excluded from the scope of insurance.

(q) This does not apply to private pleasure, etc. use under Class A, though it does under some policies. See *ante*, pp. 571 *et seq.*

(r) *Ante*, p. 572.

(s) His business as specified in the policy (*i.e.* in the schedule) and no other.

(t) Cf. *ante*, p. 579, and note (g), as to whether "trade or business" includes profession.

(u) It may be necessary to make this distinction under some policies.

(v) Cf. *ante*, p. 579

(w) *I.e.* carriage of goods.

(a) For a summary of the chief differences between the three types of description of risks, see *post*, p. 582.

(b) See *ante*, pp. 487, 578, as to whether the offer of alternative "description of use" clauses may affect the interpretation of that accepted.

(bb) The use of the insured car for such hire-driving purposes must, of course, be stated in the Schedule as the business of the assured.

Whilst the above two cases may be simply disposed of, other circumstances are more difficult of determination. Thus where the assured lets the insured vehicle out on hire with a driver, are the risks attendant upon such user within or without the scope of Class C insurance? It is submitted, with some hesitation, that the decision of this question whether such risks arise out of use for hiring or not is one which is to be made upon Common Law principles; that, in fact, "hiring" means the letting out of the insured vehicle, with or without a driver, in such circumstances that the hirer has control over the destination of the vehicle and the manner in which that destination is to be reached (c). If this, as is submitted, be the case, then it is clear that where the assured undertakes the carriage of passengers, he retaining the power to direct and control the insured vehicle, risks arising out of or in the course of such user will be excluded from the cover of Class C insurance. There is no hardship or illogicality in this, since normally no private motor vehicle is or can be used for the carriage of fare-paying passengers, as opposed to its use upon hire (d). The policy now under consideration is appropriate only to private motor car insurance, and the insurance of public service vehicles, i.e. those specially engaged in the carriage of fare-paying passengers, is invariably effected under policies completely different in scope and terms from that now under review (e).

This distinction must be kept quite clear. Section 36 (1) (b) (ii) of the Road Traffic Act, 1930 (f), does not require that risk of injury to passengers must be covered by insurance except in the case of vehicles in which passengers are carried for hire or reward that is to say, vehicles in which passengers are *regularly* so carried. For that reason, a clear distinction has been made by insurers between policies in which the car is used for private purposes, and policies which cover public service vehicles. The cases which distinguish and define these two separate uses in relation to hiring and to the carriage of fare-paying passengers have already been set out and discussed in full (g). A short summary only is required therefore at this stage.

In *Wyatt v. Guildhall Insurance Co., Ltd.* (h), where the policy was one of private motor insurance, use for hiring was excluded. The plaintiff was being carried in the insured vehicle, on an isolated occasion, for payment, and was therefore held by BRANSON, J., to be unable to sue the insurers for an indemnity under the policy by virtue of section 10 (1) of the Road Traffic Act, 1934, in relation to a judgment obtained against the assured as a result of injuries received in an accident occurring during his passage as a passenger for reward.

In *Bonham v. Zurich General Accident and Liability Insurance Co., Ltd.* (i), again a "private" motor insurance policy, a question was contained in the proposal form: "Will passengers be carried for hire or reward?" and the answer was "No." The answers in the proposal were made the basis of the contract, and the policy excluded use for hiring. The assured habitually and regularly carried three passengers who worked at the same place from his home to his place of work. Two passengers paid regularly to the assured a sum representing the cost of the railway fare for the journey between the beginning and end of their journeys, but the other never did pay. The assured never asked the passengers for payment, but the two passengers voluntarily offered him the money after completion of the journeys, and the assured would have carried them if they had paid him

(c) Chapter I, *ante*, pp. 48 *et seq.*

(d) Cf. chapter IV, *ante*, p. 202

(e) See *ante*, p. 490, and see further, *post*, chapter IX p. 652.

(f) Chapter IV, *ante*, p. 202.

(g) *Ante*, p. 202.

(h) [1937] 1 K. B. 653; [1937] 1 All E. R. 792.

(i) [1944] 1 All E. R. 573; reversed, [1945] K. B. 292; [1945] 1 All E. R. 427 (C. A.).

nothing. ATKINSON, J. (k), held that as there was no legal obligation to pay as a matter of prior agreement, there was no hiring and no carriage of passengers for reward. But in the Court of Appeal (l) (DU PARCQ and UTHWATT, L.J.J., MACKINNON, L.J., dissenting) a distinction was made between the word "hiring" and the words "for reward." Whereas it was clear that there was no hiring, yet it could not be said that these passengers were not carried for reward, in the ordinary meaning of that word. Whereas "hiring" imported an obligation to pay, "reward" included a case where there was no obligation to pay.

To summarise:—

(1) In a private motor insurance, the assured may not, under class "A" risks, hire out the car at any time in such a way that he can enforce a legal obligation to pay on the part of his passengers. If carrying passengers for reward is also excluded, he may not receive payment from any passenger for carriage in his car, while he is himself driving.

(2) Under class "C" risks in a private motor insurance the assured may not carry passengers for reward as Bonham did. On the other hand, he may apparently hire the car, with or without a driver, to a third party so that the hirer has control of the manner in which the car is to be driven (m).

(3) Where passengers are carried *regularly* for hire or reward, the vehicle becomes a contract carriage or a public service vehicle, and the appropriate insurance policy must be issued in respect of it (n).

XIV.—SCHEDULE

The Schedule incorporated into the policy contains a number of terms which will be separately dealt with, the object of which is to define and describe *part* of (o) the subject-matter of the whole insurance policy, to elucidate the identity and description of the assured, and of the vehicle (p), to define the uses to which it will be put (q), and, lastly, to determine the duration of insurance (r).

The content of the Schedule, in relation to which the effect of the entire policy must be construed, is initially defined by the statements contained in the proposal of the assured upon which the insurers have issued the policy and undertaken to indemnify the assured within its terms against the risks to be incurred by him (s). In dealing *serialim* with the matters

(k) [1944] 2 All E. R. 573.

(l) [1945] K. B. 292, [1945] 1 All E. R. 427.

(m) See p. 581, *ante*.

(n) See *Newell v. Cross*, [1936] 2 K. B. 632, [1936] 2 All E. R. 303, *McCarthy v. British Oak Insurance Co.*, [1938] 3 All E. R. 1, *East Midland Traffic Area Traffic Commrs. v. Tyler*, [1938] 3 All E. R. 39.

(o) The part of the subject-matter so dealt with by the schedule is—

(a) the interest of the assured in the preservation of a particular vehicle against loss or damage;

(b) his interest in the driving of the particular vehicle;

(c) some only of the limitations of the risks covered.

The schedule does not deal with—

(i) The nature of the risks insured—i.e. whether third party liability, loss or damage to vehicle;

(ii) Many of the restrictions of the risks insured. Cf. *ante*, p. 561.

(p) *Post*, p. 586, and see chapter VII, *ante*, pp. 421 *et seq.*

(q) *Post*, p. 584; *ante*, p. 570.

(r) Chapter VII, *ante*, pp. 468 *et seq.*

(s) As a rule the proposal form (the offer initiating the contract) is incorporated by express reference into the policy. See *ante*, p. 498.

contained in the Schedule it must therefore be remembered that their origin is in the proposal form and that the observations upon the contents of such document and the commentary upon the common form clauses thereof should be consulted in relation to each particular point (*l*).

1. *Name and address of the assured* (*a*).—These matters serve to identify the "assured," that party to the contract to whom the insurers have undertaken liabilities to indemnity and compensation under its terms. Both these matters are "material facts" so as to render their non-disclosure or misrepresentation a ground upon which insurers may rely as entitling them to avoid their obligations under the policy (*b*). The cases of *Carlton v. Park* (*c*), *Barnett v. Blackmore* (*d*), *Dunn v. Ocean, &c., Corporation, Ltd.* (*e*), *McCormick v. National Motor and Accident Insurance Union* (*f*), *Bell Assurance Association v. Licenses and General Insurance Co.* (*g*), *Zurich General Accident Insurance Co. v. Buck* (*h*), *Guardian Assurance Co. v. Sutherland* (*i*), and *Jones v. Meatyard* (*k*) may be referred to as illustrating the importance of the assured's accurately furnishing these particulars.

It must not, however, be assumed that the assured is the only person who may become entitled to the benefits of the insurers' undertakings under a policy. Persons unknown to the insurers or even to the assured at the time when he enters into the contract of insurance may become entitled to such benefits as the policy provides, as, for instance, persons driving the insured vehicle with his knowledge and consent (*l*).

Notwithstanding any benefits which such strangers to the contract between the insurers and assured may derive thereunder, the accurate identification of the assured himself is an essential foundation of the policy, a matter of obvious materiality, and with respect to which, it is submitted, a mistake, misrepresentation or failure to make full and true disclosure entitles the insurers to avoid the policy even apart from any express term bearing thereon, under which liabilities might be evaded (*m*).

2. *Business or profession*.—This matter again is one of materiality, and one which the assured is always required to state in making his proposal of insurance (*n*). From the point of view of the policy and the extent of the cover of insurance thereunder this matter is one which vitally concerns the extent of the insurers' obligations under the "Description of Use" clause (*o*), which it may affect in a variety of ways as follows.

(i) *Exclusions from classes of risk*.—Common form descriptions of use clauses fall into three classes, A, B and C, the content and meaning of which have been previously discussed in relation both to the proposal form and to the policy (*p*). Both Class A and Class B "descriptions of use" expressly exclude from their purview use of the insured vehicle for hiring, commercial travelling, racing, speed-testing and pacemaking, and use for the motor trade (*q*). Should the assured be a letter-out of cars on hire, a commercial traveller, a motor-sportsman (*a*), or a person engaged in the motor trade, such an avocation disclosed in the proposal form and incorporated in the policy may prevent the use of the car for the assured's business or profession from being covered by such types of insurance.

(*l*) See fully, *ante*, chapter VII, pp. 419 *et seq.*

(*b*) See chapter VII, *ante*, pp. 425 *et seq.*, where all these cases are discussed.

(*c*) (1922), 10 Ll. L. R. 776, 12 Ll. L. R. 246.

(*e*) (1933), 47 Ll. L. R. 129 (C. A.).

(*g*) (1923), 17 Ll. L. R. 100.

(*i*) (1939), 63 Ll. L. R. 220.

(*j*) Chapter II, *ante*, pp. 96 *et seq.*; also *ante*, pp. 527 *et seq.*

(*m*) Chapter VII, *ante*, p. 430.

(*o*) *Ante*, pp. 570 *et seq.*, and chapter VII, p. 431.

(*q*) *Gray v. Blackmore*, [1934] 1 K. B. 95.

(*a*) Chapter VII, *ante*, pp. 425 *et seq.*

(*d*) (1926), 23 Ll. L. R. 137.

(*f*) (1934), 49 Ll. L. R. 361.

(*h*) (1939), 64 Ll. L. R. 115.

(*k*) [1939] 1 All E. R. 140.

(*n*) *Ibid.*, p. 429.

(*p*) *Ante*, pp. 570 *et seq.*

(*a*) *E.g.* a racing driver.

A "Class C" description of use, while it will extend to cover the hirer of cars, the motor trader, or the commercial traveller, may still exclude the sportsman from cover of insurance whilst using the insured vehicle for his avocation (b).

(ii) *Limitation of the risks.*—Classes A, B and C "description of risk clauses" all incorporate two types of risks which are covered by the respective cover of insurance. These are, firstly, use for social, domestic and pleasure purposes (c), and secondly, use for the business of the assured (d). The differences in the formulation of the second type of risk under the three "Classes" which have already been remarked upon may be conveniently summarised as follows:

(a) *Class A* covers only use by the insured *in person* for his business purposes and excludes the carriage of goods or samples (e).

(b) *Class B* covers use by the assured whether or not *in person* for the purposes of his business, including the carriage of goods or samples. To the omission from Class B of the words "or profession" found in Class A, it is not thought that any importance attaches (f).

(c) *Class C* covers the same types of business use as Class B, but includes within the scope of the insured uses, hiring, commercial travelling and use for the purposes of the motor trade (g).

The common feature of all three classes is that it is only use for the business (or profession) of the assured "as stated in the Schedule hereto" which is covered by insurance under the respective conditions. Thus neither use for the business purposes of a person other than the assured nor use by the assured for the purposes of his business other than stated in the Schedule fall within the cover of insurance whichever class of description of use be adopted for the policy. As far as use of the insured vehicle for business purposes, and not for social, domestic or pleasure purposes, is concerned, the business or profession of the assured as stated in the Schedule definitely limits the risks of which the insurers undertake insurance, whichever "description of use" be employed (h).

(iii) *Stipulations of the Policy.*—The common formulation of the "business or profession" clause in the Schedule is as follows:

"carrying on or engaged in the business or profession of . . . and no other
"for the purposes of this insurance."

The assured's statement as to his avocation generally, by specific or general reference, is incorporated into the policy as a term thereof. It being admitted that it is a matter as to which the assured is required to make full and accurate disclosure in his proposal (hh), the question arises as to what is the effect of such statements as terms of the policy, which they invariably become (i). This question may be considered from several aspects:

(i) *Misstatement by way of misrepresentation or non-disclosure on the assured's part as to his avocation will amount to a breach of a term of the policy entitling the insurers upon general principles (where the misstatement is material) to avoid liability or, by the operation of the usual "warranties of truth and disclosure" basic terms or "conditions*

(b) *Ante*, p. 580.

(c) *Ante*, pp. 571 *et seq.*

(d) *Ante*, p. 571.

(e) *Ante*, p. 572.

(f) *Ante*, p. 572.

(g) *Ante*, p. 580.

(h) *Jointly, Welsh Insurance Corporation*, [1937] 4 All E. R. 149. As to the "description of use" clauses, see fully pp. 570 *et seq.*, *ante*, and see chapter VII, *ante*, pp. 431 *et seq.*

(hh) See *ante*, chapter VII, p. 427.

(i) See *loc. cit.* in note (h) above.

precedent" contained in the policy, to justify repudiation under the express terms thereof (j) ;

(ii) Where the assured changes his business or profession, the effect of such changes upon the policy and particularly upon the "description of use" clause therein will depend upon the construction of the words "and no other for the purposes of this policy" attached to the scheduled statement of the assured's business or profession. The question may be formulated as "Does the assured's statement of his business or profession amount to a promise by him that he will not, during the period of insurance, change his calling?" (k). It is submitted that this question cannot be affirmatively answered. If it were to be so construed the effect of the assured's change of profession would be that by breach of his implied promise not to alter his vocation, the insurers would be discharged from their liability under the policy (l). The results of such a construction would lead to ridiculous and undesirable situations. Whilst therefore a change of business by the assured will exclude use for his new business from the benefits of insurance, in the absence of a new agreement with the insurers varying the terms of the schedule in this respect, the insured vehicle will remain covered for "social, domestic and pleasure purposes."

(iii) Where the insured vehicle is used for business purposes other than those of the assured or for some other business (ll), not being a new business, than that described in the Schedule, the effect if any of such use not covered by insurance upon the insurers' position depends upon whether the limitations of use in the policy are construed as mere descriptions of use or as conditions to the validity of the policy and running concurrently with it (m). If the "description of use" stood alone, and without any reference to the scheduled "business or profession," there is no doubt that use for purposes other than those covered by the insurance would not affect the subsequent liability of the insurers under the policy (n). Construed in relation to the usual form of statement in the Schedule, the description of use may, however, have the effect and consequences of a condition of the policy. The words "and no other for the purposes of this insurance" have a meaning which assimilates them very nearly to that of "only" as employed in relation to specified uses (o). Upon the authorities which have been fully discussed in an earlier context, and particularly having regard to the dicta of the Court of Appeal in *Roberts v. Anglo-Saxon Insurance Association* (p), it is clear that where words are employed of such a nature as to

(j) *Bawden v. London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q. B. 534, and see pp. 401, 405, *ante*.

(k) As to the effect of statements of a "promissory" nature, see chapter VII, *ante*, p. 433.

(l) Further, such a construction, if it were adopted, would endanger the legality of the contract of insurance, from considerations of public policy, since it would clearly make it a contract in restraint of trade.

(ll) *Passmore v. Vulcan Boiler and General Insurance Co.* (1936), 54 Ll. L. R. 92.

(m) See chapter VII, *ante*, pp. 433 *et seq.*

(n) That it would be construed merely as use, contrary to the "description of use" clause. See *Provincial Insurance Co. v. Morgan and Foxon*, [1933] A. C. 240; *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 669, and the discussion of these cases in chapter VII at pp. 435 *et seq.*, *ante*.

(o) See chapter VII, *ante*, p. 435, and *Stone v. Licenses and General Insurance Co., Ltd.* (1942), 71 Ll. L. R. 256.

(p) (1927), 96 L. J. K. B. 590, cited in chapter VII, *ante*, p. 435. See also *Re Morgan and Provincial Insurance Co.*, [1932] 2 K. B. 70, at p. 82, *per* SCRUTTON, L.J., and *per* Lord BUCKMASTER, *Provincial Insurance Co. v. Morgan and Foxon*, [1933] A. C. 240.

amount to a binding indication by the assured of his immutable intentions concerning the use of the insured vehicle, such an expression may make use for specified purposes^(q) and only those purposes, a condition of the policy the observance whereof at all times is essential to its validity and a breach of which will entitle the insurers to treat the insurance as at an end, whether or not such breach has any relation to any accident, loss or occurrence on account of which a claim is made upon them and whether, indeed, any such accident or loss accrues or not during the continuance of the policy (q).

3. *Particulars of insured vehicle(s).*—The identification and description of the insured vehicle (r) is a matter fundamental to the insurance and one, therefore, in relation to which the principles of non-disclosure and misrepresentation apply with force (s). The insurers in the common type of proposal form (which has in this as in other aspects been already exhaustively discussed) elucidate information from the assured as to the motor car which is to constitute the subject-matter of insurance bearing particularly on the following material points :

- (i) Make of vehicle (t) ;
- (ii) Date of manufacture (u) ;
- (iii) Horse-power (v), or cylinder capacity ;
- (iv) Registration marks (w) ;
- (v) Seating capacity (x) ;
- (vi) Type of body (y) ;
- (vii) Assured's estimate of present value, including accessories and spare parts (z).

The materiality and importance of the assured's furnishing full and accurate information upon all these points has been discussed. It is only necessary to add in relation to (v), "seating capacity," that it will have a bearing upon the use of a private motor vehicle for the carriage of paying passengers, which, as has been shown, is a use normally excluded from private car insurance whether under Classes A, B or C "use" clauses (a).

Accessories and spare parts are included not only in the assured's estimate of present value, but also, as a rule, in the cover of insurance (b). Whilst such parts of the vehicle as may be appropriately described as "accessories or spares" are within cover of insurance against loss or damage only as long as they are upon the vehicle, the meaning of the phrase "accessories or spares" cannot be extended to cover essential parts of the vehicle, which thus, it appears, are insured whether they are on the insured vehicle or removed therefrom (c).

In *Seaton v. London General Insurance Co.* (d) the policy covered the vehicle and "accessories whilst thereon." The engine was removed from

(q) See this fully discussed in chapter VII, *ante*, p. 433.

(r) "There is no such thing in law as the 'insured car,'" *per* BANKES, L. J., in *Bell Assurance Co. v. Lucases and General Insurance Co.* (1923), 17 Ll. L. R. 100. But see the effect of the Domestic Agreement, *ante*, chapter VI, p. 377.

(s) Chapter VII, *ante*, p. 421.

(t) Chapter VII, *ante*, p. 421.

(u) *Ibid.* p. 421. See also *Paxman v. Motor Union* (1923), 15 Ll. L. R. 206; *Allen v. Universal Automobile Insurance Co.* (1933), 45 Ll. L. R. 55.

(v) *Ante*, p. 423.

(w) *Ante*, p. 423.

(x) *Ante*, p. 424.

(y) *Ante*, p. 424.

(z) *Ante*, p. 425. *Brentnall v. Cornhill, &c.* (1931), 40 Ll. L. R. 166; *Allen v. Universal, &c.* (*supra*).

(a) *Ante*, pp. 570 *et seq.*

(b) *Ante*, p. 502.

(c) See *Seaton v. London General Insurance Co.* (1932), 43 Ll. L. R. 398; discussed further at p. 588, *post*. See also *Ronan v. Universal Insurance Co.* (1939), 64 Ll. L. R. 288 (C. A.).

(d) (1932), 43 Ll. L. R. 398.

the chassis and whilst so apart destroyed by fire. It was suggested that the clause quoted precluded recovery for loss of anything whilst not on the vehicle. *DU PARCQ, J. (e)*, held that :

- "The engine is not an accessory. It is an essential part of the car, and
 "the mere fact that the engine is for the time being separated from the
 "body does not deprive the assured of his right to indemnity when the
 "motor vehicle has been damaged, in the sense that one of its *integral parts*
 "has been damaged."

4. *Period of insurance*.—The duration of the policy is invariably expressed in the Schedule comprised therein. Duration of insurance is one of the essential features of the contract, since it provides the measurement in time of the assured's rights and the insurers' obligations (*f*). As far as third party liability is concerned, mere entry into a contract of insurance, or even the issue of a policy embodying the terms thereof, is insufficient to comply with the requirements of the Road Traffic Act, 1930 (*g*). No person is properly insured against third party liability in compliance with his statutory obligations unless and until there is delivered to him a certificate of insurance in the prescribed form (*h*). A policy is not in force until delivery of the certificate to the assured, or to any agent who holds the certificate on behalf of the assured, has taken place (*i*). Following from this, it is submitted that insurers having accepted an offer to insure a motor vehicle are under an implied obligation to issue forthwith to the assured a certificate of insurance in the proper form, before the period of insurance which they have accepted commences (*k*). The mere statement in the Schedule of the duration of the policy, with its points of commencement and termination, is insufficient to satisfy the requirements of the Road Traffic Act, 1930, and will save neither the assured from the risks of prosecution nor the insurers from liability for breach of an implied term of the contract of insurance (*l*).

The effects of the statement of the duration of the policy may be summarised, therefore, as follows :

- (i) Determining in point of time the extent of the assured's rights and the insurers' liabilities to indemnity.
- (ii) Fixing the date before which the insurers are obliged to issue a certificate of insurance in the proper form to which the assured is entitled by virtue of the implied terms of the contract.
- (iii) Providing the basis for the assured's compliance with his statutory obligations under the Road Traffic Act, 1930, and determining the period during which, as indicated in his certificate of insurance, he may lawfully drive.

5. *Premium*.—This represents the consideration moving from the assured to the insurers in return for the liabilities undertaken by them under the policy (*m*). In practice consideration is invariably a money payment made by the assured to the insurers either prior to or upon the issue of the policy embodying the terms of the contract of insurance (*n*). The premium and its incidents have been separately discussed in an earlier chapter (*m*).

(e) As reported (1932), 43 Ll. L. R. 398, at p. 400.
 (f) See chapter VII, *ante*, p. 468.
 (g) 23 Halsbury's Statutes 607; *ante*, chapter IV, pp. 188 *et seq.*
 (h) *Ibid.*, s. 36 (5). See chapter IV, *ante*, p. 214.
 (i) *Starkey v. Hall*, [1936] 2 All E. R. 18.
 (k) *Ante*, chapter IV, p. 214. This, however, does not strictly accord with practice.
 (l) *Ibid.* See generally *Ocean Accident and Guarantee Corporation, Ltd. v. Cole*, [1932] 2 K. B. 100, and *Starkey v. Hall* (*supra*).
 (m) Chapter VII, *ante*, pp. 471 *et seq.*
 (n) *Ibid.*, p. 472, and see also, *ante*, pp. 411, 413, as to the relation of policy and proposal.

6. *Renewal*.—Motor insurance policies commonly anticipate renewal and accordingly make provision for the renewal of the contract in the policy (o). Although usually provided for in this way and very frequently effected, renewal of insurance is by no means automatic or a binding term of the original contract (p). Unless the contrary be provided it is always open for the assured or the insurers to decline to renew the policy for a further period (q). If the power of renewal be exercised, the obligations of full and accurate disclosure incumbent upon both parties to the insurance re-attach as at the date when renewal is applied for (r).

This subject, however, has also been dealt with fully in the preceding chapter.

7. *Date of signature of proposal and declaration*.—The assured's proposal form as completed is invariably incorporated by express reference into the policy (s). This incorporation proceeds in three ways:

(i) By express term of the proposal form and declaration thereunto annexed (t).

(ii) By recital at the commencement of the policy that "the proposal and declaration dated as stated in the Schedule shall be the basis of this contract and shall be deemed to be incorporated herein" (u).

(iii) By express condition attached to the policy that "the truth of the statement and answers in the said proposal shall be a condition precedent to any liability of the insurers to make any payment under this policy" (v).

The effect of the two first mentioned provisions has already been examined (w), that of the third will be indicated later (x). The Schedule supplies the necessary connection between the assured's proposal form and declaration and the policy issued thereupon, by identifying the proposal which is incorporated into the policy and so providing the basis for the application of the "basis term" or the "condition precedent" respectively. Any misstatement in the proposal and any misrepresentation or non-disclosure of material facts will thus constitute a breach of the "basic term" of the policy or amount to the non-fulfilment of a condition precedent to the liability of the insurers to the assured thereunder (y).

The cases of *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (a), and *Bell Assurance v. Licenses and General Insurance Co.* (b), in which questions as to the effect of the Schedule in motor policies arose incidentally, have been summarised elsewhere (c).

The description of the meaning and effect of the Schedule in a motor policy may usefully be concluded by a fuller account of the case of *Seaton v. London General Insurance Co.* (d). As will be seen, the Schedule of the policy in that case contained many of the terms and restrictions which are found in other parts of the specimen policy considered in this chapter.

(o) See chapter VII, *ante*, p. 468, where renewal is fully discussed.

(p) In some insurance contracts, e.g. life insurance, renewal by the insurers is often obligatory upon payment of premium.

(q) *Ante*, p. 469. In motor insurance the renewal term is invariably so framed.

(r) See chapter VII, *ante*, p. 470. *Re Wilson and Scottish, &c.*, [1920] 2 Ch. 28.

(s) See chapter VII, *ante*, pp. 385, 411, 413, for a discussion of the effect of the proposal form whether incorporated or not.

(t) Chapter VII, *ante*, p. 467.

(u) *Ante*, p. 468.

(v) *Post*, p. 623.

(w) Chapter VII, *ante*, p. 413, and *ante*, p. 498.

(x) *P. A.*, p. 621.

(y) See chapter VII, *ante*, pp. 385, 413, for full discussion of this.

(a) (1931), 146 L. T. 26.

(b) (1923), 17 Ll. L. R. 100.

(c) *Rogerson's Case*, *ante*, p. 84; *Bell's Case*, *ante*, p. 85, and *post*, chapter X.

(d) (1932), 43 Ll. L. R. 398.

In the case cited (e) there was an affirmative answer in the proposal form (which contained the usual "warranty of truth" clause (f)) to the question "Will vehicle be garaged on own premises?" and the policy contained the following loss by damage clause:

"In respect of any motor vehicle the sole property of the assured and described in the schedule hereto whilst such vehicle is being used by the assured solely for the purpose warranted in the schedule and is in the employment, custody and control of the assured and being driven by him or his fully competent paid and licensed driver, that is to say: (1) Against damage to any vehicle described in the schedule hereto caused by accidental impact between such vehicle and any person, animal or property, and the necessary lamps, tyres and accessories whilst thereon, . . ."

and also covered "loss of or damage to any vehicle described in the Schedule caused by accidental fire." The vehicle was described in the Schedule as a Ford motor-lorry, and there was a warranty that it should only be used for the purposes of the assured's own business. During the currency of the policy the assured took the engine out of the chassis for repairs. He left the chassis in his own garage and the engine in another part of his premises. Whilst there the engine was destroyed by fire.

It was urged on behalf of the insurers that they were not liable because:

- (i) The assured had increased the risk;
- (ii) Had altered the subject-matter of the insurance;
- (iii) The policy was issued to cover a motor-lorry, and the vehicle was not such when deprived of its motive power;
- (iv) If the assured's claim was upheld a lorry might be taken to pieces and then sent to different places, making the Company liable on separate insurances of each separate part.

It was held by DU PARCQ, J.:

- (1) That the answer to the question in the proposal form only meant that the vehicle would generally be kept in the assured's own garage.
- (2) At the time of the fire the vehicle still came within the schedule description although in two pieces.
- (3) It was still being used for his own business and it was still in his "employment, custody and control," and "being driven by him or his fully competent paid and licensed driver" in the sense of the policy.
- (4) That the assured could recover.

It is a little difficult to follow this decision from the reports, since the fire clause does not (g) contain any qualification as to the employment, custody and control or the driving of the vehicle. The third point of the decision seems therefore unnecessary to the result. It is submitted that this case must be followed with caution, and is applicable only to cases in which the facts are similar. If, for example, the engine had been burned whilst undergoing repairs on the premises of a firm of repairers, it seems doubtful whether the decision would have been the same, though if in those circumstances the chassis had been destroyed it might be.

PART 3.—CONDITIONS OF THE POLICY

As has been explained (h), the term condition is used in some branches of the law signifying a term of a contract the breach of which goes to its root and entitles the innocent party to treat the whole contract

(e) *Seaton v. London General Insurance Co.* (1932), 43 Ll. L. R. 398.

(f) As to which see *ante*, chapter VII, p. 467.

(g) As reported, see *Seaton v. London General Insurance Co.* (1932), 48 T. L. R. 574.

(h) *Ante*, pp. 493 *et seq.*

as having fallen to the ground (i). It was also pointed out that the term "condition" does not necessarily have this significance when found in a motor insurance policy^(j), but may be either a fundamental or a non-fundamental term in the sense explained (k). Thus, of the conditions found in the specimen policy considered in this chapter, not one is of the fundamental type, the breach whereof affects the validity or existence of the policy, though what amounts to a breach of one of these may also be a breach of a fundamental term of the contract (l).

On the other hand, the compendious "condition precedent" condition found below makes the breach of most of these non-fundamental conditions identical in effect (m), for all practical purposes, with a breach of a fundamental condition (n).

I.—CONDITION 1. NOTICE

"The assured or his legal personal representatives shall give notice in writing to the head or any branch office of the Company as soon as possible after the occurrence of any accident and/or loss and/or damage with full particulars thereof. Every letter claim writ summons and/or process shall be notified or forwarded to the Company immediately on receipt. Notice shall also be given in writing to the Company immediately the assured or his legal personal representatives shall have knowledge of any impending prosecution or inquest in connection with any accident for which there may be liability under this policy."

The failure to observe this condition, like the breach of any other contractual term or condition in the policy, disentitles the assured to make any claim against the insurers in respect of any loss, damage, or liability to which it refers (o).

It may be also that such breach not only disentitles the assured to make any claim in respect of a loss or, etc., to which it refers, but, by operation of the compendious "condition precedent" clause (p), precludes him from making any claim whatsoever under the policy (q). Nor would this construction be so unreasonable (r) as at first sight might seem, since failure to give notice of a third party claim, or counterclaim (s), or to lend proper

(i) Such may be conditions precedent, in which case the contract is void *ab initio* at the option of the party injured, or conditions subsequent which avoid the contract as from the date of their breach, again at the injured party's option. See, generally, *Heyman v Darwins, Ltd.*, [1942] A.C. 350, [1942] 1 All E.R. 337, *post*, pp. 617 *et seq.*

(j) *Auto*, pp. 493 *et seq.* It might, however, have some effect to negative operation of the *contra proferentes* rule, as most laymen would regard the word as signifying an essential term.

(k) See fully, *ante*, pp. 495 *et seq.*

(l) E.g. of the last, where there has been a failure to disclose or false representation of a material fact.

(m) I.e. on the assured's rights, but not on those of a third party.

(n) See *post*, p. 623, and further, *ante*, pp. 495 *et seq.*

(o) *Austin v Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E.R. 243; affirmed, [1945] K.B. 250, [1945] 1 All E.R. 316.

(p) As to this clause, invariably found in modern motor policies, see *post*, p. 623.

(q) This is the effect of a breach of most of the other terms of the policy. See *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 46 T.L.R. 71.

(r) And however unreasonable or inequitable the effect of a term in a motor policy may be, it must be construed to have that result if that is what its plain language means. See *Provincial Insurance Co. v. Morgan and Foxon*, [1933] A.C. 240; *Dennis, Ltd. v. Bonnin*, [1912] 2 A.C. 413.

(s) *Cross v. British Oak Insurance Co., Ltd.*, [1938] 2 K.B. 167; [1938] 1 All E.R. 383.

assistance in proceedings (f), may involve insurers in very heavy expenditure which they might otherwise have avoided (u).

The following points should be noted in connection with this and similar conditions.

(1) "As soon as possible" means as soon as is reasonably possible in all the circumstances (v).

Thus in *Verelst's Administratrix v. Motor Union Insurance Co., Ltd.* (a), a motor policy covering the assured's death by accident (b) contained the following clause :

"In case of any accident, injury, damage or loss . . . the assured or the assured's representative for the time being shall give notice . . . in writing to the head office of the Company of such accident, injury, damage or loss as soon as possible after it has come to the knowledge of the assured or of the assured's representative for the time being."

During the currency of the policy the assured was killed in an accident in India. Her personal representative learned of her death within one month of its occurrence, but did not learn of the existence of the policy until one year after that event. He then gave notice to the insurers. In arbitration proceedings it was found (as a fact) that this was notice given "as soon as possible," and ROCHE, J., held that in law this phrase in the clause must be construed as meaning as soon as possible having regard to all the circumstances, including the personal representative's ignorance of the existence of the policy and of the identity of the insurers (c).

But where such a clause as this requires notice to be given within a specified time, it must be given within that time, no matter what excuse or reason the assured has for not doing so (d).

(2) As notice cannot be given by the assured until he has knowledge of the occurrence, it sometimes (e) becomes material to decide whether the knowledge of an agent or servant is deemed to be the knowledge of the assured. Thus if the assured is abroad, he may not know of an accident happening to his car driven in England by his chauffeur until a long time after its occurrence. In cases of this type the determining factor is whether the assured's agent or servant who has knowledge of the accident is under a duty to his employer to communicate information of the accident to the assured (f).

Thus in the example given, or where the accident occurs when the car is in charge of a friend to whom it has been lent, the chauffeur or friend

(f) See, e.g., *Dickinson v. Del Solar*, [1930] 1 K. B. 376, and *Hood's Case*, [1928] Ch. 793.

(u) For example, where judgment is obtained by the third party by default—as might easily happen under the present rules of procedure—and the insurers are obliged in consequence to pay a large sum in satisfaction thereof under s. 10 of the Road Traffic Act, 1934. But see *Windsor v. Chalcraft*, [1939] 1 K. B. 279; [1938] 2 All E. R. 751, where insurers obtained a setting aside of the third party's judgment under Order 27, r. 13, R.S.C.

(v) See *Verelst's Administratrix v. Motor Union Insurance Co., Ltd.*, [1925] 2 K. B. 137. See further, *post*, p. 592.

(a) [1925] 2 K. B. 137.

(b) For other points decided in this case, see *ante*, p. 557, and *post*, p. 592.

(c) As to the meaning of "as soon as possible," see also *Hydraulic Engineering Co., Ltd. v. McHaffie* (1878), 4 Q. B. D. 670; *Hick v. Raymond and Reid*, [1893] A. C. 22; *Hulthen v. Stewart & Co.*, [1903] A. C. 389.

(d) See *Cassel v. Lancashire and Yorkshire Accident Insurance Co., Ltd.* (1885), 1 T. L. R. 495; but see also *Re Coleman's Depositaries, Ltd. and Life and Health Assurance Association*, [1907] 2 K. B. 798 (C. A.).

(e) As to when knowledge of the agent is deemed knowledge of the principal, see 1 Halsbury's Laws, 2nd Edn. 292, and the cases cited *ante*, chapter V, p. 299, note (e).

(f) Where the clause provides for notice "as soon as possible," or "immediate notice," but not where notice within a specified time of the accident is required.

would presumably be under a duty to inform the assured of the occurrence within a reasonable time. But the assured's housemaid would presumably be under no such duty, and her knowledge of the accident could not then be deemed to be the knowledge of the assured (g).

(3) The meaning of "legal personal representative" is doubtful. In most cases it would be held to mean the executor or administrator of the assured's estate after his death. But in some it might be held to mean any authorised agent of the assured.

In most cases the question will, it is submitted, be academic, since in such phrases as "immediately the assured or his personal representative shall have knowledge" or "the assured or his personal representative shall give notice" the words "the assured" must, it is submitted, be read as including any duly authorised agent of the assured whose knowledge or notice would in law be deemed to be that of the assured (h).

Thus in *Verelst's Administratrix v. Motor Union Insurance Co., Ltd.* (i), it was held that the phrase "the assured's representative for the time being" in a clause requiring notice of any claim included the assured's personal representative after her death, although in other parts of the policy reference was made to the assured's "legal personal representative" (k).

(4) "*Immediately*."—It is doubtful whether this means more than "as soon as possible" (l). It is submitted that in each case where phrases such as these appear (m) the dictum (n) approved by ROCHE, J., in *Verelst's Case* (o) that

"the question is not what time would have been necessary or what time would have been reasonable under ordinary circumstances, but what time was reasonable under existing circumstances, assuming that, in so far as the existing circumstances were extraordinary, they were not due to any act or default on the part of the assured."

(5) "*Notice in writing*."—Whether or not notice in writing is required, oral notice will in some cases be sufficient (p) where the insurers have accepted it (q). Some policies require merely "notice," which may then be oral, and is sufficient if given to some person authorised to receive it on behalf of the insurers.

(6) The differing requirements in this condition as to the addresses of the notice should be observed. Where the notice is to be given at the head or branch office of the insurers there is no difficulty where written notice is necessary (r).

Where written notice "to the Company" (s) or "to the underwriters" is required, the notice should as a rule be sent to the head office of the

(g) Save in special circumstances, as for instance where the assured goes away leaving his car in her charge.

(h) E.g. the manager of a company. As to when the agent's knowledge is deemed to be that of the Principal, see 1 Halsbury's Laws, 2nd Edn 292, and *ante*, chapter V, p. 299, note (e).

(i) [1925] 2 K. B. 137.

(k) For other points decided in this case, see *ante*, pp. 557, 561.

(l) See *Re Williams and Lancashire and Yorkshire Accident Insurance Co.'s Arbitration* (1902), 51 W. R. 222.

(m) For example, "forthwith."

(n) Of Lord HERSCHELL in *Hick v. Raymond and Reid*, [1893] A. C. 22.

(o) [1925] 2 K. B. 137, at p. 143.

(p) Cf. *McConnell v. Poland* (1926), 23 Ll. L. R. 77.

(q) See generally as to waiver, *post*, chapter IX. See also *Evans v. Employers Mutual Insurance Association, Ltd.*, [1936] 1 K. B. 505; *Brook v. Trafalgar Insurance Co.* (1946), 79 Ll. L. R. 865.

(r) Provided the notice is addressed to the company and not to an individual.

(s) As in the second part of above specimen condition.

insurers (f), and notice to a branch office or to an agent will not be sufficient, unless the assured obtained his policy through such office or agent (u), or such office or agent has been held out by the insurers as authorised to receive it (v). Many policies contain express directions as to the address to which notice is to be sent.

The assured, however, will be wise to avoid treating notice to an agent as sufficient if the policy requires a different mode of giving notice, as is shown by the following case. In *Brook v. Trafalgar Insurance Co.* (a), the plaintiff had insured his car with the defendant insurers through an agent named Nelson. The car was destroyed by fire on December 17, 1943: the accident was reported to Nelson on December 18, who provided Brook with a claim form. The form, dated January 3, 1944, was completed by Brook and returned to Nelson, who sent it on to the head office of the defendant company in London. There was a provision in the policy that

" Notice of any accident or loss must be given in writing to the company
" at its head office immediately upon the occurrence of such accident or
" loss . . . in the event of failure to comply with the terms of this condition
" and, in particular, if within seven days after such accident or loss has
" occurred the company has not been notified as above set forth, then all
" benefit under this policy shall be forfeited."

The due observation of the conditions of the policy by the assured was made a condition precedent to the right of the assured to recover under it.

In the Schedule to the policy appeared the words " J. Nelson, agent." But by Condition 9 of the policy " Any alteration in the terms of this policy is only binding upon the company when made at the head office under the hand of a managing director or secretary." STABLE, J., held that the company had waived (b) the policy conditions as to notice of loss, and that therefore the plaintiff was entitled to recover. But the Court of Appeal (SCOTT, TUCKER and BUCKNILL, L.J.J.) reversed this decision. Waiver had not been pleaded by the plaintiff, and therefore the issue of waiver should not have been considered at the trial of the action. In any event, there was no sufficient evidence that Nelson had authority from the company to waive the express condition as to notice having to be sent to the company's head office. SCOTT, L.J., used these words :

" It is common knowledge to everybody that policies are issued at the
" instance of agents who procure the business and who get a small com-
" mission on the premium for doing so. That is the sense which *prima facie*
" the printed word ' Agent ' at the bottom of the policy bears. It appears
" there for the simple reason that it so serves as a record for the office files
" of the company as to who was the person entitled to commission. To
" suggest that the word ' Agent ' in front of the name there gives the com-
" mission agent authority to take the place of the company and waive an
" express condition requiring that written notice should be sent to the
" head office of the company, when they have dozens of agents all over the
" country of that type, is, I venture to think, ridiculous."

(f) For this purpose many policies contain on the back or elsewhere in the policy an address to which the assured is expressly directed to send notice.

(u) See *Gale v. Lewis* (1846), 9 Q. B. 730, and *Marsden v. City and County Assurance Co.* (1865), L. R. 1 C. P. 232.

(v) See *Marsden v. City and County Assurance Co.* (1865), L. R. 1 C. P. 232; *A/S Rendal v. Arcos, Ltd.*, [1937] 3 All E. R. 577 (H. L.).

(a) (1946), 79 Ll. L. R. 865 (C. A.); see also *Re Williams and Lancashire and Yorkshire Accident Insurance Co.'s Arbitration* (1902), 51 W. R. 222, a workman's compensation case.

(b) As to waiver, see *post*, chapter IX, p. 691.

As to the form of notice required, the case of *Herbert v. Railway Passengers Assurance Co.* (c) should be borne in mind. The point under consideration was whether proper notice had been given to insurers of the commencement of the proceedings as required by section 10 (2) of the Road Traffic Act, 1934. PORTER, J., as he then was, held that no proper notice had been given, for, even accepting that notice to an agent was notice to the company of the bringing of proceedings, such a notice to be effective must be given formally as a notice, and it was not enough that the fact of an action being brought against the assured was mentioned in a friendly, casual conversation with the insurer's agent.

(7) "*Full particulars.*"—It is submitted that this means particulars sufficient to inform the insurers of the nature and of the approximate extent of the accident, loss or damage, and does not require the assured to give particulars of anything which he does not know (d) or is not presumed to know (e).

Having regard to the almost invariable practice of motor insurers of sending the assured a form (f) after they learn of an accident, which he is required to fill up with detailed particulars, it is apprehended that cases would rarely occur when insurers could rely upon the inadequacy of particulars sent in compliance with this condition as a breach of it. Thus, provided the assured gives the place, and date of the accident, the number of vehicles involved and of persons injured, and some indication of the nature of the injuries or damage involved, he will comply with its requirements.

Many policies contain express directions as to the particulars required in the immediate notice of an accident or loss. Where these appear they must, of course, be complied with according to the contract.

The requirements as to notice of an accident, loss, etc., under this condition must be carefully distinguished from those which the assured is under a general duty apart from the contract to give (g).

(8) "*Receipt of writ, etc.*"—Receipt here means receipt by the assured or some agent authorised on his behalf to receive it.

The partial sterility of this clause effected by section 38 of the Road Traffic Act, 1930 (h), has been explained in an earlier chapter (i). The power given to insurers by the proviso to that section to obtain repayment from the assured of monies paid by them and applied in satisfaction of the claims of third parties is exercised in the specimen (k) policy by a succeeding condition (l), the "condition precedent" clause.

Whether the giving of notice in the required mode and whether the required time will be treated as a condition precedent to the insurers' liability or to the right of the assured to recover under the policy depends not only on the presence of a "condition precedent" clause but also on the

(c) [1938] 1 All E. R. 650.

(d) *I.e.* where his servant or agent's knowledge is deemed to be his. See *ante* p. 319 and p. 591.

(e) See *Mason v. Harvey* (1853), 8 Exch. 819. *Hiddle v. National Fire, &c., Insurance Co. of New Zealand*, [1896] A.C. 372.

(f) Or giving it to him with the issue of the policy.

(g) *E.g.* in filling up the claim form sent to him after the insurers learn of the accident. Where this form accompanies the issue of the policy, as is sometimes the case, it is submitted that in the absence of express directions the assured need not fill in that form and send it as the notice required by such conditions as that considered in the text.

(h) 23 Halsbury's Statutes 607. *ante*, chapter IV.

(i) *Ante*, chapter IV, pp. 219 *et seq.*

(k) As in most others.

(l) Condition 7, *post*, p. 603.

intention of the parties as expressed in the language of the contract (*ll*). In *Re Bradley and Essex and Suffolk Accident Indemnity Society (m)*, a workman's compensation case, the assured was required to keep the name of every employee and the amount of wages paid to employees in a proper wages book, and the fulfilment of this term was declared to be a condition precedent to the company's liability under the policy. The assured kept no wages book (*mm*). Nevertheless he was held entitled to indemnity, for it was clear that the sole object of the clause was to provide for the adjustment of premiums, and compliance with the clause was not a condition precedent to the society's liability. In *Welch v. Royal Exchange Assurance (n)*, where the insurance covered fire risks, the policy provided by one condition

"The insured shall also give to the Corporation all such proofs and information with respect to the claim as may be reasonably required. No claim under this policy shall be payable unless the terms of this condition have been complied with."

The condition precedent clause was phrased differently to that in *Bradley's Case*, and read

"The Corporation agrees (subject to the conditions contained herein, which conditions shall, so far as the nature of them respectively will permit, be deemed to be conditions precedent to the right of the insured to recover hereunder) to indemnify the assured . . . in case of damage by fire."

Despite repeated requests, the insured refused after putting in a claim to give insurers information as to banking accounts operated and controlled by him in his mother's name; although there was no fraudulent concealment and the banking accounts did not contain any material justifying repudiation by the Corporation, yet the assured's failure to disclose the information required within a reasonable time after the request of the Corporation was a bar to his right to recover. *BRANSON, J. (nn)*, held that the words "so far as the nature of them respectively will permit" avoided the difficulty raised in *Bradley's Case*, and that the condition as to giving all necessary proofs was in the circumstances a condition precedent to his right to recover. This latter finding was confirmed by *MACKINNON and FINLAY, L.JJ.*, in the Court of Appeal (*o*), though *SLESSER, L.J.*, doubted it.

The circumstances in which, apart from the provisions of section 38, insurers may be unable to rely upon a breach of this condition are described in a subsequent chapter (*p*). Clauses such as the above must be clearly distinguished from those which provide that, if any claim is rejected by the insurers, the assured shall forfeit all rights under the policy unless he commences an action or arbitration within a specified time (*pp*).

Lastly, if insurers wish to rely on a breach of condition as to the giving of notice, the alleged breach must be properly set out in the pleadings (*q*).

(*ll*) *Stoneham v Ocean Rail and General Accident Insurance Co.* (1887), 19 Q. B. D. 237.

(*m*) [1912] 1 K. B. 415.

(*mm*) He only employed one man, his son.

(*n*) [1939] 1 K. B. 294; [1938] 4 All E. R. 289 (C. A.).

(*nn*) *Welch v. Royal Exchange Assurance*, [1938] 1 K. B. 757.

(*o*) [1939] 1 K. B. 294; [1938] 4 All E. R. 289.

(*p*) *Post*, chapter X, p. 691, where waiver and estoppel are described.

(*pp*) Such clauses came into operation in, *inter alia*, *Weddell's Case* [1932] 2 K. B. 363; *Loftus v. Port of Manchester Insurance Co.* (1933), 45 Ll. L. R. 252; *Revell v. London General Insurance Co.* (1934), 50 Ll. L. R. 114. They are equally invalidated against third parties by s. 38 of the Road Traffic Act, 1930 (see case last cited).

(*q*) *Baker v. Provident Accident and White Cross Insurance Co., Ltd.*, [1939] 2 All E. R. 690.

II.—CONDITION 2. CONDUCT OF LITIGATION

"No admission offer promise payment or indemnity shall be made or given by or on behalf of the assured without the written consent of the Company which shall be entitled if it so desires to take over and conduct in the name of the assured the defence or settlement of any claim or to prosecute in the name of the assured for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings or in the settlement of any claim and the assured shall give all such information and assistance as the Company may require."

Before considering this condition, the reader should be again reminded of the effect of the compendious condition precedent clause which appears later in these conditions (99).

1. "*No admission, etc.* . . . shall be made or given by or on behalf of the assured."—This, of course, refers to claims made by third parties. What is an admission in such circumstances will be a question of fact in each case.

The most important questions which are likely to arise under this part of the condition where the insurers have not repudiated the whole policy (r) are well illustrated by the case of *Tustin v. Arnold & Son* (rr), in which a motor policy contained the following clause:

"The assured shall not by himself or his agent make any admission of liability to or otherwise negotiate with any person in respect of whom indemnity is or may be claimed under paragraph 2 hereof."

The insured vehicle was involved in a collision with a third party. After the accident the driver, an illiterate man, put his mark to a statement to the effect that he was at fault and responsible for the same. This was countersigned by his mate on his behalf. The insurers repudiated liability on the ground that the driver's admission was a breach of the condition set out above.

It was held by BAILHACHE, J., that:

(1) The written admission, not being part of the *res gestae*, was inadmissible in evidence.

(2) Even if it had been so admissible the driver was not the agent of the owner to make admissions without express authority so to do, which he had not got (s).

(3) That the written "admission" did not therefore come within the meaning of the condition as being made by an agent.

The position in regard to this clause where the insurers have repudiated the claim and the assured wishes to admit liability to the third party is considered later (f).

2. "*Who shall be entitled if they so desire to take over . . . the defence or settlement of any claim . . . and shall have full discretion in the conduct of any proceedings and the settlement of any claim.*"—As has been pointed out, there is not under this or any ordinary motor policy an obligation upon the insurers to defend claims brought by third parties against their assured or to pay any costs incurred by him in defending such claims (u). They are, of

(99) *Post*, p. 623.

(r) As to the difficult and important questions which then arise, see *post*, chapter X.

(rr) (1913), 84 L. J. K. B. 2214.

(s) This is the important point decided, since even if part of the *res gestae*, the admission, not being made by an agent, would not have been a breach of the condition.

(f) *Post*, chapter IX.

(u) Save possibly where they have repudiated the policy or liability under it, and the assured reasonably defends proceedings. See chapter X, *post*, where this question is further discussed, and *cf. ante*, p. 524, and the ordinary newspaper libel policy, which insures against claims and usually provides that consent to the incurring of costs is not to be "unreasonably withheld." And see *Hulton (E.) & Co., Ltd. v. Mountain* (1921). 37 T. L. R. 869.

course, liable to indemnify the assured in respect of any liability for costs incurred by the third party under the general indemnity clause in the policy (v).

In practice difficulties under this clause rarely arise save where the insurers repudiate the policy or liability under it and leave the assured to look after himself. These difficulties are discussed in a subsequent chapter (w).

Limits of insurers' rights in conduct of litigation.—Difficulties occur (x) where there is no question of repudiation (y) when the insurers take over the conduct of proceedings under this condition (z) and desire to compromise them, allow judgment to go by default, or to dispute the amount of liability only (a), whilst the assured desires to fight, because, for example, he desires to prosecute a counterclaim against the third party (b) or is obliged under his policy to bear the first £x (c) of any loss, or the insurers are obliged by the policy to bear only a certain proportion thereof (d). Under a condition such as this the insurers can settle any claim against the assured, although his policy does not give him a full indemnity in respect thereof. In *Beacon Insurance Co., Ltd. v. Langdale* (e), the appellant, a motor cyclist, had insured with the respondents against third party risks. During the currency of the policy he had an accident, in which a pedal cyclist was involved. The pedal cyclist claimed damages from him for personal injuries. The policy contained a term that the company "shall have full discretion in the conduct of any proceedings or in the settlement of any claim." There was also a condition that the assured should be "liable to pay the first five pounds, or any less amount for which the claim may be settled, of each claim arising under this policy." The pedal cyclist's claim was settled by insurers, who then brought an action against the assured in the County Court to recover the "first five pounds." The Court of Appeal found that the settlement made by the insurers was completely within their powers and that it had been made in what they *bona fide* considered to be the common interest of themselves and the assured, and that therefore they were entitled to recover the "first five pounds" (f).

On the other hand, insurers cannot prevent the assured from prosecuting any claim against a third party in respect of personal injuries or damage to property not covered by his policy. Indeed, if the assured wishes, he may apparently (g) sue a third party for damages against the desire of insurers even though he has received full indemnity from insurers in respect of his loss under the policy, though in such a case the monies received from the

(v) See *ante*, pp. 524 *et seq.*

(w) Chapter X, *post*.

(x) The position as to costs when these difficulties arise is discussed below, *post*, chapter X.

(y) As to the position in regard to litigation with a third party where insurers repudiate, see *post*, chapter IX, and, as to costs, chapter X.

(z) *I.e.* the condition set out above, giving insurers full power to take over the conduct of proceedings.

(a) *E.g.* where, in the opinion of the insurers, there is no question as to the fault of the accident being the assured's, but the third party's claim is exorbitant.

(b) In respect of personal injuries or damage to property not covered by his policy.

(c) See further, *post*, chapter IX, as to such policies.

(d) As to this, see *Eclipse Motor Policies v. Marchbank* (1934), 1 L. J. C. C. R. 365, of which an account is given in chapter X, *post*.

(e) [1939] 4 All E. R. 204.

(f) This case deals with the relations between insurers and assured. The difficult position in which solicitors may find themselves, who are retained by insurers and who conduct negotiations on behalf of both the insurers and the assured is considered in chapter X, *post*, p. 729, and see *Groom v. Crocker*, [1939] 1 K. B. 194; [1938] 2 All E. R. 394 (C. A.), and *Re Crocker and Taxation of Costs*, [1936] Ch. 696; [1936] 2 All E. R. 899.

(g) *Morley v. Moore*, [1936] 2 K. B. 359; [1936] 2 All E. R. 79.

third party would normally (h) be impressed with a trust in favour of the insurers, and he would have to hand over that sum to the insurers. In *Morley v. Moore* (g) the plaintiff claimed for damage done to his car in a collision with the defendant's car. There was a knock for knock agreement (i) between the respective insurers of the parties, and the plaintiff's insurers paid him for the damage to his car, save for the "first £5" which under the policy he had to bear. They also instructed him not to claim from the defendant more than the £5, as they did not want the excess, in view of the knock for knock agreement. Nevertheless, the plaintiff insisted on claiming in the action the full amount of the damage to his vehicle. He succeeded on the issue of negligence, but was met with the further defence that save for the first £5 he had suffered no damage, having been paid by his insurer. The County Court judge and the Court of Appeal held that this defence failed (k).

The President, Sir BOYD MERRIMAN, remarked *obiter* :

"I hope that the result of this judgment will be that plaintiffs will realise that they still have whatever may be their full rights accompanied by whatever duties result from the exercise of those rights, notwithstanding arrangements made behind the scenes by insurance companies. If, contrary to the opinion that I have been expressing, the combined effect of arrangements whereby the assured is regarded as his own insurer for a certain proportion of the loss and this agreement known colloquially as a 'knock for knock' agreement is used seriously to prejudice insured persons when insisting upon the whole of their legal rights, I should wish to consider whether the agreement were contrary to public policy."

Lastly, although insurers may be given by this clause complete control over legal proceedings, yet they are not parties to the action and cannot therefore make an application in their own names (l).

"To prosecute in the name of the assured any claim for indemnity or damages or otherwise."—Under this condition they are apparently entitled to take over and conduct for their own benefit any claim which the assured has against a third party for indemnity or damages (m).

It is submitted, however, that this part of this condition does not give insurers any greater right than they enjoy under the general right of subrogation (n). Under that general right they can only prosecute a claim on behalf of the assured when they have paid all monies due under the policy in respect of the accident out of which the claim arises (o).

A claim for personal injuries is a cause of action distinct from that in respect of damage to property (p), but this part of the condition purports to

(h) Payment of personal accident benefits by insurers to the assured under the policy is not, however, by way of indemnity, and would be wholly irrelevant. See chapter II, p. 71, and p. 340, *ante*.

(i) See chapter X, p. 717, *post*.

(k) This case is important upon the question as to the extent to which insurers can control the assured in proceedings brought by or against him or in his name. It also affects the working of the knock for knock agreements and similar arrangements, and the question whether the insurers had lost their right to claim a refund of indemnity for the damage which they had paid, but the President remarked that if they chose to make their assured a present of that sum, that did not affect his rights.

(l) *Morley v. Ashbridge and Martin*, [1941] 1 All E. R. 231 (C. A.).

(m) Nevertheless, insurers are not parties to any action prosecuted by them under this clause; they therefore cannot make an application relating thereto in their own name. *Morley v. Ashbridge and Martin*, [1941] 1 All E. R. 231 (C. A.).

(n) See chapter II, *ante*, p. 101, and *post*, chapter IX, pp. 609 *et seq.*

(o) See *post*, chapter X, and *Pate v. Scottish Insurance Corporation*, (1929), 98 L. J. K. B. 308.

(p) See *Brownson v. Humphrey* (1884), 14 Q. B. D. 141, approved in *Wilson v. United Counties Bank, Ltd.*, [1920] A. C. 102.

give the insurers the right to prosecute the assured's claim for personal injuries for their own benefit.

In so far as this or similar conditions give insurers the right to prosecute for their own benefit the assured's claims against third parties before they have paid the assured, they would appear to be void.

Many policies containing a condition of this kind only cover the assured in respect of his liability to third parties. It is submitted that in such policies a condition entitling the insurers to take over and prosecute for their own benefit claims against a third party would be void, since the insurers have no interest in such claims, either by subrogation or otherwise (g). Moreover, even under the comprehensive policy the insurers have no interest in any claim which the assured may have for damages for personal injuries, since they are obliged to pay any sum insured by the policy in respect of these regardless of any compensation which the assured may obtain from a third party (r).

In such a case, therefore, the insurers would in no circumstances have any interest in the subject matter of the assured's claim, and an action brought by them in his name for their benefit would be maintainable (s).

Where, on the other hand, the assured's claim which the insurers desire to prosecute in their own name for their own benefit is one in respect of a loss covered by the policy, the insurers can only acquire an interest in the subject matter of the claim by subrogation—that is, complete payment of all indemnities due under the policy to the assured (t). Their only title to prosecute such claims other than by subrogation would therefore be by assignment. But a right of action in tort cannot be validly assigned (u).

For the above reasons, it is submitted that the part of the condition under consideration gives the insurers no more than they acquire by virtue of subrogation, and is inserted solely for the purpose of enabling them the more readily to enforce that right (v).

If they have no right under this clause to prosecute a claim, they have, it is submitted, no right to prosecute or settle a counterclaim without the assured's consent. Although they clearly have the right under this condition to settle a claim *against* the assured, they cannot, in the absence of the assured's consent, do so in such a manner as to prejudice the assured's counterclaim (w) if he desires to proceed with it. The difficult question as to who in these circumstances may be liable for

(i) the assured's costs ;

(ii) the third party's costs ;

is considered in a later chapter (a).

(g) See 1 Halsbury's Laws, 2nd Edn. 69-75.

(r) See *ante*, p. 542, and *Horse, Carriage and General Insurance Co., Ltd. v. Pelch* (1916), 33 T. L. R. 131.

(s) As to maintenance, see 1 Halsbury's Laws, 2nd Edn. 69-75, and cases there cited.

(t) See *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308. And see further, *post*, chapter X.

(u) See 1, 3 Halsbury's Laws, 2nd Edn. 69-75, 475, and cases there cited.

(v) Since without this express clause the assured might refuse the use of his name where the insurers require it for purposes of subrogation, in which case they would be compelled to take action against him before suing the third party.

(w) Whether claim or counterclaim for damage to property or for personal injuries or for both. See *Beacon Insurance Co., Ltd. v. Langdale*, [1939] 4 All E. R. 204 (C. A.) (p. 597, *ante*), and *Groom v. Crocher*, [1939] 1 K. B. 194 ; [1938] 2 All E. R. 394.

(a) Chapter X, *post* ; i.e. where the assured refuses to settle and insists on going on with a counterclaim. And see *Eclipse Motor Policies v. Marchbank* (1934), 1 L. J. C. C. R. 365, and *Groom v. Crocher*, [1939] 1 K. B. 194 ; [1938] 2 All E. R. 394, of which an account is given in chapter X, *post*. If, in such circumstances, the insurers are to be prevented from exercising their right to settle a third party's claim, as in

Whilst it may be that, as between insurers and assured, the insurers, as stated above, might acquire under ~~this~~ condition the right to use his name in prosecuting a claim on his behalf although it is a claim in respect of which they have made no payment under the policy, the position as between insurers and a third party is, it is submitted, entirely different.

As between insurers and a third party, the third party could, it is submitted, object to the insurers prosecuting any claim or counterclaim against him in respect of which no right of subrogation had arisen (b).

He could object on two grounds :

- (1) That they had no rights by subrogation (c) ;
- (2) That they had no rights by assignment (d).

It is difficult to see what the insurers' answer would be, but it must be remembered that in most cases of counterclaim the assured would be prosecuting the claim himself both in fact and in law.

"The insurers shall have full discretion in the conduct of any proceedings or in the settlement of any claim."—This part of the condition apparently gives the insurers full authority to make any settlement binding upon the assured—that is, binding upon him and the third party. As has been seen, the insurers who take over his defence will be liable to indemnify the assured in respect of any costs which he becomes obliged to pay (e) a third party, although these exceed the amount of the indemnity given by the policy (f). The position where the insurers have repudiated the policy or liability under it (g) is different. In this case they usually undertake the assured's defence "without prejudice" (h).

It is submitted that if the settlement is not made properly, so as not to be binding on the assured as between him and the third party, it will not be binding upon him as between him and his insurers (i). In this connection, the case of *Martin v Bannister* (k), of which an account appears in a later chapter (l), should be noted, as it illustrates the difficulties which may confront insurers and assured where a settlement of a third party claim is made by insurers under the power given by this condition. Nevertheless, the clause is so widely drawn that insurers are thereby given power to settle a third party's claim without consulting the assured, so long as it is a bona

practice they often would be, the whole object of this condition would be defeated and in many cases the most complicated difficulties would arise. It is suggested that in all cases of this kind, where the assured wishes the proceedings to continue and the insurers desire to settle or allow judgment to go by default, or do not wish to dispute liability, both insurers and assured should in their own interests endeavour to come to an agreement as to their rights and liabilities.

(b) *I.e.* before the insurers had paid the whole of the monies under the policy to the assured in respect of the accident in question.

(c) See *Page v Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308, and *Austin v Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243; affirmed, [1945] K. B. 250; [1945] 1 All E. R. 316 (C. A.), and further *post*, chapter X.

(d) Since a bare right of action in tort is not assignable. See 3 Halsbury's Laws, 2d Edn. 475 and cases there cited.

(e) Whether by settlement or by judgment and, it is submitted, whether he has paid such costs or not.

(f) See *ante*, p. 518, and see *Allen v London Guarantee and Accident Co., Ltd.* (1912), 28 T. L. R. 254, *post*, chapter IX.

(g) See *post*, chapter IX and chapter X.

(h) See further as to this, *post*, chapter X.

(i) *E.g.* if the insurers have made a purported settlement with the third party for £100, and it afterwards turns out to be an invalid settlement, their liability under the policy will not be limited to the £100.

(j) (1933), 47 Ll. L. R. 270.

(k) Chapter X, *post*.

*fi*de settlement, and even though by the settlement the assured becomes liable to pay a sum to the insurers under an excess clause in the policy (*m*).

"*The assured shall give all such information and assistance as the insurers may require.*"—This means such assistance as they may reasonably require for the purposes of this clause—that is, in defending a claim against the assured, or in the prosecution against a third party of their right of subrogation. What is reasonable depends upon the circumstances of each case (*n*). But the insurers cannot reasonably require the assured to abandon a counterclaim which he has against a third party, unless perhaps such counterclaim is for some obvious reason certain to fail (*o*).

An example of the kind of assistance which the insurers may reasonably require is to be found in *Hood's Case* (*p*), of which a full account has been given in an earlier chapter (*q*). Thus he must be willing to give evidence himself, or to allow his servant or agents to do so (*r*), and generally to give all such facilities as he would give to his own solicitor conducting a defence on his behalf.

In *Dickinson v. Del Solar* (*s*) the assured, a diplomatic agent, refused to claim diplomatic privilege in a running-down action brought against him by a third party. His insurers repudiated liability under the policy on the ground that the assured's refusal to plead diplomatic privilege was a breach of the conditions of the policy—

- (i) not to act in any way to the detriment or prejudice of the Company's interests, and
- (ii) to allow the Company to take absolute control of all negotiations and proceedings.

It was held that there was no breach of either of these conditions on the grounds :

- (1) That there was no diplomatic privilege, since it had been waived by the defendant's official superior (*t*).
- (2) That by entering appearance to the writ (which was done by the insurers) any diplomatic privilege which existed had been waived (*u*).
- (3) That since diplomatic privilege only gives immunity from civil process and not from legal liability (*u*), there would still have been a liability to the third party and a right to indemnity therefor under the policy.

This case must, it is submitted, be applied with caution, since only the first two (or either of them) points set out above were necessary to the decision. The position under this and similar clauses of a foreign sovereign or ambassador who refuses to plead diplomatic privilege remains doubtful (*uu*).

(*m*) *Beacon Insurance Co., Ltd. v. Langdale*, [1939] 4 All E. R. 204 (C. A.), and see *Groom v. Crocker*, [1939] 1 K. B. 194; [1938] 2 All E. R. 394.

(*n*) Cf. *ante*, p. 141, and cases there cited. See also *Welch v. Royal Exchange Assurance*, [1939] 1 K. B. 294; [1938] 4 All E. R. 289.

(*o*) Or to assent to a settlement which would have the same result. Even here the assured might insist upon going on if he does not by so doing involve the insurers in any further cost (*Morley v. Moore*, [1936] 2 K. B. 359; [1936] 2 All E. R. 79, *ante*, p. 598).

(*p*) [1928] Ch. 793.

(*q*) Chapter III, *ante*, p. 116.

(*r*) For example, see *Allen v. London Guarantees and Accident Co., Ltd.* (1912), 28 T. L. R. 254.

(*s*) [1930] 1 K. B. 376.

(*t*) *Taylor v. Bast* (1854), 14 C. B. 487; *Re Suarez, Suarez v. Suaves*, [1918] 1 Ch. 176.

(*u*) *Re Suarez, Suarez v. Suarez* (*supra*); *Duff Development Co., Ltd. v. Kelanian Government*, [1924] A. C. 797.

(*uu*) See *ante*, chapter II, p. 90, as to the dire penalties which may be executed upon persons who even attempt to pursue litigation against foreign sovereigns, &c. The classes of persons who may claim diplomatic privilege has been increased by the Diplomatic Privileges (Extension) Act, 1944, and the Diplomatic Privileges (United Nations and International Court of Justice) Order, 1947, S. R. & O. 1947, No. 1772.

III.—CONDITION 3. CANCELLATION CLAUSE

"The Company may cancel this policy by sending seven days' notice
 "by registered letter to the assured at his last known address and in such
 "event will return to the assured the premium less the *pro rata* portion
 "thereof for the period the policy has been in force or the policy may be
 "cancelled at any time by the assured on seven days' notice and (provided
 "no claim has arisen during the then current period of insurance) the
 "assured shall be entitled to a return of the premium less premium at the
 "Company's short period rates for the time the policy has been in force."

The provisions relating to cancellation made by this condition must be considered under three heads :

- (1) Cancellation by the insurers ;
- (2) Cancellation by the assured ;
- (3) Effect of the Road Traffic Act, 1934, upon cancellation.

(1) *Cancellation by the insurers.*—Whereas insurers may be entitled to cancel the policy upon grounds of initial non-disclosure, or misrepresentation, or breach of fundamental stipulations contained therein (v), the method of cancellation within the provision now under discussion is appropriate only to cases in which the insurers desire to be released for the future from contingent liabilities under the policy which they would otherwise by the terms of the policy be compelled to bear (w).

The mode of cancellation provided for is simple and needs little comment. Notice must be in writing, sent by registered letter to the assured's last known address, and must be given seven days before the cancellation is to become effective. One of the effects of this type of cancellation, that the insurers shall return a proportionate part of the premiums to the assured, is expressly provided for. This course, it is submitted, the insurers would be obliged to follow whether or not any losses have arisen within the terms of the policy with respect to which the assured has called upon them for indemnity prior to cancellation.

The clause is silent as to the effect of cancellation under its terms upon accrued rights and liabilities. It is submitted, upon general principles, that unilateral cancellation by the insurers can have no effect upon the accrued rights of the assured under the policy (x) or of third parties under the relevant statutes (y). The express provision which is made in relation to cancellation by the assured, to be later discussed, supports this view (z). The conditions of the policy, it is submitted, contain nothing in any way to qualify the general rule as to the effect of termination of contractual relationships by the operation of conditions subsequent or terms contained therein (a).

(2) *Cancellation by the assured.*—Corresponding to the insurers' right to cancel upon notice, the condition gives the assured a like right. Cancellation by him is to be effected, in the same way, by a seven-day notice, and its express consequence will be to entitle the assured, subject to the qualification to be next discussed, to a return of a part of the premium which he has paid in consideration of the insurance lasting for a longer period. Although

(v) Chapter VII, *ante*, and see chapter IX, *post*. (w) Chapter VII, *ante*, p. 405.

(x) *I.e.* by his own act a contracting party cannot deprive the other of his vested rights under the contract, see *Heyman v Darwins, Ltd.*, [1942] A.C. 356, [1942] 1 All E.R. 337.

(y) See chapter III, *ante*, p. 120, as to the Third Parties Act, 1930. Clearly cancellation cannot affect the rights of a third party under s. 10 of the Act of 1934, unless as provided by that section.

(z) *Post*, p. 608.

(a) *E.g.* where a contract is discharged for the future under an express or implied term within which subsequent impossibility has arisen. See *Fibrosa Spolza Akyryns v. Fairbairn Lawson Combe Barbour, Ltd.*, [1943] A.C. 32, [1942] 2 All E.R. 122. The Law Reform (Frustrated Contracts) Act, 1943, does not apply to contracts of insurance.

similar in character to his right on cancellation by the insurers, the amount of premium to the return of which the assured will be entitled will be less in proportion, since in the event of his unilateral act of cancellation he will be debited with the insurers' "short period rates" premium for the time during which the insurance has been operative.

The rights of the assured to the return of part of his premium are expressly qualified by the provision that should a claim have arisen during the current period of insurance he will not be entitled to any repayment. Cancellation by the assured, as by the insurers, cannot affect accrued rights and liabilities; cannot, that is, be retrospective in operation (*b*). In recognition of this principle express provision is made enabling the insurers to hold the whole amount of the premium when a claim has arisen during the period before the assured cancelled the insurance.

Effect of the Road Traffic Act, 1934, upon cancellation.—The effect of the 1934 Act upon the liability of insurers has already been discussed in detail (*c*). As far as it affects the present matter, the consequence of section 10 of the Road Traffic Act, 1934, is that judgment obtained by an injured third party against the assured becomes enforceable against the insurers notwithstanding that they are entitled to cancel or avoid the policy, or may have cancelled or avoided it (*d*). Such result will not, however, follow if certain circumstances are present; the only case which is now relevant is that where a policy has been cancelled by mutual consent, or under a provision therein, before the occurrence of the event from which the third party liability arose, the insurers will be freed from liability if certain conditions are satisfied (*e*). This exceptional case and the conditions which define and limit it have been fully discussed in Chapter V, and need not be subjected to further detailed analysis.

The relevant provisions of the 1934 Act are expressly framed to comprise such cancellations as may be effected under the type of clause now being considered (*f*). Cancellation "by mutual consent" is cancellation by agreement either expressed in the original contract or in some later agreement of waiver (*g*); cancellation "by virtue of any provision contained therein" is such cancellation as either insurers or assured may make within the express conditions of the policy (*h*). Neither class of cancellation will be effective for the purpose of excluding the newly imposed statutory liability of insurers unless it has been effected before the occurrence of the event from which the particular third party liability in question arose (*i*). This condition gives statutory recognition to the principle which has already been submitted, that cancellation cannot be retrospective and will therefore be barren of effect upon accrued rights and liabilities between whomsoever they exist (*k*).

Mere cancellation, even validly effected, and made before the happening of an occurrence from which liability has arisen, will not be sufficient to enable insurers to avoid the statutory liability to third parties which the

(*b*) The failure to cancel may, however, render enforceable claims otherwise invalid by waiver or estoppel. See *post*, chapter IX.

(*c*) Chapter V, *ante*, *passim*. See also the effect of the M.I.B. Agreements, chapter VI, *ante*.

(*d*) S. 10 (1) (17 Halsbury's Statutes 544), *ante*, p. 278.

(*e*) S. 10 (2); Chapter V, *ante*, p. 297.

(*f*) S. 10 (2); Chapter V, *ante*, p. 297.

(*g*) See *post*, chapter IX, as to the alteration of a policy and the necessary elements of such agreement. As to waiver, see also chapter IX.

(*h*) See *ante*, pp. 300 *et seq.*, as to whether this includes unilateral cancellation on the ground of breach of condition.

(*i*) See *ante*, pp. 297 *et seq.*

(*k*) *Ante*, p. 602.

1934 Act imposes upon them (f). One of three further conditions must be satisfied, consequent upon cancellation, to produce this result. These conditions, which have also been fully commented upon elsewhere (g), are couched in the alternative and may be summarised as follows :

(i) Surrender of the certificate of insurance by the assured to the insurers, or where it has been lost or destroyed, the making of a statutory declaration to that effect, in either case, before the occurrence of the event from which liability arose ; or

(ii) Surrender of certificate or making of a statutory declaration of loss or destruction (similarly to (i) above) within 14 days of cancellation, even though the event from which liability arises may have occurred after cancellation but before surrender or the making of a statutory declaration ; or

(iii) Commencement by insurers of criminal proceedings under the Road Traffic Act, 1934, Part II, section 14, against the assured, after cancellation, for failure to surrender his certificate or to make a statutory declaration respecting its loss ; such proceedings to be commenced either before the event giving rise to liability occurs or within 14 days of cancellation even though such event occurs before proceedings are commenced (h).

In conclusion, it may be said that as between insurers and assured cancellation under the condition under consideration is effective to terminate such rights and liabilities as may arise thereafter under the terms and within the original currency of the policy, but ineffective to alter or change accrued rights and liabilities, whether of the assured or any other person (i). As between insurers and third parties who have sustained bodily injury, cancellation is ineffective unless it is made within the four walls of section 10 (2) of the Road Traffic Act, 1934—that is :

- (1) Before the occurrence of the event giving rise to liability ;
- (2) Completed by performance of one of the alternatives of surrender, statutory declaration or proceedings prescribed therein ; and
- (3) Such further act being performed before the occurrence of the event giving rise to liability or within the prescribed time thereafter.

IV.—CONDITION 4. RATEABLE CONTRIBUTION

" If at the time any claim arises under this policy there is any other existing insurance covering the same loss damage or liability the Company shall not be liable except under Section III of this policy to pay or contribute more than its rateable proportion of any loss damage compensation costs or expense. Provided always that nothing in this condition shall impose on the Company any liability from which but for this condition it would have been relieved under the provisions of paragraph 1 (a) of Section II of this policy."

" *Rateable contribution.*"—The principle of contribution in insurance has been explained generally in an earlier chapter (j), and will be considered in more detail later (k).

The meaning and effect of rateable contribution under a condition such as this can best be explained by an illustrative example.

Thus if a policy issued by A insures X's car against loss or damage to the extent of £50, a policy issued by B insures the same car against the same risk for £100, and an accident occurs involving damage to the extent of £75. A is liable under his policy to 50/150 of the loss and B 100/150, and X cannot

(f) Chapter V, *ante*, pp. 297 et seq.

(g) *Auto*, chapter V, pp. 297 et seq.

(h) *Auto*, p. 602.

(i) Chapter II, *ante*, p. 103.

(j) Chapter V, *ante*, p. 300.

(k) *Part*, chapter X.

claim more than the sums representing these proportions from either insurer. If, however, there were no "rateable contribution clause" in his policies, X could claim the full £75 from either insurer, and the insurer who paid would be left to adjust the matter with the other under the ordinary law of contribution between insurers (r).

It must be noticed that the rateable contribution clause only applies to another policy covering the same loss, and the other policy must be a valid and subsisting policy under which the assured is not precluded by any breach of condition from obtaining payment of the indemnity (s). Thus in *Jenkins v. Deane* (t) a motor policy contained a rateable contribution clause in terms similar to those set out above. GODDARD, J. (as he then was), held that before the insurers could crave in aid this clause in a claim for an indemnity under the policy, they must discharge the onus of proving not merely that there was another policy in existence, but that the insurers under it could be called upon to pay in respect of the accident in question (u).

Position of third parties in regard to rateable contribution condition.—It seems doubtful how far the rateable contribution condition can apply to the third party liability indemnity. It is submitted that in so far as such indemnity is in respect of liability for death, bodily injuries or medical fees (v) the condition cannot apply.

At any rate it is apprehended that the clause could not be relied upon to cut down the insurers' liability to a claim by a third party claiming under section 10 of the Road Traffic Act, 1934 (w), or under the Third Parties Act, 1930 (a), in respect of bodily injuries or death (b). The effect of the M.I.B. Agreements on such claims has already been discussed in chapter VI.

But in so far as the condition applies to third party liability not required to be covered by the Act and therefore also outside the scope of the M.I.B. Agreements, it is perfectly valid. The position of third parties claiming against insurers (c) in respect of such liability would presumably be the same as that of the assured.

"*Except under Section III.*"—Section III covers personal accident benefits to the assured (or his wife or both) in respect of personal injuries. This condition, then, has no application to that clause, and an assured who loses both limbs in an accident covered by the policy may, for example, recover:

- (i) £500 under clause III;
- (ii) £1,000 under another policy not issued by the same insurers (d);
- (iii) Any sum which the Court may award in action against a third party responsible for the injuries or which such third party may voluntarily pay.

(r) As to which see generally, *ante*, chapter II, p. 103, and *post*, chapter X.

(s) See the decision of TUCKER, J., in *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1944] 2 All E. R. 243, affirmed by Court of Appeal, [1945] K. B. 250; [1945] 1 All E. R. 316, noted *ante*, p. 532, where the breach of condition was failure to give notice; and see further *ante*, p. 529, *per* ROCHE, J., in *Loyd's and Gale's Cases*, [1928] 1 K. B. 359.

(t) [1933], 47 Ll. L. R. 342.

(u) *Ibid.*, at p. 346.

(v) *I.e.* the liability required to be covered by s. 36 of the Road Traffic Act, 1930, (23 Halsbury's Statutes 607), *ante*, chapter IV, pp. 188 *et seq.*

(w) 27 Halsbury's Statutes 534; *ante*, chapter V, p. 278; *i.e.* where the third party has obtained judgment under s. 10 (a) (i), *ibid.*

(a) 23 Halsbury's Statutes 12; *ante*, chapter III, pp. 120 *et seq.*

(b) Though it is valid as between insurers and assured or as between insurers and a third party claiming in respect of a liability not required to be covered by s. 36 (1) (b).

(c) *I.e.* under the Third Parties (Rights against Insurers) Act, 1930 (23 Halsbury's Statutes 12); *ante*, chapter III, p. 120, or by assignment, as in *Jenkins v. Deane* (1933), 47 Ll. L. R. 342, and *Barrett v. London General Insurance Co., Ltd.*, [1935] 1 K. B. 238.

(d) *Ante*, pp. 540 *et seq.*

Effect of condition upon other clauses in policy.—The effect of a rateable contribution clause upon a clause excluding indemnity where there is "co-existing cover" has already been discussed (f).

"*Provided always that nothing in this condition shall impose on the Company any liability, etc.*"—This proviso may be assumed to have been inserted with the object of getting over the position created in *Loyd's* and *Gale's* Cases (g). The proviso was found in the rateable contribution clause in *Weddell's* Case (h) in one policy, but the other policy contained no rateable contribution clause (i). In that case the effect of this proviso does not appear to have been properly tested.

"It was pointed out by counsel for the defendants that on this basis, "if neither policy contained a rateable proportion clause, they would destroy each other entirely, and further, that such might be the position in this case, seeing that the proviso to the rateable proportion clause in condition 4 of the road transport company's policy seems to negative its use "to cut down the proviso as to collateral insurance in the case of a friend or relative (k). However, he did not contend for this result, his clients "being content to accept the decision of the arbitrator" (l).

On the authority of *Austin v Zurich General Accident and Liability Insurance Co., Ltd.* (m), however, it would seem that this proviso adds nothing to the position when in each policy of insurance there is a clause negating liability in the event of double insurance.

V—CONDITION 5. UNSAFE CONDITION OF VEHICLE

"The assured shall take all reasonable steps to safeguard from loss or damage and maintain in efficient condition any motor car described in the Schedule hereto, and the Company shall have at all times free access "to examine such motor car."

Examples of the inefficient condition of a motor vehicle which may bring it within such a clause as the above will be given later. But it must here be pointed out that the inefficient or dangerous condition of a vehicle may of itself give rise to a liability to a third party (n). So also may leaving the vehicle in an unsafe position on the road (o), even though the owner is not negligent in so leaving it (p).

Two fundamental questions arise upon the interpretation of this condition:

1. *Is it an essential condition?*—That is, is it a condition the breach of which entitles the insurers to declare the policy void? It is submitted,

(f) *Ante*, pp. 528 *et seq.*

(g) For a full account of these cases see *ante*, p. 510. In these cases there was in both policies a rateable contribution clause, but neither policy contained this proviso. See *ante*, p. 531.

(h) [1932] 2 K. B. 563. See *ante*, p. 519, for a full account of this case.

(i) In *Loyd's* and *Gale's* Cases (*supra*) both policies contained a rateable contribution clause, but neither contained a proviso of this kind.

(k) *Id.* to the effect that his company was not liable for more than half.

(l) *Per* ROWLAT, J., [1932] 2 K. B. 563.

(m) [1944] 2 All E. R. 243; affirmed, [1945] K. B. 250, [1945] 1 All E. R. 316.

(n) See *Mugrow v. Pandelus*, [1919] 2 K. B. 43; *Hutchins v. Maudslayi* (1920), 37 T. L. R. 72, doubted in *Phillips v. Britannia Hygienic Laundry Co.*, [1923] 1 K. B. 539; but see *Monk v. Warbey*, [1935] 1 K. B. 75.

(o) See s. 50, Road Traffic Act, 1930 (23 Halsbury's Statutes 647); *Parker v. Miller* (1926), 42 T. L. R. 408; *Rueff v. Long & Co.*, [1916] 1 K. B. 148; *Lynch v. Nordin* (1847), 1 Q. B. 29.

(p) See s. 50, Road Traffic Act, 1930, and *Ingram v. United Automobile Service, Ltd.*, [1943] K. B. 612; [1943] 2 All E. R. 71 (C. A.); *Montford v. Raisbeck and Hewitt (R. T. & F.) Ltd.*, [1944] K. B. 689; [1944] 2 All E. R. 371 (C. A.).

with some hesitation, that it is not. Thus if the insurers, after the policy has been in force for six months, learn that from the beginning the assured has habitually kept the car in an unsafe or dangerous condition they cannot declare the policy to be void from its inception. This question is not entirely so academic as it may seem (g), since the insurers might only discover the breach after having paid a loss. Where they discovered it before they could always cancel the policy under the cancellation clause, in which case, provided no claim arose during the period of notice required by that clause, no question would arise.

2. *Is it a contractual term or a mere limitation of risk?*—It is submitted that, quite clearly, it is a contractual term. It follows, therefore, that by the operation of Condition 7, which makes the due fulfilment of any term or condition in the policy a condition precedent to the insurers' liability, if the assured at any time fails to observe this condition the insurers may repudiate liability in respect of any claim under the policy, whether or not that claim arises out of an accident caused by a failure to keep the vehicle in an efficient condition, and whether when the accident happens the vehicle is in an efficient condition or not (r).

The condition under consideration must be clearly distinguished from that in question in the case of *Bonney v. Cornhill Insurance Co.* (t). In that case Condition 10 was that :

"The Company* will not be liable for injury damage or loss caused through driving the insured vehicle in an unsafe condition either before or after an accident."

Section C of the policy provided that the insurers were not liable for :

"damage . . . caused by fire, lightning, self-ignition, explosion of petrol or acetylene gas up to the market value of the motor vehicle and/or accessories at the time of such damage. . . ."

CHARLES, J., pointed out that :

"It is a little difficult to interpret that Section 'C' in connection with Condition 10 of the conditions, because one would suppose that if the valves of a car were in such a condition that it was backfiring in its engine so as to result in self-ignition it is difficult to believe that one could properly describe that car as safe, and yet the insurance company accept that as a risk for which they must pay."

The facts were that the car broke down with backfiring (u) and other symptoms indicating that the vehicle was in an unsafe condition. But the assured and another skilled mechanic attended to it, and when they had got it into what they thought a safe condition, proceeded cautiously to drive it to the nearest garage. On the way it caught fire and was destroyed. It was apparently held that, although in fact the vehicle must have been in an unsafe condition, the loss was covered by the policy.

But it must be carefully observed that that clause (v) could only operate so as to deprive the assured of any indemnity under the policy, if the breach of it caused the loss, damage or liability in respect of which the particular claim for indemnity was made.

(g) Having regard to the interpretation placed upon this condition below.

(r) *Jones and James v. Provincial Insurance Co.* (1929), 35 Ll. L. R. 135.

(t) (1931), 40 Ll. L. R. 39.

(u) Cf. *Musgrove v. Pandelis* (supra), where backfiring gave rise to an extensive third party liability. See ante, p. 516.

(v) And others like it.

In *Crossley v. Road Transport and General Insurance Co.* (w) a question was raised as to the meaning of a clause which provided that the assured should "at all times see that the car was in proper working order." ROCHER, J., stated the alternative constructions of it as follows :

"One view contended for is that that means that the assured shall ensure that the car is in working order and condition and shall ensure that whether he knows of its being out of condition or not, and shall do it during the whole currency of the period covered by the insurance. Another construction contended for is that the assured shall see, so far as sight and prevision will allow him, that the car shall continue in that condition."

It is submitted that the latter is the correct construction of this kind of clause, as it clearly is of the specimen condition given above, which stipulates that the assured shall "take all reasonable steps (x)."

In *Jenkins v. Deane* (a) the policy contained a clause providing that—

"The assured shall take all reasonable steps to keep the insured vehicle in good repair and condition . . . and the insurers shall not be liable for injury loss or damage through the driving of any vehicle in an unsafe condition."

An accident occurred whilst the insured vehicle was towing another with a defective tow-rope, and it was pleaded by the insurers that the accident was caused by the insured vehicle being in an unsafe condition. GODDARD, J. (as he then was), held that as the tow-rope was no part of it the vehicle was not in an unsafe condition. In *Piddington's Case* "unsafe condition" was pleaded but abandoned (b).

"Unroadworthy condition."—In *Barrett v. London General Insurance Co.* (c) a policy contained the clause :

"This policy does not cover liability in respect of any accident whilst driving the motor car in an unsafe or unroadworthy condition."

Whilst the assured was driving the car his footbrake suddenly failed, causing (d) him to run down and kill a third party. The killed man's widow brought an action against the assured (e) and was awarded damages and costs. She then took an assignment from the assured of his rights under his policy (f) and proceeded to enforce them against the insurers. The insurers pleaded that the assured was not covered, as at the time of the accident the vehicle was in an unroadworthy and unsafe condition. They succeeded in proving only that a nipple and cable had come apart, thus causing the brake to be useless at the moment when it was applied (d) before the accident, but failed to prove that they came apart or that the assured knew of the defect before that moment.

GODDARD, J., held that in the absence of authority (g), their contention failed, for the reasons which the following extracts from his judgment show :

(w) (1925), 21 Li. L. R. 219.

(x) Cf. *Jones and James' Case* (supra) and *Barrett's Case* (infra).

(a) (1933), 47 Li. L. R. 342.

(b) See ante, p. 575.

(c) (1935), 1 K. B. 238.

(d) "There is no doubt that the accident was caused by the footbrake failing at the critical moment," per GODDARD, J. (as he then was). If this is so, it is difficult to see how the assured was responsible for the accident, as it was found he knew nothing of any defect.

(e) Under the Fatal Accidents Act, 1846 (12 Halsbury's Statutes 335).

(f) It should be noticed in this case, as in *Jenkins v. Deane* (1933), 103 L. J. K. B. 250, the third party took an assignment of the assured's rights under the policy.

(g) "Both counsel said that they knew of no authority on this point, and no cases were cited. I have been unable to find any case relating to the insurance of motor . . . vehicles in which this or a similar exclusion has been considered." *Ibid.*, at p. 240. As to similar exclusions, see, however, the cases cited in this section above.

"The addition of the word 'unsafe' to 'unroadworthy,' seems to add nothing. If a vehicle were unsafe it would be unroadworthy, and, *vice versa*, 'unroadworthy' seems to imply the same state in relation to a road vehicle as 'unseaworthy' does to a vessel. It is elementary in marine insurance that the owner of the vessel impliedly warrants that it is seaworthy. So far as I know, it has not yet been decided whether there is the same implied warranty in the case of a motor car, and the object of the exclusion is to put the underwriters of a motor policy in the same position in that respect as those of a marine policy. It matters not in the result whether the protection is given to the insurers by means of a warranty, express or implied, or by an express clause exempting them if the vehicle or vessel were not fit for the element, were it land or sea, on which it is to be used. It is settled law that there is an implied warranty that a ship is seaworthy at the time of sailing, but there is no warranty that she should continue seaworthy throughout the voyage" (k).

"That doctrine should apply to the clause under construction, and it should be read as meaning that the car must be roadworthy when it sets out on its journey".

This case was important in so far as it purported to establish that there is an implied condition in a motor policy that the vehicle shall be roadworthy. But this proposition was short-lived. In *Trickett v. Queensland Insurance Co.* (i) insurers repudiated liability to an assignee of W.'s policy, which excluded liability "while the insured car is being driven in a damaged or unsafe condition. W. had been killed in an accident while driving the insured car, which at the time of the collision was without lights. The trial judge found that the condition of the car, so far as its lights were concerned, was unsafe, and had been unsafe for some time before the accident. The Privy Council held that it was unnecessary for the insurers to show that the car was unsafe to the knowledge of the driver, and that the law affecting the roadworthiness of motor cars should not be assimilated to the law governing the seaworthiness of ships at sea. It was not enough that the car had been roadworthy at the start of its journey. No decision was given in this case to say how the clause would apply to latent defect.

"All reasonable steps to safeguard from loss or damage."—This duty is rather different from that relating to the condition of the vehicle. It must be distinguished from the implied duty to minimise loss (k). Strictly to comply with it the assured must, for example, not "leave his car in tempting positions" (l) where it is likely to be stolen, or interfered with by children (l).

Thus in *Martin v. Stanborough* (m) it was held that to leave a car on a steep slope when the brakes were out of order, and with only a block of wood which could easily be removed, was negligent. To leave a car with good brakes but no block on a slope where it might be interfered with by children would be equally negligent (n) and an excellent example of failing to take all reasonable steps to safeguard from loss or damage. But if this is the construction to be put upon the condition no third party liability arising out of negligent driving by the assured could be covered by the policy.

(k) Citing and following *PARKE, B.*, in *Dixon v. Sadler* (1839), 5 M. & W. 405, at p. 414, affirmed *sub nom. Sadler v. Dixon* (1841), 8 M. & W. 895; *Biccard v. Shepherd* (1861), 14 Moo. P. C. C. 471, at p. 495.

(i) [1936] A. C. 159 (P. C.).

(k) See *post*, p. 646.

(l) See *Farra v. Hetherington* (1931), 47 T. L. R. 465, where it was held that the fact that this was the assured's habit was material and that his failure to disclose it avoided the policy, 40 Ll. L. R. 132, and see *Hambrook v. Stokes Brothers*, [1925] 1 K. B. 141; *Ruoff v. Long & Co.*, [1916] 1 K. B. 148.

(m) (1924), 41 T. L. R. 1, and see s. 50 of the Road Traffic Act, 1930 (23 Halsbury's Statutes 647), which makes it an offence so to leave a vehicle.

(n) See *Lynch v. Nurdin* (1841), 1 Q. B. 29.

It is difficult to see, therefore, what failure to take reasonable steps this condition covers.

Examples can be imagined, such as where the insured vehicle catches fire and the assured, all the means to do so being readily available, takes no steps to quell it, but stands by and watches a small fire starting from an electrical fuse spread and consume the whole car, which would clearly be covered by the condition (o). Another arose in *Bonney v. Cornhill Insurance Co.* (p), where there was a question under a similar condition whether the assured ought not to have towed the insured vehicle to the nearest garage instead of driving it under its own power (q). It is impossible to draw the line between examples such as these, and each case must be decided on its own peculiar facts. But it is submitted that, in general, it would be found that nothing which was not a breach of the implied term in an insurance contract that the assured must not himself deliberately create the risk (r) insured against, would come within this part of this condition.

This clause, as to taking all reasonable steps to safeguard from damage takes many different forms in motor insurance policies. A clause excluding liability when the car is driven in an unsafe or unroadworthy condition has already been discussed (s). In *National Farmers' Union Mutual Insurance Society, Ltd. v. Dawson* (t) an analogous clause appeared in the policy to the effect that the assured should use all care and diligence to avoid accidents and should employ only steady and sober drivers. The assured, whilst driving the car himself while under the influence of drink, injured some third parties. Insurers settled the third parties' claims and brought arbitration proceedings against the assured to recover the sums so paid, on the ground that the restriction imposed by the clause referred to was one that was made of no effect by section 12 of the Road Traffic Act of 1934 against third parties, and therefore insurers were entitled to recover from the assured the sums paid by way of settlement with the third parties as damages for breach of the clause. It was contended on behalf of Mr. Dawson that section 12 of the 1934 Act did not require that the clause referred to should be of no effect against third parties: the insurers had therefore made a voluntary payment to the third parties and could not recover from the assured. The arbitrator agreed with the argument of the insurers, but in the Divisional Court Lord CALDECOTE, L.C.J., rejected the contention that the clause was hit by section 12 (a) of the 1934 Act. The policy, he said, did not purport to restrict the insurance by reference to the physical condition of persons driving the vehicle. At most, it purported to restrict the insurance from applying to cases where the assured had not used all care and diligence, and that was something quite different from a restriction which referred to the physical condition of persons driving the vehicle. The proviso to section 12 did not apply. On the other hand, a sum of about £1,000 had been paid by insurers to the third parties as a result of the failure of the assured to use all care and diligence to avoid an accident. The damages paid by the insurers were the natural results of the breach of contract which the assured committed, and the insurers could therefore recover the sums paid.

A second defence was put forward against the insurers which, though also rejected by Lord CALDECOTE, requires examination. It was argued that the clause requiring the assured to use all care and diligence to avoid accidents was repugnant to the main purpose of the policy, i.e., insurance against

(o) Cf. *ante*, p. 516.

(p) It was held that in the circumstances it was reasonable to drive.

(q) See *post*, chapter IX, as to this implied term.

(r) Cf. *Barrett's Case* and *Trickett v. Queensland Insurance Co.*, *ante*, pp. 608 et seq.

(t) [1941] 2 K. B. 424.

(p) [1931], 40 Ll. L. R. 39.

liability to pay damages to third parties for the negligence of the assured. The argument was this, that insurers might not say "We will insure you against negligence on condition that you are not negligent." This contention was put forward in *Concrete, Ltd. v. Attenborough* (u), where the policy was one insuring an employer against accidents occurring in his business. The policy contained a condition requiring the assured to exercise all reasonable care in seeing that the plant, etc., was substantial and sound and in proper order, and that all reasonable safeguards and precautions against accidents were provided and used. BRANSON, J., interpreted the clause as meaning that the assured did not guarantee that he would see, but that he had to take reasonable care in seeing that the plant, etc., were substantial and sound. If, for instance, he had taken reasonable precautions to provide a fence for a wheel, and the fence was not used, and as a result someone was injured, the assured might still be responsible under the Factory Acts, but having taken those precautions, he would be entitled to indemnity under the policy. If, on the other hand, he had refused to provide a fence for the wheel, he would not be entitled to be indemnified because he had not attempted to take reasonable care to see that the safeguard was provided and used (v). In *Woolfall and Rimmer, Ltd. v. Moyle* (w) these dicta were not wholly approved by the Court of Appeal. In that case, again a case of an employer's liability, there was a condition in the policy that the assured should take all reasonable precautions to prevent accidents and to comply with all statutory obligations. The purchase and supply of timber for scaffolding was left entirely to the foreman, who was competent and skilled. An accident occurred, causing injury to several workmen, when scaffolding, for which suitable timber was not available, broke and cast them to the ground. It was held that the assured had taken reasonable precautions by employing a competent foreman. The contention that the condition referred to applied to the negligence of the foreman was a misconception. The condition was not a warranty that everyone employed by the assured, or in fact anyone except the assured, would take reasonable precautions.

Nevertheless, it is possible to conceive of a clause being inserted in a motor insurance policy which can only be construed as requiring the assured, as a condition precedent to the company's liability, to be without negligence in the driving of the insured car. If the policy was one against third party risks, that clause would be repugnant to the main purpose of the policy, and might therefore be held to be void.

VI.—CONDITION 6. ARBITRATION CLAUSE

"If any question or difference arise between the Company and the assured or any claimant under this policy as to the meaning and effect of this policy or as to any obligation or liability hereunder the same shall be submitted to the decision of an arbitrator under the provisions of the Arbitration Act, 1889, the Arbitration (Scotland) Act, 1894, or other statutory provision for arbitration as may at the time apply to such question or difference; and it is expressly stipulated that the obtaining of an award by such arbitrator shall be a condition precedent to any right to sue on the policy. If the Company shall disclaim liability to the assured for any claim hereunder and such claim shall not within twelve calendar

(u) (1939), 65 Ll. L. R. 174.

(v) In *Pictorial Machinery, Ltd. v. Nicolls* (1940), 67 Ll. L. R. 524, the same condition was considered by HUMPHREYS, J. A workman was carrying two bottles containing acetone, when one fell and caused a fire. The judge held that the practice of the trade as to the method of delivery indicated that there was no breach of the assured's obligation to "take all reasonable safeguards and precautions against accidents."

(w) [1942] 1 K. B. 66; [1941] 3 All E. R. 304.

" months from the date of such disclaimer have been referred to arbitration
 " under the provisions herein contained then the claim shall for all purposes
 " be deemed to have been abandoned and shall not thereafter be recoverable
 " hereunder."

This condition, the so-called " Arbitration Clause," which is invariably to be found in contracts of motor insurance, requires careful consideration from a variety of aspects. It is in what is known as the *Scott v. Avery* form (x). In view both of legislation of recent years and judicial tendencies it is necessary to enquire into its validity, its scope, applicability and effects (x). It must, however, at the outset be pointed out that section 3 (4) of the Arbitration Act, 1934, has robbed the clause of much of its former strength (a).

1. Validity of the Arbitration Clause.—The question of validity must be considered under two heads: first, validity at Common Law; and secondly, validity under the Road Traffic Act of 1934 (b).

(a) **Validity at Common Law.**—Since the earliest days when arbitration clauses arose for consideration by the Courts it has been regarded as settled law that an agreement the object or consequence of which would be to oust the jurisdiction of the Courts is void and unenforceable as contrary to public policy (c).

Distinction has always, however, been drawn between clauses which purported to oust the jurisdiction of the Courts by completely depriving a party to the contract of his right to resort to the Courts in the event of a dispute arising thereunder, on the one hand, and, on the other, clauses providing that some further act should be done or performed in relation to a difference before any action could be brought, or providing that the assessment of liability should be made by some third party whilst leaving either party the right if he complied with the prescribed conditions of ultimate recourse to the Courts (d). The first type of clauses were held void as against public policy; the second type, known as *Scott v. Avery* Clauses, from the decision in the case of that name, were held good and enforceable (by means of stay of proceedings under section 4 of the Arbitration Act, 1889 (e)). Following the decision and the form of the disputed clause in *Scott v. Avery* (f), the validity of which was upheld in the House of Lords, it became the general practice, particularly in insurance contracts, to formulate the arbitration clause with the concluding words " and the obtaining of an award . . . shall be a condition precedent to any right to sue on the policy " (g).

(x) See chapter I, *ante*, as to general principles of arbitration and the *Scott v. Avery* Form.

(a) Since the Court now has power to say that a condition which the parties have agreed shall be a condition precedent may be ignored. See *post*, pp 611 *et seq*.

(b) 27 Halsbury's Statutes 534

(c) *Scott v. Avery* (1856), 5 H. L. Cas 811. This principle of law is peculiar to our system of law. In France and in other countries of Europe, it is perfectly legitimate for parties to a commercial agreement to accept as final and binding the decision of a single arbitrator, from whom no appeal lies.

(d) *Per* HANWORTH, M.R., in *Freshwater v. Western Australian Assurance Co., Ltd.* [1933] 1 K. B. 515, at p. 523. " It postpones but does not annihilate the right of access to the Court "

(e) See chapter I, *ante*, p. 11.

(f) (1856), 5 H. L. Cas 811

(g) It was well settled that these words, whatever the validity of the words which preceded them, made the arbitration clause unimpeachable. The prevailing opinion was, however, that a mere agreement to refer all disputes to arbitration, without more, ran dangerously close to attempting to oust the jurisdiction of the Courts and was of questionable validity. The question of the validity of a clause in such form appears never to have arisen in practice, since the *Scott v. Avery* form was usually followed.

It was at one time thought that section 38 of the Road Traffic Act, 1930 (*h*), rendered the *Scott v. Avery* form of clause of doubtful validity. This point is discussed below. The common form of arbitration clause without the *Scott v. Avery* addition was upheld as valid in the following motor vehicle insurance case.

In *Valle-Jones v. Liverpool and London and Globe Insurance Co.* (*i*) a dispute arose under a motor insurance policy as to the meaning of the phrase therein, "business purposes," and as to whether the insured vehicle was being used at the time of an accident for which a claim was made under the policy for such purposes within the meaning thereof. The assured also claimed damages for breach of contract for refusing to indemnify him in respect of this accident. The policy contained an arbitration clause which was not in the *Scott v. Avery* form, and did not make arbitration a condition precedent to the right of action. It was contended by the assured that as there was a point of law on the construction of the policy, and also a claim for damages, the Court should in the exercise of its discretion refuse to stay the action. On appeal to the Court of Appeal it was held (*h*) that the action must be stayed, SCRUTTON, L.J., observing as follows :

" It has long been settled that that clause as it stands in this policy does not oust the jurisdiction of the Court. It has also long been settled that the Courts approach the matter with the tendency to say that people who make agreements should keep them, and that when a man has agreed to refer a claim to arbitration, he ought not to go to Court unless there is some overwhelming reason why he should not observe the terms of the contract."

Following the decision in *Valle-Jones' Case*, the validity of arbitration clauses partly in the *Scott v. Avery* form and partly without such addition arose for decision. In *Freshwater v. Western Australian Assurance Co., Ltd.* (*l*), no point was taken as to the effect of the Road Traffic Act, 1930, upon the *Scott v. Avery* addition. In the second of these, *Jones v. Birch Brothers, Ltd.* (*m*), an action had been brought by an injured third party against the owners of two motor vehicles; the insurers of one of the defendants, Barnes, repudiated liability upon the ground of breaches of condition, whereupon Barnes sought to bring in the insurers by way of third party proceedings. The insurers applied for a stay of the third party proceedings under section 4 of the Arbitration Act, 1889, relying upon an arbitration clause in the same form as that now under consideration.

It was argued that as far as the *Scott v. Avery* addition was concerned, the clause was invalidated by the operation of section 38 of the Road Traffic Act, 1930 (*n*); further, that the *Scott v. Avery* addition was unseverable from the first part of the arbitration clause, or that if it were severable, such first part was invalid and unenforceable as amounting to an attempt to oust the jurisdiction of the Court.

Holding that the *Scott v. Avery* addition was severable from the first part of the clause, SCRUTTON, L.J. (*o*), held that the first part was valid and enforceable in the following terms :

" I take first the ordinary arbitration clause, that is to say, the first part of condition 6 down to the words ' applicable thereto.' The practice of the Courts on this clause is that they do not treat it as ousting their

(*h*) 23 Halsbury's Statutes 639.

(*i*) (1933). 46 Ll. L. R. 313.

(*l*) Upholding the decision of the Master and Judge.

(*j*) [1933] 1 K. B. 515.

(*m*) [1933] 2 K. B. 597.

(*n*) 23 Halsbury's Statutes 639; see chapter IV. *ante*, p. 219.

(*o*) *Jones v. Birch Brothers, Ltd.*, [1933] 2 K. B. 597, at p. 609.

"jurisdiction, but, as it is desirable in the public interest that people who make legal contracts keep them, they stay the action and refer the dispute to arbitration under the agreement, unless special circumstances are shown why the agreement should not be observed: see *per* Lord HANWORTH in *Freshwater v. Western Australian Assurance Co., Ltd.* (p). I said myself in *Gowar v. Hales* (q): 'But there is an arbitration clause in the policy which means that the assured has agreed to the term of the policy that disputes between him and the assurance company shall be settled by arbitration. Now that does not oust the jurisdiction of the Courts if they think fit to allow an action; but it is a general principle that people who make contracts should keep them rather than break them, and the owner of a motor car who, having agreed in a policy to settle a dispute by arbitration, does not do it but goes to law, is breaking his contract, and the general principle therefore on which the Courts act is that unless there are special circumstances, they invite the person who brings an action to comply with his contract and go to arbitration.' There are many other authorities (r) to the same effect" (o).

Similar views upon the severability of the *Scott v. Avery* addition, and the validity of the clause without that addition, were also expressed by GREER and ROMER, L.JJ., in their judgments (o).

It should be noticed that where the clause is in the ordinary form without the *Scott v. Avery* addition, the presence of a compendious "Condition precedent clause," which most motor policies contain, may give the clause the same effect as that addition (s).

On the face of the authorities mentioned above it may thus be confidently submitted that an arbitration clause in the form under consideration, even without the *Scott v. Avery* addition, is valid and enforceable, and will not be held to amount to an ousting of the jurisdiction of the Courts.

(b) **Effect of section 38 of the Road Traffic Act, 1930.**—The content and effect of section 38 of the Act of 1930 has already been fully discussed (ss). It suffices to remind the reader briefly that it provides that conditions on policies as to the performance or non-performance of specified acts after the occurrence of an event giving rise to liability shall be of no effect in relation to claims based upon death or bodily injury to third parties. The section is subject to a proviso saving as against the assured the validity of provisions in the policy binding him to repay to the insurers sums paid by them in satisfaction of third party claims.

It was thought at one time that an arbitration clause couched in the *Scott v. Avery* form was rendered of no effect by this section 38, in so far as it required the assured to perform a specified act after the motor accident, and the performance of this act was made a condition precedent to insurer's liability. It was so argued in *Jones v. Birch Brothers, Ltd.* (t), but the point was not finally determined. The arbitration clause in its ordinary form was held by SCRUTTON, L.J., to be unaffected by section 38, and the *Scott v. Avery* part of the clause was severable (u). Lord Justice GREER was inclined to think that section 38 rendered inoperative the *Scott v. Avery* part of the arbitration clause, but considered that there should nevertheless be a stay of the proceedings (v) because they might have had the effect of rendering the policy inoperative if they had been allowed to proceed.

(p) [1933] 1 K. B. 515, at pp. 519, 520.

(q) [1928] 1 K. B. 191.

(r) See most of the cases cited in this section.

(s) See *post*, p. 623, and *Gowar v. Hales*, [1928] 1 K. B. 191.

(ss) Chapter IV, *ante*, p. 219.

(t) [1933] 2 K. B. 597.

(u) The Lord Justice did not think it necessary for his decision to determine finally what was the effect of the proviso to section 38.

(v) The injured plaintiff in a running-down action brought in the defendant's insurers as third parties. The insurers applied for a stay of these third party proceedings.

It is submitted, however, that whilst in each case the actual words of the arbitration clause must be considered in general, the *Scott v. Avery* form will not be invalidated by section 38. The section aims at conditions providing that no *liability shall arise* or *liability shall cease* in the event specified (a). Most *Scott v. Avery* clauses merely provide that the liability shall only be enforceable by arbitration, and in such clauses unless they provide that the proceedings must be commenced or the award obtained within a limited time—a condition which the Court can now cancel (b)—there is nothing to provide that the liability shall not arise or that it shall cease if the assured does or fails to do anything (c). On the other hand, where, as in *Freshwater v. Western Australian Assurance Co., Ltd.* (d), the clause provides that arbitration shall be a condition precedent to making *any claim* under the policy, it is submitted that it must be construed in the same sense as that last described—namely, that “claim” refers only to a disputed claim (e), and that therefore *liability* is not affected, though its enforcement is, by the condition.

(c) **Validity under the Road Traffic Act, 1934.**—The questions as to how far insurers seeking a declaration that they are entitled to avoid a policy, in proceedings under section 10 (3) of the Road Traffic Act, 1934, may be met with an application to stay the proceedings on the ground that there is a valid and subsisting submission, or that the obtaining of an award is a condition precedent to the right to sue, have been discussed in an earlier chapter (f). Confusion has arisen in the past owing to the use of a single phrase, “repudiation of the policy,” to describe two totally different things. It may mean either that insurers are alleging that owing to fraud, mistake, misrepresentation or non-disclosure the policy never came into effect, or, secondly, that in reliance on a breach by the assured of an express or implied term in the policy the insurers are not liable to the assured under the policy. The cases which made clear this distinction (g) were all discussed in *Heyman v. Darwins, Ltd.* (h), and for convenience are set out under Repudiation, below (i).

2. Effect of Arbitration Clause.—Whilst a party to an agreement containing an arbitration clause is left free to commence proceedings in contravention of his agreement, since no submission is permitted to take effect by way of ousting the jurisdiction of the Court (k), it is open to the other party to apply for a stay of proceedings under the well-known section 4 of the Arbitration Act, 1889 (l). The Court’s jurisdiction to accede to such an application and grant a stay is discretionary, but once the party applying

(a) Cf. *per* Lord WRIGHT, in *Heyman v. Darwins, Ltd.*, [1942] A.C. 356; [1942] 1 All E.R. 337: “In arbitration agreements collateral to the substantive stipulations of the contract; it is merely procedural and ancillary.”

(b) Under the Arbitration Act, 1934, see *post*, pp. 621 *et seq.*

(c) Cf. a clause which provides that the insurers’ liability shall cease if an action or arbitration is not commenced within a specified time. See *Revell v. London General Insurance Co.* (1934), 50 Ll. L.R. 114.

(d) [1933] 1 K.B. 515.

(e) It would seem absurd to suggest that such a clause means that the assured cannot ask to be paid in respect of a liability not disputed without first obtaining an award.

(f) *Ante*, chapter V, pp. 303 *et seq.*

(g) *Toller v. Law Accident Insurance Society, Ltd.*, [1936] 2 All E.R. 952; *Woodall v. Pearl Assurance Co.*, [1919] 1 K.B. 593; *Siebbing v. Liverpool and London and Globe Insurance Co., Ltd.*, [1917] 2 K.B. 433; *Golding v. London and Edinburgh Insurance Co.* [1932], 43 Ll. L.R. 487; *Stevens & Sons v. Timber and General Mutual Accident Insurance Association* (1933), 102 L.J.K.B. 337.

(h) [1942] A.C. 356; [1942] 1 All E.R. 337.

(i) *Ante*, pp. 612 *et seq.*

(i) *Post*, pp. 617 *et seq.*

(l) Chapter I, *ante*, p. 11

therefor has shown that the dispute, now the subject of legal proceedings, is one falling within the scope of a valid and subsisting reference to arbitration, the Court as a rule will grant a stay, unless the party resisting the application under section 4 succeeds in showing some exceptional reason why no stay should be ordered in the special circumstances of his case.

Formerly the Court would never refuse a stay where the clause was in the *Scott v. Avery* form (m), but now by section 3 (4) of the 1934 Act (n) they are given power to dispense with the condition precedent.

In granting a stay the Court acts in pursuance of the general principle that persons should be held to their contracts. Conversely, it follows that where there is no subsisting agreement whereunder the dispute in question could be referred to arbitration, the Court will not grant a stay of proceedings under section 4 of the 1889 Act (o). The principles on which the Court will exercise its discretion and grant a stay of proceedings were considered by Lord WRIGHT and Lord PORTER in *Heyman v. Darwins, Ltd.* (q). The discretion of the judge, once exercised, will rarely be interfered with on appeal, unless an erroneous conception of the rules is proved (r). But, as examples, where a difficult question of pure law is the only matter in dispute between the parties (s), or where there is a serious allegation of fraud against one of the parties (t), the Court will normally refuse a stay.

Repudiation.—For some time it was thought, on the authority of the now much questioned (u) decision in *Jureidini v. British and Irish Millers Insurance Co., Ltd.* (a), that where the parties applying for a stay had repudiated liability under the agreement within which the submission to arbitration which they were seeking to enforce was contained, the Court would refuse to stay proceedings initiated by the party affected by their repudiation. It is now, however, clear that this decision must be confined to the special facts and form of the arbitration clause in that case (b).

It was made clear by the Divisional Court in *Stebbing v. Liverpool and London and Globe Insurance Co., Ltd.* (c), and by the Court of Appeal in *Woodall v. Pearl Assurance Co.* (d), *Golding v. London and Edinburgh Insurance Co.* (dd) and *Stevens & Sons v. Timber and General Mutual Accident Insurance Association* (e) that the decision in *Jureidini v. National British and Irish Millers Insurance Co., Ltd.* (f), was not applicable so as to disentitle insurers who were applying under the arbitration clause in an insurance policy from obtaining a stay under section 4 of the Arbitration Act, 1889, when they were repudiating liabilities which were sought to be enforced against them in legal proceedings, under the very conditions of the policy itself (g).

(m) See *Smith, Coney and Barrett v. Becker, Gray & Co.*, [1916] 2 Ch. 86, at p. 101.

(n) 27 Halsbury's Statutes 30.

(o) 1 Halsbury's Statutes 454.

(q) [1942] A. C. 356; [1942] 1 All E. R. 337.

(r) *Osenlow & Co. v. Johnston*, [1942] A. C. 130, at p. 138; [1941] 2 All E. R. 245, at p. 250, per Viscount SIMON, L.J.

(s) *Montagu v. Provident Assurance Association* (1935), 51 Ll. L. R. 153.

(t) *Permaras v. Royal Exchange Assurance Corporation* (1930), 64 Ll. L. R. 145.

(u) See *Heyman v. Darwins, Ltd.*, [1942] A. C. 356; [1942] 1 All E. R. 337.

(a) [1915] A. C. 499.

(b) *Woodall v. Pearl Assurance Co.*, [1919] 1 K. B. 593; *Stevens & Sons v. Timber and General Mutual Accident Insurance Association* (1933), 45 Ll. L. R. 43; *Heyman v. Darwins, Ltd.* (*supra*).

(c) [1917] 2 K. B. 433.

(d) [1919] 1 K. B. 593.

(e) [1933], 45 Ll. L. R. 43.

(dd) [1932], 43 Ll. L. R. 487.

(f) [1915] A. C. 499.

(g) See also *Metal Products, Ltd. v. Phoenix Insurance Co.* (1926), 23 Ll. L. R. 87, and *Barni v. London General Insurance Co.* (1933), 45 Ll. L. R. 68.

The above cases must be carefully distinguished from those in which the whole policy is alleged to be void, for example on the ground of fraud, as in *Monro's Case* (gg), or where the policy is alleged never to have come into existence, as in *Toller's Case*.

In *Toller v. Law Accident Insurance Co.* (h), an interlocutory appeal, the plaintiff alleged that the defendant insurers had agreed to issue a fresh policy of insurance to him on payment of a further premium. Three cover notes were issued, but two days after the last one had expired and before any premium had been paid or a policy issued, the plaintiff had a motor accident. The policy, if it had been issued, would have contained an arbitration clause. The defendant insurers were held not to be entitled to a grant of a stay of the plaintiff's action, for their allegation was that there had never been an agreement to issue a policy, and therefore the clause on which the jurisdiction to grant a stay was based had never existed (i).

The distinction between the two types of cases would seem to be fairly clear, but, as has been stated, a certain confusion had been brought about by a trilogy of cases, two decided by the House of Lords (k) and one by the Privy Council (l), which seemed to restrict the application of an arbitration clause where the contract has, for some reason or another, come to an end. The law on this point was therefore fully discussed by the House of Lords in the case of *Heyman v. Darwins, Ltd.* (m), in order finally to dispose of some inaccuracies which might be thought to have been produced by these three decisions. The following extracts from the judgments in the House of Lords illustrate the general principles to be applied for a decision whether a dispute falls within a given arbitration clause.

Viscount SIMON used these words (n) :

" The answer to the question whether a dispute falls within an arbitration clause in a contract must depend on (a) what the dispute is and (b) what disputes the arbitration clause covers. To take (b) first, the language of this arbitration clause is as broad as can well be imagined. It embraces any dispute between the parties ' in respect of ' the agreement or ' in respect of any provision in the agreement or in respect of anything arising out of it. If the parties are at one on the point that they did enter into a binding agreement in terms which are not in dispute, and the difference that has arisen between them is as to their respective rights under the admitted agreement in the events that have happened—for example, as to whether the agreement has been broken by either of them ; or as to the damage resulting from such breach ; or as to whether the breach by one of them goes to the root of the contract and entitles the other to claim to be discharged from further performance ; or as to whether events supervening since the agreement was made have brought the contract to an end so that neither party is required to perform further—in all such cases it seems to me that the difference is within such an arbitration clause as this."

(gg) *Monro v. Bognor Urban Council*, [1915] 3 K. B. 167.

(h) (C. A.) (1936), 55 Ll. L. R. 258.

(i) See also *Moore v. Povey* (1940), 56 T. L. R. 564.

(k) *Johannesburg Municipal Council v. Stewart (D.) & Co.* (1902), *Ltd.*, [1909] S. C. (H. L.) 53 ; *Jureidini v. National British and Irish Millers Insurance Co., Ltd.*, [1915] A. C. 499.

(l) *Hirji Mulji v. Chong Yue Steamship Co.*, [1926] A. C. 497.

(m) [1942] A. C. 356 ; [1942] 1 All E. R. 337. See also *Woolf v. Collis Removal Service*, [1948] K. B. 11 ; [1947] 2 All E. R. 260 (C. A.) ; *Shayler v. Woolf*, [1946] Ch. 320 ; [1946] 2 All E. R. 54.

(n) *Heyman v. Darwins, Ltd.* (1942), 72 Ll. L. R. 65, at p. 67.

LORD SIMON then discussed the two cases of *Johannesburg Municipal Council v. Stewart (D.) & Co. (1902), Ltd. (p)* and *Hirji Mulji v. Cheong Yue Steamship Co. (q)* in so far as they dealt with the effect of subsequent frustration on an existing contract containing a wide arbitration clause. In so far as it had been laid down in the case of *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation, Ltd. (r)*, that the doctrine of discharge from liability by frustration depended on an implied term in the contract between the parties, a disputed allegation by one party that the contract had been brought to an end by frustration would normally be contested in arbitration proceedings, there being a dispute "under the contract" (s). The case of *Jureidini v. National British and Irish Millers Insurance Co., Ltd. (t)*, was then discussed. It was pointed out that the arbitration clause was in that case a very narrow one, and only applied to differences as to amount of loss, and not to a claim which the respondents rejected altogether, whatever the loss might be. The case should be regarded as having been decided on that ground, and therefore the following words of Viscount HALDANE (u), which have given rise to so much confusion as to the meaning of repudiation, must be regarded as no longer of binding effect.

"Now, my Lords, speaking for myself, when there is repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced."

LORD SIMON'S judgment ended with the observation that the governing consideration in every case must be the precise terms of the language in which the arbitration clause is framed (a).

LORDS MACMILLAN and WRIGHT first rejected the statements in the judgments given in the *Johannesburg Case (p)*, *Jureidini's Case (t)* and *Hirji Mulji's Case (q)* in so far as they asserted that repudiation of an existing contract, or frustration of an existing contract abolished the right of the parties thereto to arbitration on a dispute under the contract, and then set out the general effect of repudiation on arbitration clauses of various kinds.

LORD WRIGHT pointed out that an arbitration clause was a matter of agreement between the parties, subject to the overriding discretion of the Court given by section 4 of the Arbitration Act, 1889, to stay an action brought in breach of an arbitration clause. He distinguished between an agreement to submit differences and disputes to arbitration and an arbitration agreement which provides that an award is a condition precedent to any legal right of recovery on the contract (b). This latter type of contract to arbitrate must be given effect by the Court unless the condition has been waived, that is, unless the person seeking to set it up has somehow disintitiled himself to do so.

"A submission may however take many different forms. It may be a special agreement to arbitrate upon a particular dispute which has already arisen on some matter, such as a contract, tort, trust or family arrange-

(p) [1902] S. C. (H. L.) 51.

(q) [1916] A. C. 497.

(r) [1942] A. C. 154; [1941] 2 All E. R. 165.

(s) *Tamplin (F. A.), S.S. Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.* [1916] 2 A. C. 397; *Metropolitan Water Board v. Dick, Kerr & Co.* [1918] A. C. 119.

(t) [1915] A. C. 499.

(u) *Jureidini v. National British and Irish Millers Insurance Co., Ltd.*, [1915] A. C. 499, at p. 505.

(a) He expressly forbore to deal with the situation which arises when a contract stipulates that the arbitration must take place before an action can be brought (i.e. the *Scott v. Avery* addition, see p. 612, *ante*).

(b) The *Scott v. Avery* clause. See WARRINGTON, L. J., in *Woodall v. Pearl Assurance Co.*, [1919] 1 K. B. 593.

"ment. Thus, to take a single example, in *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd. (c)*, there was a specific submission of the difference whether the charter-party in question had been frustrated, the charterers claiming damages because the vessel had not been tendered to load her cargo, the ship owners defending the claim on the ground of frustration. That illustrates clearly one aspect of an arbitration agreement, namely that it is collateral to the substantive stipulations of the contract: it is merely procedural and ancillary, it is a mode of settling disputes though the agreement to do so is itself subject to the discretion of the Court . . . It may also be noted that the agreement to arbitrate depends upon there being a dispute or difference in respect of the substantive stipulation."

As to the ambit of the different arbitration clauses by which disputes arising *under, out of, or in relation to* the contract, Lord WRIGHT said:

"As at present advised I find it difficult to distinguish a dispute where there is a claim for damages and the defence set up is that the contract is frustrated from any other defence, or to understand why such a dispute should be outside a submission of disputes *under* the contract. It is no doubt less difficult to treat these questions as falling within a submission of disputes arising *out of or in relation to* a contract, but I do not think such differences in words should be decisive . . . but the question is still open for decision in this House."

As to the effect of repudiation, Lord WRIGHT used these words:

"The word repudiation has also led to difficulties, because it is an ambiguous word constantly used without precise definition in contract law. Repudiation of a contract is sometimes used as meaning that the defendant denies that there was ever a contract in the sense of an actual *consensus ad idem*. If that is the case a submission of disputes under the contract never comes into operative existence . . . Short of this, one party may allege that consent was vitiated by fraud, or duress or illegality (*d*); there again it would be a question of construction whether the collateral arbitration clause could be treated as severable and could be invoked for settling such a dispute.

"But there is a form of repudiation where the party who repudiates does not deny that the contract was intended between the parties but claims that it is not binding because of the failure of some condition or the infringement of some duty fundamental to the enforceability of the contract. Other cases of repudiation are where one party, though not disputing the contract, declares that he will not perform it and, admitting the breach, leaves the other party to claim damages, or, secondly, where there is anticipatory breach of a contract, when one party by words or conduct evinces an intention no longer to be bound and the other party accepts the repudiation and rescinds the contract."

Lord WRIGHT pointed out that except where there was no *consensus ad idem*, and therefore no contract, the normal arbitration clause could be invoked in the event of repudiation.

"But if the question is whether the alleged contract is void for illegality, or being voidable was avoided because induced by fraud or misrepresentation, or on the ground of mistake, it depends on the terms of the submission whether the dispute falls within the arbitrator's jurisdiction. This for example was applied by the Court of Appeal in *Toller v. Law Accident Insurance Co. (e)*. But the position may be different where the contract contains a clause that in certain events it is not to be enforceable. This distinction is illustrated in *Woodall v. Pearl Assurance Co. (f)*, an action

(c) [1942] A. C. 154; [1941] 2 All E. R. 165.

(d) And also, in insurance law, material misrepresentation or non-disclosure.

(e) [1936] 2 All E. R. 952.

(f) [1919] 1 K. B. 593.

"on a policy which made an award a condition precedent to recovery. The policy contained a provision that any mis-statement or suppression in the proposal and declaration on which the policy was based should render it null and void. It was held that the claim by the company that the policy was null and void under that provision was within the submission, and that the company were not repudiating the contract as a whole, but denying liability under it in reliance on its express terms.

"A similar conclusion was reached in *Stebbing v. Liverpool and London and Globe Insurance Co., Ltd.* (g) . . . These decisions were approved by Lord SUMNER in *Macaura v. Northern Assurance Co.* (h) . . . and followed in the Court of Appeal in *Golding v. London and Edinburgh Insurance Co.* (i) and *Stevens & Sons v. Timber and General Mutual Accident Insurance Association* (k).

Lord PORTER, speaking of repudiation, quoted the words of SCOTT, L.J., in *Toller v. Law Accident Insurance Society, Ltd.* (l) :

"It may mean : repudiate the original existence of the contract. It may mean : disclose an intention to disregard it *in toto* and refuse to be bound by its terms altogether. Or it may mean : a mere contention that under the terms of the contract the defendant is completely free from liability by reason of some fact. Except in the first case, the contract is not repudiated. Even in the second, all that is repudiated is the defendant's future liability under it."

In the second case, Lord PORTER could not see why even the wrongdoer (m) should not apply to have the action stayed and succeed in his application unless the Court in its discretion will not let him take advantage of a clause in a contract which he has refused to carry out (n).

To summarise :

(1) Repudiation of a contract containing an arbitration clause may take many forms, but it is only where one party repudiates on the ground that there was never any *consensus ad idem* or that apparent *consensus ad idem* was vitiated by fraud, duress, illegality, mistake or (in insurance contracts) misrepresentation or non-disclosure that the collateral agreement to submit disputes to arbitration disappears with the main contract.

(2) Where, however, the contract comes into existence, and one of the parties repudiates, whether or not in so doing he relies upon or breaks an express or implied term in the contract, the arbitration clause normally applies.

(3) The repudiating party in (2), even if in the wrong, can still rely upon the arbitration clause, though the Court may in its discretion refuse him a stay of proceedings.

(4) Where the contract comes into existence, but is subsequently frustrated, in so far as the doctrine that frustration excuses performance rests on an implied term in the contract, the arbitration clause will still apply.

(5) In all cases, the terms of the arbitration clause and the terms of the dispute must be carefully examined to see whether the latter comes within the ambit of the former.

(6) Where the arbitration clause contains a *Scott v. Avery* addition, the Court will normally give the arbitration clause effect (o).

(g) [1917] 2 K. B. 433.

(h) [1932] 43 Ll. L. R. 487.

(i) [1936] 2 All E. R. 952, at p. 956.

(k) Since the contract came into existence and is still in existence, if only for the purpose of determining damages.

(l) And the discretion, once exercised, will rarely be interfered with on appeal. Cf. *Denny v. Holloway*, [1938] 2 All E. R. 262.

(m) [1925] A. C. 619, at p. 631.

(n) [1933] 102 Ll. J. K. B. 337.

(o) I.e. the repudiating party.

3. Content of the Arbitration Clause.—On and after January 1, 1935, arbitrations within the scope of the reference in motor insurance policies are governed by the provisions of the Arbitration Act, 1889, as amended and extended by those of the Arbitration Act, 1934 (*p*). Even did the express terms of the common form of arbitration clause not make it clear that a submission arising under it should be governed by any new legislation applicable from time to time, the provisions of the 1934 Act itself would necessitate its being applied to such arbitrations (*q*). The mode of appointment, powers, duties and status of such arbitrator as the parties may agree upon or as may be otherwise appointed to conduct a reference within the submission are matters more appropriately dealt with in the authoritative works upon "Arbitration," subject now to the effect of the Act of 1934, and in this connection the reader is referred to the short summary of the present law which for convenience is contained in Chapter I of this work (*r*).

4. Persons bound by the Arbitration Clause.—The terms of the arbitration clause purport to be binding upon the assured "or any claimant" under the policy. It may be regarded as settled law that the submission is therefore binding upon :

A. *The assured and the insurers* (*s*).

B. Any person claiming indemnity (*t*) from insurers as being a person whom the policy purports to cover (*u*).

C. *The assured's personal representatives or his trustee in bankruptcy*, as far as the latter derives (*v*) or retains (*a*) any rights to claim under the policy (*b*) ;

D. *A third party* who has become entitled to rights against the insurers under the Third Parties Act, 1930 (*c*). This proposition is supported by the express authority of *Freshwater v. Western Australian Assurance Co., Ltd.* (*d*) and a dictum of Lord HANWORTH therein.

E. *An assignee*. Any other person claiming payment of sums under the terms of the policy whether as a person entitled to indemnity thereunder (in so far as such person does in law derive any right to sue or claim in his own name thereunder, a proposition which, as has been previously shown, is of doubtful validity) or as a person entitled by virtue of an assignment from the assured (in so far as such assignment be binding on the insurers, again a proposition of doubtful validity which is hereafter discussed). Where, however, insurers allege that the policy is not available to the assignee, and that therefore there is no policy in existence between them and the assignee, the dispute must be settled by action (*e*).

(*p*) See chapter I, *ante*, pp. 9 *et seq.*

(*q*) Arbitration Act, 1934, s. 19.

(*r*) *Ante*, p. 9.

(*s*) As to when the clause will not be binding on the insurers, see *ante*, chapter V, p. 303.

(*t*) By virtue of s. 36 (4) of the Road Traffic Act, 1930; see p. 211, *ante*.

(*u*) *Digby v. General Accident, Fire and Life Assurance Corporation, Ltd.*, [1940] 2 K. B. 226; [1940] 3 All E. R. 190.

(*v*) Subject to the operation of the Third Parties Act, 1930. See chapter III, *ante*, pp. 120 *et seq.*, and see 1 Halsbury's Laws, 2nd Edn., 626.

(*a*) He may disclaim the benefit of such rights as he does acquire.

(*b*) Arbitration Act, 1934, ss. 1 & 2; 27 Halsbury's Statutes 28.

(*c*) Chapter III, *ante*, p. 154. Cf. *Dennedy v. Bellamy*, [1938] 2 All E. R. 262, and *Smith v. Pearl Assurance Co., Ltd.*, [1939] 1 All E. R. 95.

(*d*) [1933] 1 K. B. 515, at p. 522. "A third party such as the plaintiff cannot eliminate all the terms and conditions of the policy, but, if he wishes to rely upon the policy, he is bound by the terms and conditions therein written, in other words, he is bound by the clause which provides for arbitration. . . . That word claimant obviously including someone outside the assured; it may be a third party; it may be an executor or an administrator, or the like."

(*e*) *Harman v. Crilly (Zurich General Accident and Liability Insurance Co., Ltd., Third Parties)*, [1943] 1 K. B. 168; [1943] 1 All E. R. 140.

F. There is no question that a third party becoming entitled to rights against motor car insurers under the terms of Part II of the Road Traffic Act, 1934 (f), is not affected by an arbitration clause subsisting between the insurers and their assured (g). It need only be pointed out that the position of third parties obtaining a judgment under the last-mentioned statute is vastly different from their position under the earlier Third Parties (Rights against Insurers) Act, 1930 (h). Their rights under the respective enactments are quite distinct in character, and no analogy can be drawn between their position in law thereunder. Although section 10 (1) of the Road Traffic Act, 1934, has not been repealed, however, it will not be invoked by "Road Traffic Act" third parties after July 1, 1946, since the M.I.B. Agreements render recourse to it unnecessary (i).

5. Period within which arbitration proceedings must be initiated.—The provision requiring the assured to submit any dispute arising out of the insurers' repudiation or disclaimer of liability to arbitration within twelve calendar months of such repudiation or disclaimer under penalty of being for ever after debarred from recovering against them requires consideration from three separate aspects: first, as regards its validity; secondly, as regards its effect on the assured; and thirdly, as regards its effect upon the right of the assured to sue on the policy.

A. After some doubt it was definitely decided in the case of the *Atlantic Shipping and Trading Co. v. Louis Dreyfus & Co.* (k), that clauses in this form and of this purport are valid and enforceable, as terms of the contract between the parties of which the arbitration clause forms a part, and were not, as had been contended, void as contrary to public policy.

B. The same authority (l) may also be cited for the proposition that if the assured does not follow the prescribed course within the prescribed time, he will not only be precluded from his right to have a dispute referred to arbitration, but will also be unable to resort to legal proceedings with reference thereto either upon the ground that his right to recover is regulated by the terms of the condition which he has himself broken, or that, as under the *Scott v. Avery* form of arbitration clause, an award was a condition precedent to his right of action. The Act of 1934, however, makes an important change in the law relating to this matter by section 16 (6), (7) under which the Court is empowered on such terms as the justice of the case may demand, notwithstanding that the time limited in the submission for the notice to appoint or appointment of an arbitrator or some other step to be taken, has expired, and where it is satisfied that undue hardship would be otherwise entailed, to extend the time for the doing of such act for such period as it shall deem proper (n).

C. It was formerly held, on the authority of the *Board of Trade v. Cayzer, Irvine & Co.* (o), that where an arbitration clause in the *Scott v. Avery* form was contained in an agreement, a right of action on such agreement was not barred until after the expiry of the appropriate period of time calculated as from the date of the award. This decision that the Statutes of Limitation commenced to run upon contracts containing a *Scott v. Avery*

(f) 27 Halsbury's Statutes 544

(g) Chapter V *ante* pp. 284 et seq.

(h) 23 Halsbury's Statutes 12 See chapter III, *ante*

(i) See chapter VI, *ante*

(k) [1922] 2 A.C. 250

(l) See also *Ford (H) & Co., Ltd. v. Compagnie Furness (France)*, [1922] 2 K.B. 797

(m) Arbitration Act, 1934, ss. 16, 17, 27 Halsbury's Statutes 34, 35 See *Louis de Rudder v. Nirose Societa* (1935), 53 Ll. L. R. 21, for the principles on which the Court will act when deciding to extend the time for a reference Application for such an extension of time must be made to the (Divisional) Court Practice Note, Weekly Notes, April 3, 1943

(o) [1927] A.C. 610

arbitration clause only after making of an award, was set at naught, after January 1, 1935, by section 16 (2) of the Arbitration Act, 1934 (p), which provides that—

"a cause of action shall for the purpose of the statutes of limitation both
 "as originally enacted and as applying to arbitrations (a), be deemed to
 "have accrued in respect of any such matter at the time it would have
 "accrued but for that term in the agreement" (b).

VII.—CONDITION 7. CONDITION PRECEDENT CLAUSE

"The due observance and fulfilment of the terms provisions conditions
 "and endorsements of this policy in so far as they relate to anything to be
 "done or complied with by the assured shall subject to the provisions of
 "section 38 of the Road Traffic Act 1930 and of section 9 of the Motor
 "Vehicles and Road Traffic Act (Northern Ireland) 1930 be conditions
 "precedent to any liability of the Company to make any payment under this
 "policy. The assured shall repay to the Company all sums paid by the
 "Company (and which have been applied to the satisfaction of the claims
 "of third parties) in respect of any claim under this policy which the Com-
 "pany would not have been liable to pay but for the said provisions of either
 "of the said Acts."

This condition makes it clear that the insurers can in any case repudiate liability in respect of a claim, if there has at any time been any breach of the promissory terms of the policy (c). In this connection it must be remembered that this condition has no application to a term which merely defines or limits the risk, or describes the subject-matter (d). This clause, unlike those sometimes found in other policies, expressly states that it applies only to clauses which "relate to anything to be done or complied with by the assured." Thus if the policy, in the "Description of Use" clause, provides that it covers the vehicle only when being used for business, the assured does not fail to do anything to be "done or complied with" by him if he uses it for purposes of private pleasure. When so used, the vehicle is not "on risk" (e). But provided the term is something more than a "limitation of risk" clause, the breach of it at any time (f), and whether or not it is the cause of or occurs at the same time as the accident or loss in respect of which the claim is made (g), will prevent the assured from recovering in respect of any claim under the policy. Thus if he fails to comply with the requirement of the proposal form that everything therein stated is true and accurate (h), or has failed to maintain his vehicle in an efficient condition (i), or has committed a breach of the implied condition requiring him to have disclosed every material fact (j) during the negotiations pre-

(p) *Nota bene* s. 19 thereof, which says: "This Act shall not affect any arbitration which has been commenced . . . before 1st Jan 1935, but shall apply to any arbitration commenced after that date under an agreement made before it."

(a) By s. 16 (1) of the Act.

(b) "That term," i.e. the *Scott v. Avery* clause.

(c) See *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 46 T. L. R. 71, and see further, *ante*, p. 496, and *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(d) See *ante*, p. 570, and see *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240; *Farr v. Motor Traders' Mutual Insurance Society*, [1920] 3 K. B. 669, and, further, chapter VII, pp. 433 *et seq.*

(e) See *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590, and cases cited on p. 492, *ante*, note (o).

(f) Before or after.

(g) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 46 T. L. R. 71.

(h) See *ante*, chapter VII, p. 467.

(i) *Jones and James v. Provincial Insurance Co., Ltd.* (*supra*), and *ante*, pp. 606 *et seq.*

(j) As to whether the obligation to disclose is an implied condition of the contract, see *ante*, chapter VIII, pp. 389 *et seq.*

coding the issue of the policy (*k*), or a breach of the condition requiring him to give notice (*l*) of every accident; he will not be entitled to make any claim under the policy, although his breach has nothing whatever to do with the loss, damage or liability in respect of which it is made (*m*).

"Subject to the provisions of section 38 of the Road Traffic Act, 1930."—The provisions of this section, and their effect upon conditions such as that given in the specimen, have been fully explained elsewhere (*n*). The terms and clauses of the usual form of motor policy which are hit by section 38 may be summarised here :

1. A clause requiring notice of any claim, accident, loss, etc.
2. A clause requiring the assured to keep the insured vehicle in an efficient condition or to safeguard the vehicle against loss or damage, in so far as it requires him to do or not to do any *specified thing* (*o*) after an accident.
3. A clause requiring the assured to give the insurers all possible assistance in defending a third party claim against him, in so far as such clause requires him to do a specified thing (*o*).
4. A clause requiring the assured to commence proceedings against the insurers within a certain time (*p*).

"The assured shall repay . . . which the Company would not have been liable to pay but for the said provisions."—This part of the condition carries into effect the proviso in section 38 of the Road Traffic Act, 1930 (*q*). That proviso and its rather peculiar provisions have been fully considered in a previous chapter, to which the reader is referred. It is only necessary to remind him of the provisions of subsection (4) of section 10 (*r*), and of the proviso to section 12 (*s*) of the Road Traffic Act, 1934 (*t*).

By subsection (4) of section 10 of the 1934 Act insurers may recover from the assured any sum in excess of that which he is required to pay under the policy, if the insurers have paid over a sum to a third party by virtue of section 10 (1) of that Act. Thus, if the assured has agreed to pay the first £*x* of any claim, and insurers have paid £*x* + *y* to a third party by virtue of section 10 (1), £*x* can be recovered from the assured. Similarly sums paid by insurers to third parties by virtue only of the terms of section 12 can be recovered. So far as the provisions of section 10 (4) and section 12 are concerned, no express term is required in the policy to enable the insurers to enforce this right of recovery.

In *Merchants and Manufacturers Insurance Co., Ltd. v. Hunt and Thorne* (*u*) insurers, *ex abundante cautela*, had inserted in the policy a clause that provided that

"Nothing in this policy or in any endorsement thereon shall affect the right of any person indemnified by this policy or of any other person to recover an amount under or by virtue of the provisions of the Road Traffic Act, 1934, sections 10 and 12."

(A) As in *Dunn v. Ocean Accident and Guarantee Corporation, Ltd.* (1933), 50 T. L. R. 32.

(l) See, e.g., *Waddell v. Road Transport and General Insurance Co.* (1932) 2 K. B. 503.

(m) *Jones and James v. Provincial Insurance Co., Ltd.* (*supra*), and see further, *ante*, pp. 433 *et seq.*, and cases there cited.

(n) *Ante*, chapter IV, p. 219.

(o) Generally these clauses merely impose a vague duty. It is doubtful how far the breach of them is a failure to do a specified thing (see *ante*, pp. 219 *et seq.*).

(p) *Revell v. London General Insurance Co.* (1934), 50 T. L. R. 114.

(q) 23 Halsbury's Statutes 639. See *ante*, chapter IV, p. 219.

(r) *Ante*, chapter V, p. 278.

(s) *Ante*, chapter V, pp. 327 *et seq.*

(t) *Ante*, chapter V.

(u) [1941] 1 K. B. 295; [1941] 1 All E. R. 123.

Insurers sought a declaration that they were entitled to avoid the policy under section 10 (3) of the 1934 Act for material misrepresentation. *STABLE, J.*, found that answers in the proposal form were false in a material particular within the meaning of section 10 (3) of the Road Traffic Act, 1934, but the plaintiffs had by the terms of this clause contracted out of their right to the declaration claimed.

In the Court of Appeal (*v*), the judgment of *STABLE, J.*, was confirmed on other grounds, and the point as to the meaning of this clause was not argued (*w*). *ATKINSON, J.*, referred to it in *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison* (*x*), where a similar clause was inserted in the policy under review, and pointed out that the right to avoid a policy for misrepresentation or non-disclosure arose outside the contract, and if it were proved that there were no contract in existence, *consensus ad idem* having been vitiated by misrepresentation, this clause went with the rest of the contract. Nevertheless, it was pointed out that the words of the clause are meaningless, as they add nothing to the rights granted by section 10 (4) and the proviso to section 12 of the 1934 Act.

"Subject to the provisions of the Motor Vehicles (Northern Ireland) Act, 1930."—The provisions of the Northern Ireland statutes in regard to motor insurance are substantially identical to those of the Road Traffic Acts, 1930–1934 (*a*).

Effect on Arbitration Clause.—It should be noticed that this clause may make an arbitration clause which does not contain the *Scott v. Avery* addition have the same effect (*b*) as one which does (*c*).

VIII.—CONDITION 8. PROPOSAL FORM CLAUSE

"The truth of the statements and answers in the said proposal shall be a condition precedent to any liability of the Company to make any payment under this policy."

The above condition has been frequently alluded to in this work, and is discussed in detail in the preceding chapter (*d*). Whilst it is unnecessary to reiterate matters which have been exhaustively considered, it is nevertheless appropriate to summarise the results of the earlier passages.

(1) Should the statements of the assured made in the proposal form, specifically incorporated by the basis clause (*e*) with and identified in the Schedule to the policy as has been shown (*f*), depart to any extent from the truth, either by way of concealment or misstatement, the insurers in reliance on this condition may repudiate liability to the assured (*g*);

(2) The question of the substance or the materiality of the facts concealed or misstated is irrelevant in determining the rights of the insurers to repudiate under this condition (*h*);

(*v*) (1941), 68 Ll. L. R. 117.

(*w*) Though *LUXMOORE, L.J.*, said that the argument against it seemed to have considerable force.

(*x*) (1942), 71 Ll. L. R. 243, at p. 253.

(*a*) *Ante*, chapter IV.

(*b*) *I.e.* make an award a condition precedent to the right to claim under or sue upon the policy (see *ante*, pp. 611 *et seq.*).

(*c*) See *Gomar v. Halas*, [1928] 1 K. B. 191.

(*d*) Chapter VII, *ante*, p. 385, and see also *ante*, p. 467.

(*e*) See *ante*, p. 498.

(*f*) *Ante*, p. 382.

(*g*) Chapter VII, *ante*, p. 385; e.g. *Parman v. Motor Union Assurance Society* (1923), 15 Ll. L. R. 306.

(*h*) See, e.g., *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Glicksman v. Lancashire and General Assurance Co.*, [1927] A. C. 139.

(3) The insurers are not by relying upon such a condition avoiding a liability which is incumbent upon them, the position in law being that since the conditions precedent to the insurers' liability have not been satisfied, there is and never has been any liability upon them (i) ;

(4) The condition under review does not derogate from, but is supplemental to the Common Law rights of insurers to repudiate for non-disclosure or misrepresentation of a material fact (k) ;

(5) As far as the rights of third parties under the Road Traffic Act, 1934, are concerned (l), insurers are not entitled to set up a breach of this condition in answer to their claims, nor are they entitled to rely upon a breach of this condition as a ground for a declaratory judgment under the provisions of section 10 (3) of that Act (m) ;

(6) This clause seems to be redundant to the " Declaration and Warranty " clause in the proposal form (n) and to the " Basis Clause " in the policy (o).

(i) *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (1934), 49 Ll. L. R. 231. And see *post*, chapter IX, pp. 663 *et seq*.

(k) See cases cited in note (h) above.

(l) Road Traffic Act, 1934, s. 10 (3), chapter V, *ante*, p. 303.

(m) See further, *ante*, chapter V, pp. 303 *et seq*. But third parties, since the coming into effect of the M I B Agreements, do not need to rely on s. 10 (1) of the Road Traffic Act, 1934, nor can insurers make use of s. 10 (3) of that Act to avoid a policy if their assured has already incurred a liability to a third party by injuring him in a road accident.

(n) *Ante*, chapter VII, p. 467.

(o) *Ante*, p. 498.

CHAPTER IX

OPERATION AND TERMINATION OF POLICIES

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PART I.—BINDING FORCE OF POLICY

1. Generally.—As has been seen, the policy constitutes the contract between the parties, together with any document such as the proposal form or endorsements which may be incorporated therewith. The circumstances have been explained in which oral evidence can be given to explain the meaning of terms in the policy (*a*).

In a previous chapter (*b*), in dealing with the question of proposal and acceptance (*b*), the circumstances in which a policy constitutes a counter-offer by the insurers have been explained (*c*). Usually, however, in motor insurance the issue of the policy constitutes the insurers' acceptance of the assured's offer.

When this is so, and there is therefore a binding contract between the parties after the issue of the policy, the question arises as to what is the assured's position if the policy contains terms for which he has not bargained.

2. Divergence between policy and agreed terms.—If the assured knows of the unexpected terms, and makes no objection thereto within a reasonable time, he may be held to be bound by them (*d*). This may be either by operation of the doctrine of estoppel (*e*) or because the policy containing the new terms is regarded as a fresh offer by the insurers which the assured has tacitly accepted (*f*). But if he does not know of the

(a) *Ante*, p. 486.

(b) Chapter VII, *ante*, pp. 408 *et seq.* and 416 *et seq.*

(c) It can only be a counter offer if the assured's attention is drawn to any terms for which he has not bargained. See *South East Lancashire Insurance Co., Ltd. v. Croisdale*, (1931), 40 Ll. L. R. 22; and *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399; 33 Ll. L. R. 315; *Sun Life Assurance Co. of Canada v. Jervis*, [1943] 2 All E. R. 425.

(d) See *General Accident Insurance Corporation v. Cronk* (1901), 17 T. L. R. 233. He can, of course, refuse to accept a policy upon discovering that it contains terms for which he has not contracted, and can insist upon being given a policy in accordance with his bargain. See *South East Lancashire Insurance Co., Ltd. v. Croisdale* (1931), 40 Ll. L. R. 22, *ante*, p. 410. Cf. *Sun Life Assurance Co. of Canada v. Jervis*, [1943] 2 All E. R. 425.

(e) See *per COLERIDGE, J.*, in *Foster v. Menlor Life Assurance Co.* (1854), 3 E. & B. 48, at p. 75. As to estoppel, see *post*, p. 691.

(f) See *ante*, p. 416, and see *Canning v. Farquhar* (1886), 16 Q. B. D. 727.

unexpected terms he cannot be bound by them, and there is apparently no obligation upon the assured to read his policy to find out whether it contains terms for which he has not bargained (g).

The position has to be considered under two heads.

1. *Where the assured seeks to enforce the policy.*—As has been pointed out (h), the policy, together with any other document, such as the proposal form, which may be incorporated therewith, constitutes the contract between the parties.

This being so, if the policy (i) contains terms which are not in accordance with the policy which the assured by his proposal undertook to accept, the assured cannot at the same time approbate by enforcing the policy and reprobate by refusing to be bound by some of its terms (j). In such circumstances, if he desires to enforce the policy, without the terms to which he objects, he must in the action in which he claims on the policy obtain rectification thereof by the Court (k).

2. *Where the insurers seek to enforce the policy.*—In this case the assured is not bound by any terms in the policy to which he has not assented (l). On the other hand, by issuing the wrong policy (unless, it is submitted, it can be shown to be a mistake) (m) the insurers either commit a breach of contract which entitles the assured to repudiate the whole transaction (n), or must be regarded as having refused the assured's offer (o) and making a counter-offer (p) which the assured is, of course, under no obligation to accept.

(g) See *South East Lancashire Insurance Co., Ltd. v. Croisdale* (1931), 40 Ll. L. R. 22. "It was suggested that though the defendant might have been entitled to reject the policies when they first came, he kept them too long, and that when he did repudiate them he did not repudiate clearly on this ground and must be held by them. I accept his statement that he did not read the policies and I do not think he was bound to read them. Of course, he took the risk of not reading them. But it seems to me if there was any obligation on one side or the other, there was an obligation on the part of the company to call attention to the fact that they were not allowing a rebate." *Per* MACNAGHTEN, J., *ibid.*, at p. 24. For an account of this case, see *ante*, p. 410. And see *Pattison v. Mills* (1828), 1 Dow. & Cl. 342 (H. L.), and cf. *Foster v. Mentor Life Assurance Co.* (1854), 3 E. & B. 48, and *Allom v. Property Insurance Co.* (1911), *Times Commercial Supp.* 10th February. Nevertheless, it has been held in the Divisional Court in prosecutions under s. 35 (1) of the Road Traffic Act, 1930, that it is the duty of any person who uses or who causes or permits user of a motor vehicle on the road to make sure that that user is covered by insurance as required by s. 35, and this duty can normally be performed only by reading the terms of the appropriate insurance policy. See *per* Lord GODDARD, L.C.J., in *Knowler v. Rennison*, [1948] K. B. 488; [1947] 1 All E. R. 302, and *Labrum v. Williamson*, [1947] K. B. 816; [1947] 1 All E. R. 824.

(h) *Ante*, pp. 467, 481, 498.

(i) Or other documents incorporated therewith, or otherwise constituting the contract.

(j) See *post*, p. 630.

(k) See, e.g., *Roberts v. Anglo-Saxon Insurance Association* (1927), 96 L. J. K. B. 590; *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413; *Macdonald v. Law Union Assurance Co.* (1874), L. R. 9 Q. B. 328. Cf. *Sun Life Assurance Co. of Canada v. Jervis*, [1943] 2 All E. R. 425; *Zurich General Accident Insurance Co. v. Buck* (1930), 64 Ll. L. R. 115; *Dauey v. Pearl Assurance Co.* (1939), 63 Ll. L. R. 54; *Printing Machinery Co., Ltd. v. Linotype and Machinery, Ltd.*, [1912] 1 Ch. 566; *Crane v. Hegeman-Harris Co.*, [1939] 4 All E. R. 68 (C. A.).

(l) See *South East Lancashire Insurance Co., Ltd. v. Croisdale* (1931), 40 Ll. L. R. 22, and *ante*, pp. 408 *et seq*.

(m) I.e. a mistake which the insurers are ready to rectify. In this case the issue of the wrong policy would be a mere nullity. As a rule there would be no difficulty in such a case. Since the insurers are not bound to issue the policy within a specified time (unless they have expressly contracted to do so) and need only issue it within a reasonable time, which period would be extended by the mistake.

(n) See *South East Lancashire Insurance Co., Ltd. v. Croisdale* (1931), 40 Ll. L. R. 22.

(o) By not accepting it.

(p) See further *ante*, chapter VII, pp. 408, 416.

3. Rectification and alteration of policy.—If the policy does not represent the true contract made between the parties, either of them may claim to have it rectified by the Court so as to accord with their real bargain (*q*). There must, however, have been a real bargain, and where one party thought he was agreeing to one set of terms whilst the other party intended another (*r*), there is no real bargain, and rectification will not be granted to either party (*s*). Moreover, besides a real bargain there must also be a concluded and enforceable contract (*t*). The principle upon which rectification is granted is that the Courts will not rectify or make the contract between the parties, but will rectify only the instrument which has been used in pursuance of the terms of the contract (*u*). Rectification may be ordered at any time either before or after loss (*v*). Rectification may also be effected by mutual consent, in the sense that the parties may agree to alter the wording so as to accord with their real bargain. This must be distinguished from alteration of the contract by mutual consent, which can only be validly effected by an agreement between the parties which must contain all the elements of contract (*w*), including consideration (*x*), and which either supersedes the original (*y*) contract, or is merely an agreed variation of the mode of its performance (*z*).

4. Actions for rescission of policy or for a declaration.—Apart from the statutory right given to insurers by subsection (3) of section 10 of the Road Traffic Act, 1934 (*a*), either party to a motor insurance contract may in certain circumstances have the right, where the contract is void *ab initio*, to claim a declaration that the contract is void or voidable, and that the policy be cancelled (*b*). As was suggested when considering the same question under the above subsection (*d*) it is extremely doubtful whether insurers can ever claim a declaration that the policy is void or voidable where the assured has not taken any steps to enforce it, nor made any claim under it against the insurers. "If there has been a dispute between the parties, the one asserting and the other denying the validity of the policy, it would be open to the plaintiff to claim a declaration. But he is not entitled to claim a declaration unless before action brought there has been a dispute upon the point as to which he desires a declaration" (*e*). But, as was submitted in the same place (*f*), in cases of motor insurance policies

(*q*) See *Foulter v Scottish Equitable Life Insurance Society and Ritchie* (1858), 28 L. J. Ch. 225.

(*r*) *Higgins (W.), Ltd v Northampton Corporation*, [1927] 1 Ch. 128.

(*s*) See, however, as to when oral evidence can be given to explain the meaning of the policy, *ante*, p. 486.

(*t*) See *Bentley v. Mackay* (1862), 4 De G. F. & J. 270, *Mackenzie v Coulson* (1869) L. R. 8 Eq. 368, at p. 375.

(*u*) See *Mackenzie v Coulson* (*supra*).

(*v*) See *Henkle v Royal Exchange Assurance Co* (1749), 1 Ven. Sen. 317, or after renewal of the policy, *Pattison v Mills* (1828), 1 Dow. & Cl. 342 (H. L.).

(*w*) It need not, however, be in writing if the policy is not to last more than one year. See *Morris v. Baron & Co.*, [1918] A. C. 1.

(*x*) The consideration generally consists in the mutual relinquishment of rights under the original contract.

(*y*) See *Morris v. Baron & Co.* (*supra*), and see *post*, p. 631.

(*z*) See *Panoutsos v. Raymond Hadley Corporation of New York*, [1917] 1 K. B. 707.

(*a*) As to this, see fully *ante*, chapter V, p. 303, and chapter VII, p. 407.

(*b*) Cf. *ante*, pp. 602 *et seq*.

(*c*) *I.s.* s. 10 (3) of the Act of 1934.

(*d*) *Per BHAIR, J.* in *Sparenborg v. Edinburgh Life Assurance Co.*, [1912] 1 K. B. 195, at p. 204, citing an unreported case in which STIRLING, J., so held. See also *ante*, chapter V, p. 304, note (1), and cases there cited, and *London Passenger Transport Board v. Maccrop*, [1942] A. C. 332; [1942] 1 All E. R. 97.

(*e*) *Ante*, p. 304.

a ground for declaring the policy void will always constitute a breach of some express stipulation, and it may be that by this means insurers can obtain a declaration, although the assured has never asserted the validity of the policy. Since clauses giving a unilateral right of cancellation are nearly always to be found in motor policies (*g*), claims for rescission will in practice only occur by way of counterclaim by insurers in actions upon the policy brought against them by the assured after a loss occurred (*h*), or in actions brought under subsection (3) of section 10 of the Road Traffic Act, 1934, for the purposes of that section (*i*). Rescission can only be claimed upon the ground that the policy is void *ab initio*, as from fraud (*k*), non-disclosure (*l*), or innocent misrepresentation (*m*), and cannot be obtained where the policy valid at its inception has been avoided by some breach of condition occurring during its currency (*n*). However this may be, a claim for rescission of the policy must be distinguished from a claim for a declaration as to the validity of the policy or as to the parties' rights thereunder (*o*). Such a declaration may, apart from the proceedings under section 10 (3) of the Road Traffic Act, 1934 (*p*), be obtained by either party in an appropriate case (*q*), although there is no question of the policy being void *ab initio*.

Rescission may always be effected by mutual consent, and for this purpose a binding agreement, containing all the elements of a contract (*s*) which need never, however, be in writing (*t*), is necessary.

PART 2.—ENDORSEMENTS

1. Generally.—In most motor insurance policies all the terms thereof are printed upon the face of the document in which it is contained (*u*). On the back of the policy there is generally to be found certain printing giving, for example, the name and address of the insurers, and writing giving the number of the policy, the name of the assured, the date of expiry, etc. These do not form part of the contractual terms of the policy (*v*), though they may of course be referred to for the purpose of identification. In some cases, however, the conditions of the policy are printed upon the back thereof (*w*). In such cases the conditions form part of the policy if they are expressly incorporated—as they invariably are (*x*)—with or referred to in the terms printed upon the face of it.

Thus most policies contain upon their faces some term to the effect

(*g*) For the effect of a clause of this type see fully *ante*, p. 602.

(*h*) And these will be rare, since almost every motor policy expires unless renewed by mutual consent after a year, and proceedings under a policy will not often come to trial during its currency.

(*i*) See *ante*, pp. 303 *et seq.* These actions will rarely be brought in future, if at all.

(*k*) A policy is not, strictly speaking, void when vitiated by fraud, non-disclosure, or false representation. See *post*, p. 663.

(*l*) See *ante*, chapter VII, p. 388.

(*m*) *Ante*, chapter VII, p. 397.

(*n*) See Welford on Accident Insurance, 2nd Edn., p. 83. *Heyman v. Darwins, Ltd.*, [1942] A. C. 356; [1942] 1 All E. R. 337; see *post*, p. 667.

(*o*) See, e.g., *Law Guarantee Trust and Accident Society v. Munich Re-Insurance Co.*, [1912] 1 Ch. 138. See R. S. C., O. XXV, r. 5, and the cases cited in the notes thereto in the current Annual Practice.

(*p*) 27 Halsbury's Statutes 545. As to those proceedings, see fully *ante*, chapter V, pp. 303 *et seq.*

(*q*) See *Brooking v. Maudslay, Son and Field* (1888), 38 Ch. D. 636; *Ewer v. National Employers' Mutual General Insurance Association, Ltd.*, [1937] 2 All E. R. 193.

(*s*) Including consideration, which will usually consist in the compromise of some claim, or the mutual foregoing of all rights under the contract.

(*t*) See *Morris v. Baron & Co.*, [1918] A. C. 1.

(*u*) See, e.g., the specimen policy printed in the last chapter, *ante*, pp. 498 *et seq.*

(*v*) See Welford on Accident Insurance, 2nd Edn., p. 61, citing *May*, s. 158.

(*w*) This is now becoming rare.

(*x*) See *ante*, pp. 385, 478.

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that the insurance thereby given is "subject to the terms conditions and limitations contained herein and of any endorsement hereon."

An endorsement consists of words which are added to the printed parts of the policy. These are generally contained in a typewritten or printed slip which is gummed on to the back or face of the policy, or of words typewritten, hand-written or stamped on to the policy itself (y).

Such endorsements, if they are to be found on the back of the policy, are binding on the assured only if they are expressly incorporated or referred to by some such term as that indicated above, or are proved by oral (z) or other (a) evidence to have been intended by the parties to be so (b). If, however, they are to be found upon the face of the policy they constitute one of its express terms apart from any incorporating clause. Sometimes the endorsement may be inconsistent with the printed terms of the policy (c). In this case, it is submitted, the endorsement should be preferred to the printed part, as expressing the later intention of the parties (d).

Endorsements are sometimes attached to the policy in order to make it accord with the terms agreed between the parties, and are sometimes added afterwards in order to alter the express terms originally agreed upon (e). In the latter case it is a nice question whether the endorsement represents a new contract, or merely an agreed variation (f) of the mode of performance of the original contract. The general rule is that the terms of a contract cannot be altered, except by a valid and binding agreement rescinding the old and incorporating it, as varied, with the new (g). Where an endorsement constitutes such a new contract—as it sometimes clearly will (h)—it requires stamping to the same extent as the original policy (i).

For example, in *Bonney v. Cornhill Insurance Co.* (j) the proposal form contained a question and answer which, with the "warranty of truth and basis" clause, amounted to an express term of the policy to the effect that the insured vehicle would not be covered when used on a regular service between London and Wales. The following endorsement was later, by arrangement between the parties, added to the policy :

"It is hereby declared and agreed that this policy is extended to apply
" whilst the within-described vehicle is being used on a service from London
" to Aberystwith for a period of three months from noon May 16 1929."

This endorsement was clearly inconsistent with the term of the policy excluding cover for general use between London and Wales, but was nevertheless effective for the period expressed therein, as to which there was no dispute (k).

(y) Either on to the back or face

(z) See *Letts v. Excess Insurance Co* (1916), 32 T. L. R. 361, *Bonney v. Cornhill Insurance Co* (1931), 40 Ll. L. R. 39

(a) E.g. by letters between the parties. See *Bonney v. Cornhill Insurance Co* (*supra*).

(b) See *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399

(c) See *ante*, p. 486, as to when oral evidence may be given

(d) See *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399.

(e) E.g. an endorsement suspending road cover, but keeping in force the fire and theft clauses.

(f) See *Panoulis v. Raymond Hadley Corporation of New York*, [1917] 1 K. B. 767

(g) See *Morris v. Baron & Co.*, [1918] A. C. 1; *British and Beningtons, Ltd. v. North Western Cachar Tea Co.*, [1923] A. C. 48. 7 Halsbury's Laws, 2nd Edn. 171.

(h) E.g. where the insured vehicle is changed

(i) See *Royal Exchange Assurance v. Hope*, [1928] Ch. 179.

(j) (1931), 40 Ll. L. R. 39.

(k) Cf. *Palmer v. Cornhill Insurance Co.* (1935), 52 Ll. L. R. 78, where the cover of the policy was restricted by mutual oral agreement after a certificate had been issued covering three months' use

In some policies the "description of use"—that is, the term of the policy which defines and describes the use of the insured vehicle which the policy covers (*l*)—is contained in an endorsement. Many other examples of endorsements might be given. Thus endorsements are used for altering the description of use (*m*), for renewing the policy, for suspending (*n*) or partially suspending it (*o*), for adding new parties thereto, and generally for recording any variation of its terms (*p*) which the parties desire to effect. In practice, however, the only endorsement which causes difficulty is that which is inserted or attached to policies covering a vehicle which is the subject of a hire-purchase agreement.

2. Hire-Purchase Endorsements.—The ostensible object of a hire-purchase endorsement is to secure the interest of the owner of the vehicle—that is, the person who is letting or selling the vehicle by hire purchase to the assured. The owner in this sense is generally a finance company and not the original seller of the vehicle. The interest of such an owner is that if any damage is done to the vehicle, or it be lost by theft or destroyed by fire, the money payable in respect of such damage or loss shall not be misapplied by the assured, but shall be expended either in reinstating the loss or damage or in paying the monies due under the hire-purchase agreement. Whilst this object is common to all hire-purchase endorsements, the wording of such endorsements is by no means uniform. In many, if not in all, cases it is extremely doubtful whether such endorsements have effect in law completely to achieve this object. In each case the problems arising under a hire-purchase endorsement must be considered with regard to the facts and the words of the endorsement in that particular case.

As the wording of the endorsement has not been standardised it is not possible to do more than set forth certain general principles, which must determine the validity and effect of every such endorsement. When this has been done, two examples of hire-purchase endorsements will be given and commented upon for the purpose of illustration. As a rule the hire-purchase endorsement is attached to the policy as originally issued. Where, however, it is attached later, in addition to the considerations set forth below, those mentioned above (*q*) as to the effect in law of a purported alteration to a contract must be applied (*r*).

General principles affecting hire-purchase endorsements.—The effect of the endorsement has to be considered from three angles. First, from the point of view of the assured; and second, from the point of view of the owner of the vehicle; and third, from that of a third party to whom the assured has incurred a liability covered by the policy.

(a) The position of the assured.—The position of the assured is comparatively simple. He is bound by the terms of the policy to which he has assented (*s*). He is not, however, obliged to accept a policy containing terms for which he has not bargained (*t*). It is doubtful how far the assured

(*l*) See further as to this, *ante*, p. 570.

(*m*) See above as to the validity of this.

(*n*) E.g. when the car is to be laid up for some time in consequence of repairs.

(*o*) Insured persons should carefully note the duty under Regulation 14 of the Motor Vehicles (Third Party Risks) Regulations (S. R. & O. No. 926 of 1941, *ante*, chapter IV, p. 217) to notify the Minister of Transport when a policy is suspended.

(*p*) Which may or may not amount to a new contract requiring stamping. See *ante*, p. 631.

(*q*) *Ante*, p. 631.

(*r*) See cases cited in note (*g*), *ante*, p. 632.

(*s*) As to when the assured is taken to have assented to the terms of the policy, see generally *ante*, p. 628.

(*t*) See further, p. 628.

whose vehicle is being acquired¹ under a hire-purchase agreement bargains with the insurers for a policy containing a hire-purchase endorsement (u). It might be argued that the issue of policies containing hire-purchase endorsements has become so common that an assured who declares in his proposal that the vehicle to be insured is being bought by him under a hire-purchase agreement (as he is bound to do when such is the case (v)) impliedly bargains for a hire-purchase endorsement. Moreover, it might be possible to establish a custom to the effect that all motor policies issued in respect of vehicles being bought by hire-purchase contain the endorsement. This doubt can only be resolved according to the facts of each case (w). It is clear, however, that if the assured has not either bargained for or accepted (u) the hire-purchase endorsement he is not bound by it. On the other hand, if the endorsement is added to the policy after issue, it may constitute an attempted novation (x) which will not be binding on anybody unless based on a new contract containing all the necessary elements of contract (y).

If the assured is bound by the hire-purchase endorsement his rights are determined by the terms of the particular endorsement in the same way as under any other clause in the policy (z).

Thus if the endorsement provides that monies payable under the policy in respect of loss of or damage to the insured vehicle shall be paid to the hire-owners, the assured, if bound by the endorsement, has no right to insist upon payment of such monies to him (a).

Whether the assured is bound by the terms of the endorsement or not, his policy will automatically come to an end on the termination of the hire-purchase agreement so soon as he parts with possession of the vehicle (otherwise than by purchase of the car by the assured), since his interest in the vehicle then ceases (b).

(b) The hire-owners.—The position of the hire-owners in regard to a hire-purchase endorsement in a policy issued to the hire-purchaser is more complicated. Their rights, as determined by the general principles of the law of contract are as follows :

(1) No person who is not a party to a contract can himself directly enforce rights in his favour thereunder (c).

(2) Consideration must move from the plaintiff (d).

In most cases the hire-owners are in no sense a party to the policy, unless it can be said that the assured is their agent (e). But even in this case there would, as a rule, be no consideration moving from the hire-owner.

(u) The hire-purchase agreement will usually contain some provision relating to insurance, but this is not a document to which the insurers are parties.

(v) See *ante*, chapter VII, p. 427.

(w) As to when he will be taken to have accepted a term for which he has not bargained, see further *ante*, p. 628.

(x) See further *ante*.

(y) See chapter I, *ante*, pp. 1 *et seq.*

(z) In case of inconsistency the endorsement will in some cases be preferred. *Ante*, p. 632.

(a) Great difficulty arises in some cases where the car is destroyed towards the end of the hire-purchase agreement. Under the terms of the endorsement the assured may not be entitled to claim payment for the amount due on the loss. On the other hand, the hire-owners have no equitable right to the whole of this sum, and may not have a legal right to any of it. Clearly if it is paid to them they will be trustees for the assured for the balance after deducting the amount due on the hire-purchase agreement.

(b) See *post*, p. 655, as to the termination of policies by this means.

(c) *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* [1915] A. C. 847; *Tweedle v. Atkinson* (1861), 1 B. & S. 393.

(d) See *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* [1915] A. C. 847.

(e) This would, it is apprehended, to a large extent depend upon the terms of the hire-purchase agreement.

When consideration is given by an agent (*f*) it cannot be relied upon by the principal unless it was given on his behalf.

Where the premium is paid by the assured it is, it is submitted, paid by him on his own behalf; unless there is something in the hire-purchase agreement which requires him to pay it on behalf of the owners as well (*g*).

Where, as sometimes is the case, the premium is paid by the owners, it would seem that it is paid by them as agents for the assured (*h*) if the policy is issued to him and recites the payment by him of the premium. It might be, however, that in certain cases it would be held that a premium paid by the owners was paid by them on their own behalf as well as on behalf of the assured.

It should be noticed that in practice where a policy is issued to cover a vehicle being bought by hire purchase, the insurers issue a duplicate copy of the policy—including the endorsement—to the owners. It is possible that in such cases, if the decision in *Re National Benefit Assurance Co.* (*k*) is followed, the owners might be held to have rights by estoppel against the insurers (*l*).

Moreover it must not be forgotten that in any case there may be some collateral agreement between the owners and the insurers which entitles the owners to take advantage of the endorsement (*m*).

With the above general considerations in mind, the effect of each hire-purchase endorsement as between owners and insurers must be decided by the particular circumstances of the case. But it may be said that the owners will be affected by any misconduct or breach of condition on the part of the assured (*n*). Thus if he fraudulently destroys the vehicle, they, although quite innocent, may be unable to recover (*o*).

(*c*) **Third parties.**—As will be seen from the first of the examples given below, hire-purchase endorsements sometimes contain terms which purport to affect the rights of third parties.

Thus, under the endorsement referred to, it would seem that a third party who had acquired rights under the Third Parties Act, 1930 (*p*), might be deprived of the fruits of those rights by the owners requiring (*q*) payment of the indemnity under the policy to be made to them (*r*).

(*f*) Save in marine insurance, where the broker is liable under s. 35 of the Marine Insurance Act, 1906, 9 Halsbury's Statutes 853. See also *Unilever Insurance Co. of Milan v. Merchants Marine Insurance Co.* [1897] 2 Q. B. 93.

(*g*) It is doubtful whether a term in that agreement which merely requires the assured to effect an insurance would be sufficient to constitute the premium paid by him a consideration moving from the hire-owners.

(*h*) Who would have paid, or undertaken to pay, the owners an equivalent amount.

(*k*) [1932] 2 Ch. 184.

(*l*) As to estoppel more generally, see *ante*, p. 68, and *post*, p. 691.

(*m*) For example, if the insurers agree to give the owners the benefit of the hire-purchase endorsement in consideration of the owners procuring the policy to be effected with them.

(*n*) Since in such cases the loss will not as a rule be one insured by the policy—see *Samuel (P.) & Co. v. Dumas*, [1924] A. C. 431. In some cases they might be held unaffected by breaches committed *after* loss.

(*o*) See *Re Carr and Sun Fire Insurance Co.* (1897), 13 T. L. R. 186. This, however, would depend upon the endorsement in each case, and upon whether the owners could be regarded as mere mortgagees—see *Samuel (P.) & Co. v. Dumas*, *supra*.

(*p*) The Third Parties (Rights against Insurers) Act, 1930, 23 Halsbury's Statutes 12. See *ante*, chapter III.

(*q*) This is not a point which is likely to occur often in practice, but it is difficult to see what the answer to the problem would be.

(*r*) Since the third party gets, under the Act, no more rights than the assured himself had. See *ante*, chapter III, pp. 130 et seq.

The position of a third party's rights under section 10 (s) of the Road Traffic Act, 1934 (i), would, however, be untouched by any such endorsement in the policy.

Specimen Hire-Purchase Endorsement A.

" It is hereby understood and agreed that the X. Y. Z. Finance Corporation, Ltd., of 005 Bishopsgate, E.C. 2, are the owners of the vehicle described in the schedule of this policy under the terms and conditions of a hire purchase agreement entered into with the assured and that they have prior right to all payments hereunder until they shall have notified the insurers in writing that they have ceased to own the vehicle. Save and except that all claims made by third parties or for injury or medical expenses or damage to property or payments for repairs to the said vehicle authorised by the insurers may be paid direct unless otherwise notified in writing by the owners to the insurers.

" Should the said hire purchase agreement for any reason be terminated except by purchase, then the policy shall simultaneously terminate and no return of premium shall be payable by the insurers to the assured.

" Subject otherwise to the terms, exceptions and conditions of this policy."

It will be seen that this endorsement makes the assured's right to any payment under the policy (u) defeasible upon the owners giving the insurers a written request to make the payment to them.

It must be carefully observed that this form of endorsement makes the policy instantly determinable upon the hire-purchase agreement coming to an end for any reason except the purchase of the vehicle by the assured. In this respect it is to be contrasted with the other form of endorsement set out below. It should also be contrasted with the general position where the assured's interest in the vehicle ceases. In that case, the policy will as a rule remain effective whilst the vehicle is still in the assured's possession (v). The hire-purchase agreement will be terminable according to its own terms. Most such agreements are determinable by the owners at any time upon written notice being given to the purchaser if he is in default in payment of any instalment due thereunder. Some, however, may be determined upon such default without any notice being given. Whatever terms the hire-purchase agreement has in this respect, it must be carefully noted that, under endorsements such as the above, the assured will not be covered by this policy after the termination of the hire-purchase agreement, and will, if he uses the vehicle on the road, be committing an offence under section 35 (w) of the Road Traffic Act, 1930 (x). It should also be remarked that upon the termination of the policy by this means (y) the assured is not entitled to any return of premium (z).

Finally, this form of endorsement makes no provision for the determination of the owner's rights under it when the hire-purchase agreement has been brought to an end by purchase. Assuming that the owners have any

(s) As to these, see fully *ante*, chapter IV, pp. 278 *et seq.*

(i) *Ante*, chapter IV, and see the M I B. Agreements, chapter VI, *ante*.

(u) Including the indemnity against third party liability.

(v) See *post*.

(w) As to which see *ante*, chapter IV, pp. 163 *et seq.* and pp. 242 *et seq.*

(x) *Ante*, pp. 160 *et seq.*

(y) It would seem that even if the hire-purchase agreement is wrongfully repudiated by the owners the assured may lose the benefit of his premium. If so, a sum to represent this loss should be claimed in any action against the owners.

(z) A person desiring to change the car which he is acquiring by hire purchase should, therefore, be careful to obtain the insurers' consent to a transfer of the policy to the new car before termination of the hire-purchase agreement.

rights enforceable against the insurers under this endorsement these would, it is submitted, automatically expire when their interest in the insured vehicle has ceased (a).

Specimen Hire-Purchase Endorsement B.

" It is hereby declared and agreed subject to the terms and conditions of this policy that the A. B. C. Trust, Ltd., are interested in the insurance of the vehicle described within under a hire purchase agreement dated the day of between the assured on the one part and the A. B. C. Trust, Ltd., on the other part, the terms and conditions whereof as to ownership and payment of loss so far as not inconsistent with this policy are incorporated herewith. Should the said hire purchase agreement for any reason be terminated then the interest of the assured shall simultaneously terminate, and the policy shall operate for the sole benefit of the A. B. C. Trust, Ltd., and no return of premium shall be payable by the underwriters to the assured.

" It is further understood and agreed that this insurance, after the hirer's interest terminates, does not extend to cover running risks for the car hereby insured unless agreed otherwise by endorsement hereon, except that in the case of the owners seizing the within described car owing to a breach of the hire purchase agreement, underwriters agree to full benefits of this policy operating whilst such vehicle being in the charge of a competent licensed driver in the employ of or acting on behalf of the owners, is being driven to the premises of the dealer with whom the car is to be garaged.

" Nothing herein to be construed as giving the A. B. C. Trust, Ltd., any right to indemnity under the policy to which the assured would not be entitled."

Three points upon this type of endorsement should be noted :

(1) Certain terms of the hire-purchase agreement are expressed to be incorporated in the policy "so far as not inconsistent therewith." Without examining the particular terms of the hire-purchase agreement it is not possible to say what the precise effect of this clause in any given case would be.

(2) The endorsement is so expressed that apparently the policy comes to an end if the hire-purchase agreement is determined by the purchase of the car. This is clearly not the intention of the parties. Nevertheless, it seems to be the position in law unless the position is rectified by a subsequent endorsement (b).

(3) The policy remains in force for the benefit of the owners (c) whilst it is being driven by anyone (d) to the premises of the dealer with whom it is to be garaged (e), provided it is in charge of a competent licensed driver acting on behalf of the owners.

3. Endorsements to cover the carrying of passengers for hire or reward (f).—Many insurers do not print special policies for insuring vehicles in which passengers are carried for hire or reward, such as public

(a) See *per* COCKBURN, L. J., in *North of England Oil-Cake Co. v. Archangel Insurance Co.* (1875), L. R. 10 Q. B. 249, at p. 253.

(b) Or otherwise by agreement with the insurers. As to rectification by the Court, see *ante*, p. 630.

(c) Apparently not for the benefit of the assured.

(d) Even, presumably, the assured, or an unlicensed driver.

(e) Not, apparently, if it is being driven anywhere else, e.g. to the person to whom it has been sold or to the owners' premises.

(f) As to the requirements of s. 36 (1) (b) of the Road Traffic Act, 1930, in respect of liability for death of or bodily injury to passengers carried for hire or reward, see *ante*, chapter IV, p. 188.

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service vehicles (g) or private hire cars. The insurance of such vehicles is often effected by means of an ordinary commercial vehicle or private car policy to which an appropriate endorsement is attached. Two examples of such endorsements are given below.

(1) "It is hereby declared and agreed that notwithstanding anything to the contrary contained therein this policy shall be operative whilst any vehicle described in the schedule thereto is being driven by or is for the purpose of being driven in the charge of any person other than the within-named assured or a driver in his employ, unless the vehicle is being used for social, domestic or pleasure purposes and not for hire or reward.

"It is further declared and agreed that the exclusion in General Exception 1 (a) of this policy relating to use for hire or reward shall not relate to use as a stage, express or contract carriage.

"Subject otherwise to the terms, exceptions and conditions of the policy."

The General Exception 1 (a) referred to is the exception which excludes the use of the vehicle for hire or reward from the cover given by the policy (h).

(2) "*Passenger Risk where the Conveyance of Passengers for Hire or Reward is included.*

"Notwithstanding anything to the contrary contained in Proviso (c) of Paragraph (1) of Section II, but subject otherwise to the terms exceptions and conditions of this policy, the company will in consideration of the payment of an additional premium indemnify the assured against liability at law for compensation and claimants' costs and expenses in respect of death of or bodily injury to any person being carried in or upon or entering or getting on to or alighting from any vehicle described in the schedule to this policy.

"Provided always that in the event of an accident occurring whilst such vehicle is carrying more than 20 persons (in addition to the conductor, if any, and the driver) the assured shall repay to the company a rateable proportion of the total amount payable by the company by reason of this endorsement in respect of such accident in connection with such vehicle."

Proviso (c) of paragraph (1) of section II of the policy is some such clause as excludes from the third party liability covered by the policy, liability in respect of the death of or bodily injury to

"any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from such vehicle at the time of the occurrence of the event out of which any claim arises."

The proviso to the endorsement is difficult to understand. Presumably it would be construed to have the effect which is best illustrated by the following example:

Whilst the vehicle is carrying 22 passengers an accident occurs involving the assured in liability to a passenger to the total of £100. If the insurers pay this sum to the third party, they are entitled to claim repayment from the assured of $\frac{2}{3}$ thereof—i.e., £10.

If, in the same circumstances, 30 passengers were being carried, presumably the assured would be liable to refund $\frac{1}{2}$ —that is, one-half of the sum paid by the insurers to the third party.

(g) I.e. motor coaches, etc. As to public service vehicles, see further *ante*, p. 202.

(h) In the case of omnibuses and hackney carriages used within the Metropolitan Police area, a special policy bearing what is known as the "Scotland Yard wording" is required for police licence purposes.

PART 3.—IMPLIED TERMS

1. Generally.—In general no term will be implied in a policy unless its implication is essential in order to give business efficacy thereto (*i*). The most important of these is the insurers' right to subrogation (*k*). This topic is dealt with in a later chapter (*l*). The question as to how far the duty of good faith arises from an implied term in the contract has already been discussed (*m*). The duty to minimise the loss is sometimes imposed by an express term in motor policies (*n*), and was considered in the last chapter (*o*).

2. Continuance of insurable interest.—In addition it may be said that it is an implied term of the policy that the assured shall have at its inception, and shall continue to have during the existence of the policy, an insurable interest in the subject-matter thereof (*p*). Although insurable interest may no longer always be essential to the validity of a motor insurance policy (*q*), it is submitted that this implied term still exists, and that the lack of insurable interest at its inception will, unless disclosed (*r*), vitiate the policy, as will the cessation thereof during its currency (*s*).

3. Alteration of Risk.—It is sometimes thought that there is an implied condition that the risk will not be materially altered.

It is submitted, however, that there is no authority for this proposition (*t*). On the other hand, there are several cases in which the contrary has been held (*u*).

"In effect there being no violation of the law and no fraud on the part of the assured, an increase of risk, to the subject-matter of insurance, its identity remaining, though such increased risk be caused by the assured, if it is not prohibited by the policy, does not avoid the insurance" (*a*).

Many, if not most, alterations of the risks will come within the express terms (*b*) of a motor insurance policy (*c*). Thus if the insured vehicle is so altered as to become substantially a different vehicle, it will not be covered by the policy (*d*).

(i) *The Moorcock* (1889), 14 P D 64

(k) In so far as this right can be said to arise from an implied term, as to which see *post*, chapter X.

(l) Chapter X, *post*.

(m) *Ante*, p 389.

(n) *Ante*, p 609. If there is no express term imposing it, a term to that effect may be implied, Marine Insurance Act, 1906 (9 Halsbury's Statutes 851). And see Chalmers on Marine Insurance, 4th Edn, p 113. *See quare*, see *Lind v Mitchell* (1928), 98 L J K B 120. (o) See *ante*, p 609. (p) See *ante*, chapter II, p 87.

(q) As to which see *ante*, chapter II, p 87, and chapter IV, p 211.

(r) If disclosed clearly no term to the contrary could be implied.

(s) On the ground of non-disclosure, see *ante*, chapter VII, pp 406 *et seq*.

(t) See generally Welford & Otter-Barry on Fire Insurance, 4th Edn, pp 209 *et seq*; Welford on Accident Insurance, 2nd Edn, p 146.

(u) See for example, *Pim v Reid* (1843), 6 Man & G 1, *Baxendale v Harvey* (1859), 4 H & N 445, *Shaw v Robberds* (1837), 6 Ad & El 75.

(a) *Per WILLES, J*, in *Thompson v Hopper* (1858), E B & E 1038, at p 1049.

(b) When the alteration is covered by the express terms it is a question of construction in each case whether the alteration affects.

(i) any claim under the policy.

(ii) any claim arising during the time when the alteration prevails;

(iii) any claim caused by the alteration.

See *Barrett v Jermyn* (1849), 3 Exch 535, *Stokes v Cox* (1856), 1 H & N 533, and cases cited in next note.

(c) *E.g.* the clauses which describe and limit the risk, see *ante*, p 570. See also *Dawsons, Ltd v Bonnin*, [1922] 2 A C 413, *Farr v Motor Traders' Mutual Insurance Society*, [1920] 3 K B 669, *Roberts v Anglo-Saxon Insurance Association* (1927), 96 L J K B 590, *Provincial Insurance Co v Morgan*, [1933] A C 240.

(d) See, as to alterations changing the identity of the subject-matter, *Thompson v Hopper* (1858), E B & E 1038; *Law Guarantee Trust and Accident Society v Munich Re-Insurance Co*, [1912] 1 Ch. 138.

Difficulties arise in motor insurance in cases where the proposal form (e), in addition to the usual "warranty of truth declaration" (f), contains a clause to the effect that the answers therein shall be "of a promissory nature" (g).

Thus, for example, the assured may truthfully answer the question as to physical infirmities by saying that he has none. Subsequently, during the currency of the policy, he sustains an injury which affects his driving capability. Undoubtedly the risk is thereby altered and increased. If the answer is not made "of a promissory nature," the alteration has no effect upon the policy (h). But if the proposal contains a clause to the effect that the answers shall be of a promissory nature the position is extremely doubtful (i). Each case must be decided according to the facts, the words of the particular question and answer, and the terms of the policy in that case (k), but it is submitted that usually the effect of a clause making the answer "of a promissory nature" will be to make such an alteration as that described a ground upon which the insurers could repudiate liability under or avoid the policy (l). If the effect of the clause is merely to describe the risk, the insurers could in the example given only repudiate liability in respect of an accident occurring when the injured assured was driving the vehicle (m). If it amounts to a condition (n), they could avoid the policy whoever drove. Even though there is no warranty that the answers in the proposal shall be of a promissory nature, it is possible, whether the clause is descriptive of the risk or amounts to a condition, in some cases for the insurers to escape liability to the assured on both grounds (o). Thus, in *Beauchamp v. National Mutual Indemnity Insurance Co., Ltd.* (p), a builder took out a policy with the defendants to cover risk of accidents occurring during the demolition of a mill. He was asked in the proposal form "Are any . . . explosives used in your business?" to which he replied "No." The plaintiff demolished the mill and in the course of the demolition used explosives. Three persons were killed by masonry falling as a result of the explosions. The plaintiff claimed indemnity in respect of these deaths from the insurers. FINLAY, J., in his judgment referred to *Dawsons, Ltd. v. Bonnin* (q) as laying down the general law on the subject. The question in that case was, it will be remembered, "State full address at which the vehicle will usually be garaged," and a wrong address was inadvertently given. The questions in the proposal form were made the basis of the contract. Lord WRIGHT stated that the relevant answer quoted above referred to the future and was of a promissory nature and apt to create a warranty. FINLAY, J., held that the denial of the use of explosives in *Beauchamp's Case* (p) amounted to a war-

(e) As to the effect of the proposal form see *ante*, chapter VII, pp. 411 *et seq.*

(f) As to which see *ante*, chapter VII, p. 467.

(g) And the proposal is incorporated with and made the basis of the policy, *ante*, p. 498.

(h) See *Thompson v. Hopper* (1858), E. B. & E. 1038, and the cases cited in note (y) *supra*.

(i) See *Seaton v. London General Insurance Co., Ltd.* (1932), 48 T. L. R. 374. For a full discussion of the similar position in fire insurance cases, see Welford & Otter-Barry on Fire Insurance, 4th Edn., pp. 211 *et seq.*

(k) See *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240.

(l) As to the distinction between repudiating liability under and avoiding the policy, see *ante*, pp. 280 and 619, and *post*, p. 663.

(m) See *Re Morgan and Provincial Insurance Co.*, [1932] 2 K. B. 70, *per* SCRUTTON, L. J., at p. 82.

(n) Whether it amounts to the one or the other is entirely a question of construction. See *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413, and *Provincial Insurance Co. v. Morgan*, [1933] A. C. 240, and *ante*, pp. 433, 494-6.

(o) I.e. that the risk in question is outside the scope of the policy and that the assured has been guilty of a breach of warranty.

(p) [1937] 3 All E. R. 19.

(q) [1922] 2 A. C. 413.

ranty that they would not be used, and, secondly, that even if it amounted to a mere description of the risk to be insured, the cause of the accident being the use of explosives, there had been a change in the risk, for the company had insured a "non-explosive" demolition.

The insurers were therefore not liable.

Nevertheless, the wording of the policy or of the questions and answers in the proposal form must be carefully examined in each case to see whether in fact the assured has undertaken not to alter the risk after the date on which the contract of insurance was formed.

In *Woolfall and Rimmer, Ltd. v. Moyle (r)*, the policy indemnified employers, carrying on the business of electrical engineers, painters and decorators, in respect of their liability at Common Law or by Statute to their workmen who might be injured by accident in the course of their employment. One of the questions in the proposal form was "Are your machinery, plant and ways properly fenced and guarded, and otherwise in good order and condition," which was answered "Yes." Several employees were injured and one was killed when a plank forming part of the employers' scaffolding gave way. Insurers argued that the plank was defective at the time of the accident, and although it was not alleged that the answer to the question quoted was inaccurate at the time it was made, yet the employers were under a duty to inform insurers if at any time it ceased to be true.

Lord GREENE, M.R., found that there was no justification for reading into that perfectly simple question any element of futurity whatsoever. It was not true to say that the answer would be valueless unless the element of futurity was attached to it. The value of the question was that it enabled insurers to find out with what sort of person they were dealing. If the assured were careless about his machinery, the risk would be different. Had insurers intended that this question should carry the meaning which they had suggested at the trial, nothing would have been easier than to say so.

4. Voluntary creation or increase of risk by assured.—Whilst there is no implied term prohibiting alteration of the risk, a fraudulent alteration (s) or creation (t) of the risk will never be covered by the policy (u), and there is often an express term against increasing it (v).

It is sometimes said that any voluntary increase of the risk, though not fraudulent, by the assured is impliedly prohibited by the policy, so that a loss arising therefrom does not come within its terms (w).

It is submitted, however, that a voluntary but not fraudulent increase or creation of risk does not affect the assured's right to claim under a motor policy, unless such conduct is hit by its express terms (x) or is a deliberate act on his part which causes the accident in respect of which the claim is made. Where the increase or creation of the risk is not the cause of the loss in respect of which a claim is made, the position seems reasonably clear, as covered by the authorities supporting the proposition that there

(r) [1942] 1 K. B. 66 (C. A.); [1941] 3 All E. R. 304.

(s) As, for example, if he insures his car for one purpose, having always intended to use it for another and more hazardous purpose. This, however, would always amount to a material non-disclosure or false representation and would be excluded by the express terms of most motor policies.

(t) As, for example, if the assured wilfully damages or destroys the insured vehicle with a view to getting the loss paid by the insurers.

(u) See *Brewster v. Blackmore* (1925), 22 Ll. L. R. 258; and *Barnett v. Blackmore* (1926), 23 Ll. L. R. 137, for examples of cases in which it was alleged, but not proved, that cars lost by fire had been fraudulently destroyed by the assured.

(v) See *ante*, p. 609.

(w) See *Porter's Laws of Insurance*, 8th Edn., p. 8, citing a Canadian authority.

(x) E.g. the clause imposing upon the assured the duty to take all reasonable steps to minimise loss. See this clause discussed *ante*, p. 609.

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is no implied term against alteration of the risk. But where the assured voluntarily creates the hazard, which causes the loss, the position is not free from doubt. The question was raised but not decided in *Tinline v. White Cross Insurance (a)* where the assured claimed in respect of a third party liability arising from a collision caused by his criminal negligence (b), and the insurers relied upon the defence *inter alia* that

- "the assured voluntarily increased the risk the insurers had to bear under
- "the policy and that the death and injuries in respect of which he was liable
- "to third parties were directly attributable to that risk."

In *James v. British General Insurance Co. (c)* the same point was raised in a case where the accident in respect of which the assured claimed was caused by his driving when drunk (b). The defence there was (*inter alia*) (d) that the assured

- "created a risk which was never in the contemplation of the parties, or
- "alternatively voluntarily increased the risk which the defendants bore
- "under the policy, and the death, injuries and damage were directly attributable to such risk or increased risk" (e).

It was apparently held that this defence failed because on the facts the assured had not deliberately put himself in a condition of drunkenness, or deliberately put himself into the position of driving a motor vehicle whilst drunk (f). This case inferentially decides that only a deliberate increase or creation of risk by the assured will be impliedly excepted from the cover given by the policy. It is submitted that this is the correct view, and that it applies only to claims in respect of loss, damage or liability directly caused by the deliberate act (g). The contention that the assured had altered or enlarged the risk was also unsuccessfully raised in *Seaton's Case (h)* and *Piddington's Case (i)* and in *Jenkins v. Deane (k)*.

Thus if the assured deliberately drives his car through flames and as a result the car is damaged or destroyed by fire, he may not recover this loss under his policy. A more common example would be the deliberate driving of the insured car in excess of a speed limit known to the assured (l) or in defiance of traffic signals.

Supposing that as a result of deliberate driving through a town at a speed of 90 m.p.h. the assured caused shock to a passenger resulting in that passenger's death. It is submitted that a claim in respect of that death would be impliedly excluded (m) as would a claim in respect of damage to the car or injury to the assured (n).

(a) [1921] 3 K. B. 327.

(b) For which he was convicted of manslaughter.

(c) [1927] 2 K. B. 311.

(d) The main ground relied upon was public policy, but it was also pleaded that an accident so caused was not within the meaning of that word in the policy.

(e) From the report it appears that the point was not pressed, the defendant preferring to rely upon the broad ground of public policy, see *ante*, chapter II, p. 107, and *post*, p. 643; but on the facts as held it would appear that the increase of risk was involuntary.

(f) *Per Roche, J.*, [1927] 2 K. B. 311, at p. 325. Cf. *National Farmers' Union Mutual Insurance Society, Ltd. v. Dawson*, [1941] 2 K. B. 424; see p. 610, *ante*.

(g) Cf. *Barrell v. Jermey* (1849), 3 Exch. 535, and *Stokes v. Cox* (1856), 1 H. & N. 533.

(h) *Seaton v. London General Insurance Co., Ltd.* (1932), 48 T. L. R. 574.

(i) *Piddington v. Co-operative Insurance Society*, [1934] 2 K. B. 236.

(k) (1933), 103 L. J. K. B. 250.

(l) E.g. a 30 m.p.h. limit in a built-up area. See s. 1 of the Road Traffic Act, 1934; 27 Halsbury's Statutes 555.

(m) Nor would the implied term conflict with public policy, since insurance against liability in respect of the death of a voluntary passenger is not required. See chapter IV, *ante*, p. 206, and s. 36 (1) (b) (ii) of the Road Traffic Act, 1930, *ante*, p. 188.

(n) In regard to which claims the question of public policy requiring insurance would not arise.

It must be remembered that no term which conflicts with the law or with public policy can be implied. It follows that in so far as the law or public policy requires insurance against third party liability, no term excluding such liability if it arises from the deliberate creation of a risk by the assured can be implied (o).

5. Implied legality of third party liability insurance.—This topic in its general aspect has been discussed in an earlier chapter (p). Whilst the decisions in *Tinline v. White Cross Insurance* (q) and *James v. British General Insurance Co.* (r) to the effect that public policy does not prohibit insurance against third party liability caused by inadvertent criminal acts have been doubted by the Court of Appeal (s) it is submitted that in so far as third party liability insurance is made compulsory (t) by the Road Traffic Act, 1930 (u), there is no rule of public policy which prohibits insurance against liability arising from a criminal act, whether that act be deliberate or inadvertent.

Thus as ROCHE, J., remarked in *James v. British General Insurance Co.* (a) it would be "rather extraordinary to hold that such insurance was against public policy while Parliament was contemporaneously providing the contrary."

Moreover there is in the application of this rule of public policy a clear distinction between indemnifying the assured against the consequences of his wrongful act and indemnifying an innocent third party against those consequences (b). But unless there is an express term in the policy to that effect (c), the insurers who indemnify a third party for the consequences of the assured's illegal act may not be able to recover the sum so paid, with the result that an indemnity to the third party will also be an indemnity to the assured.

It must be admitted, however, that the question is one of considerable doubt, since although the Road Traffic Act, 1930, requires insurance against any liability to third parties in respect of death or personal injuries, it has been held that this does not mean liability however caused, and that insurance is sufficient for the purposes of the Act although it excludes liability arising out of some specified use of the vehicle (d).

There is nothing in either of the Road Traffic Acts (e) which prevents the insertion in the policy of an express term to the effect that third party liability arising from an illegal act is not covered (f), or even one to the effect that the insured vehicle is not on risk when being used in an illegal manner or for an illegal purpose (g). It is difficult to say therefore that if an express term is permissible, an implied term to the same effect conflicts

(o) See next paragraph.

(p) *Ante*, chapter II, p. 107.

(q) [1921] 3 K. B. 327.

(r) [1927] 2 K. B. 311.

(s) In *Haseldine v. Hoshen*, [1933] 1 K. B. 822.

(t) *I.e.* liability in respect of the death of or bodily injury to third parties. See s. 36 (1) (b) of the Act, *ante*, p. 188.

(u) 23 Halsbury's Statutes, 607; *ante*, chapter IV.

(a) As reported (1921), 27 Ll. L. R. 328, at p. 330. Compare the remarks of DU PARCQ, J., as he then was, in *Boulton v. Hinkley* (1935), 51 Ll. L. R. 113, on the effect of compulsory insurance resulting in some people feeling less responsibility, "when they know that, if they do by negligence injure somebody, the penalty will not fall on them."

(b) See *ante*, chapter II, p. 109, and cases there cited.

(c) Road Traffic Act, 1934, *ante*, chapter V.

(d) See as to this *ante*, chapter IV, pp. 193 *et seq.*

(e) *I.e.* the Act of 1930; 23 Halsbury's Statutes 607, or the Act of 1934; 27 Halsbury's Statutes 534.

(f) See further, *ante*, p. 326.
(g) See, as to implied exception excluding use of a vessel for illegal purposes in a marine policy, *Dudgeon v. Pembroke* (1874), L. R. 9 Q. B. 581; *Pipon v. Cope* (1808), 1 Camp. 434; *Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co.*, [1898] 2 Q. B. 114, at p. 129.

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with the law or with public policy. In so far as a third party liability insurance does not cover liability arising from the deliberate criminal act of the assured, the restriction arises from an implied term since otherwise the whole insurance would be void (h). Moreover, it is clear that the Court of Appeal had in mind the statutory requirements of compulsory insurance when doubting the correctness of the decisions in *Tinline's* (i) and *James'* (k) Cases (l). This topic in motor insurance may be summarised as follows:

(1) Although the decisions in *Tinline v. White Cross Insurance* (i) and *James v. British General Insurance Co.* (k) Cases may not have been correctly decided in the then state of the law, it is submitted that since third party liability insurance is now compulsory they would be followed in similar circumstances and consequently there is no implied term excluding liability arising from an *inadvertent* illegal act.

(2) It is doubtful whether all third party liability arising from a *deliberate* illegal act (m) is not still (n) impliedly excluded from the cover given by an ordinary motor policy (o).

(3) As regards third party liability against which insurance is not required (p) and as regards other losses (q), these are impliedly excluded from the cover of the policy if caused by a *deliberate* criminal act.

(4) As regards third party liability against which insurance is not required, and as regards other losses, it is doubtful whether these are not impliedly excluded from the cover of the policy if caused by certain illegal though not deliberate acts (r).

(5) As regards any indemnity against the costs of defending prosecutions in respect of criminal acts, this is illegal in so far as it indemnifies the assured against the consequences of a deliberate criminal act, and probably also in so far as it covers the consequences of certain inadvertent criminal acts (s).

(A) See *per* SCRUTTON and GREER, L. J.J., in *Haseldine v. Hosken*, [1933] 1 K. B. 822, unless, of course, there is a term expressly covering "liability" so caused.

(i) [1921] 3 K. B. 327.

(k) [1927] 2 K. B. 311.

(l) "With regard to these two decisions, they do not in my view affect this case, and I do not think it necessary, nor do I intend, to express any opinion on the question whether I should follow them if the point involved came before me and it became necessary to consider them. The present position of the law of motor insurance, in view of the statutory requirements of compulsory insurance, is in such a complicated state that we should not pronounce any opinion upon it until we are obliged to do so; but I desire to add this, that it must not be taken, because I say nothing more in this case about the two decisions just mentioned or whether I agree or do not agree with the principle on which they are based, that I at present approve of them." *Per* SCRUTTON, L. J., in *Haseldine v. Hosken*, [1933] 1 K. B. 822, at p. 835.

"I agree with what SCRUTTON, L. J., has said in reference to the two decisions in *Tinline v. White Cross Insurance* and *James v. British General Insurance Co.* "I find it a little difficult to distinguish those cases from the present, but I do not wish to say anything to preclude their full consideration in a case which arises on facts similar to those in the two decisions mentioned." *Per* GREER, L. J., *ibid.*, at p. 838.

(m) *Tinline v. White Cross Insurance*, [1921] 3 K. B. 327; *James v. British General Insurance Co.*, [1927] 2 K. B. 311; *Haseldine v. Hosken*, [1933] 1 K. B. 822; cf. *Berasford v. Royal Insurance Co., Ltd.*, [1938] A. C. 586; [1938] 2 All E. R. 602; in which it was held that no man may insure himself against the commission of a crime.

(n) *I.e.* in spite of the Road Traffic Act.

(o) If the policy expressly covers such liability, it would be void.

(p) *E.g.* liability to voluntary passengers.

(q) *E.g.* personal injury to the assured or damage to the vehicle.

(r) *I.e.* not deliberate in the sense of being a wilful and knowing violation of the law. But they must be deliberate in the sense that the assured know the character of the acts he was about to do, though not necessarily knowing their effect in law, and intending to do them, did them; *Haseldine v. Hosken*, [1933] 1 K. B. 822.

(s) *I.e.* inadvertent as far as their criminality is concerned. But the acts themselves must be intentional. See *Haseldine v. Hosken* (*supra*); *sed quare*.

6. Implied term of continuous good faith.—It is sometimes said that the duty of good faith extends beyond the making of the contract and binds the parties throughout its duration (*t*).

This statement may, however, be misleading, since the requirements and degree of the good faith required after the making of the contract are not those required during its negotiation (*u*). Thus, as has been seen (*v*), there is no implied duty upon the assured to disclose any alteration or increase in the risk after the contract has been made. Again, although the assured may be bound not deliberately to create or increase the risk insured against (*w*), this obligation arises rather from a term which must be implied in the contract to give it reasonable business efficacy than from the duty of good faith (*x*).

Whether the duty to observe the utmost good faith in the negotiations leading up to an insurance contract arises from an implied term of the contract itself (*y*) or from a general rule of law, it may be said that there is an implied condition of every insurance contract that the assured shall not attempt to commit a fraud upon his insurers.

And it is submitted that this must be regarded as an implied term for the following reasons :

(1) The assured is under a general duty (apart from contract) not to commit fraud against anyone, but he is under no duty not to attempt it.

(2) Whilst without any implied term to that effect the assured could never recover under a fraudulent claim, an abortive attempt to make such would be without effect.

(3) Fraud, or attempted fraud, by the assured on his insurers avoids the whole policy (*a*).

Thus in *Britton v. Royal Insurance Co. (b)*, WILLES, J., pointed out (*c*) :

" It is the practice to insert in fire policies conditions that they shall be
" void in the event of a fraudulent claim . . . such a condition is only in
" accordance with legal principle . . . if there is wilful falsehood or fraud
" in the claim the assured forfeits all claim whatever upon the policy."

Thus if the assured fraudulently invents the existence (*d*) or cause (*d*) or amount of a loss (*d*), or creates the loss himself (*e*), the policy will be voidable at the option of the insurers. On the other hand, the loss will not be one insured against (*f*).

It should be noted that the assured's fraud, if it avoids the policy at all, may avoid it as against innocent parties, such as the owners of the vehicle from whom the assured is acquiring it by hire purchase (*g*), his trustee in bankruptcy (*h*).

(*t*) See *per* WILLES, J., in *Britton v. Royal Insurance Co.* (1866), 4 F. & F. 905, at p. 909. Welford on Accident Insurance, 2nd Edn., pp. 170, 199; Welford & Otter-Barry on Fire Insurance, 4th Edn., p. 289, and *cf. ante*, chapter II, p. 101.

(*u*) As to which see *ante*, chapter II, p. 101, chapter VII, and *Wilmott v. General Accident Insurance Corporation* (1935), 53 Ll. L. R. 156.

(*v*) *Ante*, pp. 417, 639 *et seq.*

(*w*) As to how far this applies to motor policies, see *ante*, pp. 641 *et seq.*

(*x*) *Cf.* Welford on Accident Insurance, 2nd Edn., p. 170.

(*y*) As to which see *ante*, chapter VII, p. 389.

(*a*) At their option.

(*b*) (1866), 4 F. & F. 905.

(*c*) *Ibid.*, at p. 919.

(*d*) See, e.g., *Phillips v. Chapman* (1921), 7 Ll. L. R. 139; *Cuppittman v. Marshall* (1924), 18 Ll. L. R. 277.

(*e*) E.g. fraudulently stating the cause to be a peril insured, when in fact it is one excepted by the policy—for instance, falsely stating that only one car was in use at the time of loss where the policy insures two, provided only one is used at a time.

(*f*) See *Samuel (P.) & Co. v. Dumas*, [1924] A. C. 431.

(*g*) As to the hire-owners' interests generally, see *ante*, p. 634.

(*h*) *I.e.* subsequent to the issue of the policy.

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On the other hand fraud (i) by some other person to which he is not privy (k) will not, as a rule, affect the assured (l), though it is doubtful whether this applies if the other person is his agent (m) by whose misconduct in the preliminary negotiations the assured would as a rule be affected (n).

The essential elements of fraud have been described elsewhere (o), and the proof of fraud will be a question of fact in each case. But it must be remembered that whilst in these cases the attempt (p) at fraud is enough, mere proof of an unfulfilled intention to defraud will not suffice (q).

7. Implied duty to minimise loss.—In motor policies there is sometimes an express term (r) requiring the assured to take all reasonable steps to minimise the loss resulting from the risks insured against. Where the policy does not contain this term it must be implied (s). Thus if the assured runs down a pedestrian he must take all reasonable steps for his safety and assistance, and must not leave him in the road to die or be run over again (s).

8. Implied condition that vehicle shall be roadworthy.—Since the decision of GODDARD, J. (as he then was), in *Barrett v. London General Insurance Co.* (t), was disapproved in *Trickett v. Queensland Insurance Co.* (u), it may be regarded as settled law that there is no such rule in motor insurance law as there is in marine insurance law that the insured car must be roadworthy before it is set out on a journey.

PART 4.—RIGHT TO PAYMENT UNDER POLICY

1. Generally.—The right to payment of monies due under a motor insurance policy is governed by the terms of the policy. It must be considered under each head of various classes of insurance given by a comprehensive (v) motor policy. It must be clearly distinguished from the right to an indemnity under the policy. Throughout this section of this chapter the right to claim referred to is the right to claim monies accrued due under the policy (a), though their amount need not necessarily have been quantified (b).

2. Third party liability indemnity.—Although the right to an indemnity in respect of third party liability arises as soon as the liability

(i) See *Re Carr and Sun Fire Insurance Co.* (1897), 13 T. L. R. 186.

(k) See *Brewster v. Blackmore* (1925), 21 Ll. L. R. 258.

(l) Cf. *Barnett v. Blackmore* (1926), 23 Ll. L. R. 137.

(m) See *Thomas v. Tyne and Wear Steamship Freight Insurance Association*, [1917] 1 K. B. 938.

(n) See *ante*, chapter VII, p. 401.

(o) *Ante*, pp. 5, 406.

(p) I.e. the actual making of a fraudulent claim, although the attempt is discovered in time and the insurers lose nothing.

(q) See, however, *R. v. Robinson*, [1915] 2 K. B. 342.

(r) This must be distinguished from the express term requiring the assured to take all reasonable steps to avert the loss. See *ante*, p. 609, and cf. Marine Insurance Act, 1906, s. 79 (4), and *Lind v. Mitchell* (1928), 98 L. J. K. B. 120.

(s) See *City Tailors v. Evans* (1921), 38 T. L. R. 230. In any event a loss so caused or increased will not be, or will *pro tanto* not be, a loss proximately caused by the risk insured against. *PER SCRUTTON, L.J.*, *ibid.*, at p. 235. And see *Samuel (P.) & Co. v. Dumas*, [1924] A. C. 431, but cf. *Lind v. Mitchell* (1928), 98 L. J. K. B. 120.

(t) [1935] 1 K. B. 238; see p. 609, *ante*.

(u) [1936] A. C. 159 (P. C.); see *ante*, pp. 609–610.

(v) See *ante*, chapter II, p. 78.

(a) For the effect of death, assignment, etc., on the policy itself, see *post*, pp. 661, 639.

(b) E.g. the assured incurs liability to a third party and dies in the same accident. His personal representative can claim payment of the indemnity although the amount thereof is not quantified until later.

is incurred (c), the right to payment in respect of the indemnity does not now arise until the sum payable has been quantified (d).

The question whether the assured is entitled to demand payment of this sum (when quantified) to him, or whether the insurers can discharge their obligation to indemnify by payment direct to the third party and the conflicting decisions upon the point, have been considered elsewhere (e). The answer to this question must depend upon the wording of the relevant clauses in the policy in each case (f). But since the passing of the Third Parties Act, 1930 (g), the question is largely academic, since the assured's trustee in bankruptcy can no longer claim the money for the benefit of the general creditors (h), and the assured, if the money is applied in discharge of his liability, could presumably only claim nominal damages for any breach of an obligation to pay it to him (i).

Moreover, the assured could not in any case be entitled to payment of an indemnity in respect of a liability to a third party, which the insurers are obliged by section 10 of the Road Traffic Act, 1934, to discharge by direct payment to the third party.

Although the obligation to pay money in respect of a third party liability indemnity may be discharged by payment to the third party, the right to claim it is still vested in the assured to the extent that he can assign that right to the third party to whom the corresponding liability was incurred (k). The extent to which this right can be attached by garnishee proceedings at the instance of a third party has been considered in an earlier chapter (l). The position of this right upon the insolvency of the assured is now governed by statute (m), and has been described elsewhere (n). Upon death the right will automatically pass to the assured's personal representative or trustee. The change in this connection made by the Law Reform (Miscellaneous Provisions) Act, 1934 (o), should be observed. Before that statute was passed, any third party liability of the assured would generally (p) be extinguished by his death (q). It should be stressed that if the money due in respect of the third party liability indemnity is paid to the assured, he need not apply it in discharge of that liability, but, if the liability itself is extinguished or diminished, he will be obliged to refund to the insurers (r). This may be contrasted with the position under the next head.

(c) *I.e.* at the moment of the accident which gives rise to it. *Per* TOMLIN, J., in *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793, at p. 800.

(d) *I.e.* when the amount of the liability has determined.

(e) *Ante*, chapter VIII, p. 515, chapter III, p. 156. See also chapter II, pp. 74-75 *et seq.*

(f) It is now settled that the clause giving the insurers the right to settle or compromise any claim (as to which, see *ante*, p. 596) gives them the right to pay the third party direct; see *Israelson v. Dawson*, [1933] 1 K. B. 301, *per* GREER, L. J., and *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1943] A. C. 121; [1942] 2 All E. R. 319, *per* Lord MAUGHAM; *Beacon Insurance Co., Ltd. v. Langdale*, [1939] 4 All E. R. 204 (C.A.).

(g) The Third Parties (Rights against Insurers) Act, *ante*, chapter III, pp. 120 *et seq.*

(h) As he could before that Act; see *Re Harrington Motor Co., Ex parte Chaplin*, [1928] Ch. 105, and *Hood's Trustees v. Southern Union General Insurance Co. of Australasia*, [1928] Ch. 793, *ante*, pp. 116 *et seq.*

(i) Cf. *ante*, p. 75 as to the position where the assured is paid the indemnity by the insurers and then reduces or extinguishes his liability to the third party.

(k) See *Jenkins v. Deane* (1933), 103 L. J. K. B. 250, where this was done, and *Taylor v. Eagle Star Insurance Co.* (1940), 67 Ll. L. R. 136; *Barrett v. London General Insurance Co.*, [1935] 1 K. B. 238.

(l) *Ante*, chapter III, p. 155.

(m) *Ante*, chapter III.

(p) For the exceptions, see *ante*, chapter I, p. 52.

(q) See *ante*, chapter I, and cases there cited.

(r) See *ante*, pp. 75, 103, and *post*, chapter X.

(m) See note (g), *supra*.

(o) *Ante*, chapter I, p. 52

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The question of the right to claim payment under this head of a person who is not a party at Common Law to the policy, such as a person claiming under a clause purporting to extend the right to an indemnity to persons driving with the assured's consent (s), has already been discussed. The cases in which the indemnity has been assigned to the third party himself are noted below.

3. Loss or damage to vehicle indemnity.—The obligation of insurers may under a policy containing an express term to that effect (t) be discharged at their option by reinstatement—that is, repair or replacement of the vehicle. Otherwise the insurers are obliged to pay the sum due in respect of the loss or damage, and, when paid, the assured is at liberty to expend it in any manner he pleases (u). This, like any other right, is always subject to any hire-purchase endorsement there may be (a). Thus, if his car has been stolen and he is paid the insured value thereof, he is not obliged to buy a new car, but may do what he likes with the money (u). The right to claim monies accrued due under this head will pass on insolvency to the assured's trustee in bankruptcy or liquidator (b), as the case may be, and on death to his personal representatives. It may also, unless there is a term of the contract preventing this, be assigned by the assured to any person.

4. Personal accident benefits.—The right to payment of these may be subject to the terms of a hire-purchase endorsement (c). They consist in :

(a) *Sums due in respect of injuries to or death of the assured*, which are clearly payable to him only or to his assignee. As has been submitted, the right to claim payment of sums due in respect of injuries may pass to the assured's trustee in bankruptcy (d). The right to monies due on his death would pass to his personal representatives, or, in the case of insolvency (e), to the administrator in bankruptcy.

(b) *Sums due in respect of injuries to or death of the assured's wife.*—Those due in respect of injuries cannot be claimed by the wife herself, but may be claimed by him as trustee on her behalf. It is suggested that they may be claimed by the assured in his own right (f). Sums due on the death of the assured's wife would be claimable, it is submitted, not by her personal representatives, but by the assured or his personal representatives, and would not form part of her estate.

(c) *Sums due in respect of medical expenses of passengers.*—The passengers have clearly no right to claim these direct. The right of the assured to claim them has been fully discussed elsewhere (g).

5. Legal costs, etc.—The right to claim monies due in respect of legal costs or any other costs or expenses for which the insurers may be liable (other than those awarded or due to a third party which come under the third party liability indemnity) belongs to the assured, to his assignee, or to his trustee in bankruptcy, liquidator or personal representative, as the case may be.

(s) *Ante*, chapter II, pp. 96 *et seq.*; chapter IV, p. 210; chapter VIII, p. 527.

(t) See cases cited *ante*, p. 507, and see *Queen Insurance Co. v. Vay* (1867), 16 L. T. 239.

(u) In the absence, of course, of fraud. Cf. *Bowen v. Martin* (1940), 67 Ll. L. R. 1.

(a) As to hire-purchase endorsements giving an apparent right of payment to the hire-owners, see *ante*, p. 634.

(b) See *ante*, chapter III, as to the insolvency generally.

(c) See *ante*, p. 633.

(d) *Ante*, p. 115.

(e) Cf. *ante*, chapter III, p. 115.

(f) For he has an interest in the loss of her consortium caused by her injuries, see *ante*, chapter II, p. 55.

(g) *Ante*, p. 554.

6. Assignment of right to payment.—The question then arises as to whether this right can be assigned by him to another, so as to entitle that other directly to enforce payment against the insurers. The distinction between assignment of the policy and assignment of the right to payment of monies due thereunder has already been drawn (*h*). Whilst a motor insurance policy is not assignable in the full sense without the consent of the insurers, the right to payment thereunder may be assigned unless some term in the policy prohibits it. If there is such a term, then the assured cannot assign his right to payment so as to enable the assignee to enforce it directly in his own favour. In such a case it would apparently be necessary for the assignee to join the assured as nominal plaintiff in any action against the insurers (*i*). In so far as the assured can only claim payment of monies due under the policy as trustee for another, it is extremely doubtful whether he can assign that right to anyone but the person for whose benefit (*k*) he is trustee. In *Jenkins v. Deane* (*l*), *Barrett v. London General Insurance Co.* (*m*), and in *Taylor v. Eagle Star Insurance Co.* (*n*) the assured assigned his rights to the third party.

7. Payment by insurers to agents.—It should be noted that the insurers will discharge their liability to make payments under the policy, if they pay the money due to the assured to his agent, if that agent is authorised to receive it or is held out by the assured as being so. But the money must be paid in the manner authorised by the assured. Thus in *McCarthy v. Dixon & Co. (London), Ltd.* (*o*), the assured sent in a claim to Dixon & Co., who had acted as his brokers, in respect of the loss of his car. He had authorised X to receive the money due from the insurers on his behalf, but only in cash. The brokers paid X the amount of the loss (*p*)—£200—by sending him £88 in cash and paying the balance by contra account. X misapplied the £88 and subsequently became bankrupt. It was held (*q*) that the assured was entitled to recover the full £200 (less £2 commission) from the brokers, as they had not paid the amount of the loss to X in accordance with his authority—namely, all in cash (*r*).

PART 5.—LIMITED LIABILITY POLICIES

Certain motor policies are issued in which the amount of the insurers' total liability under the policy (*s*), or in respect of any one claim or accident (*t*), is limited. The legality of this type of policy for the purposes of the Road Traffic Act, 1930, has been considered elsewhere (*u*). It should be noted the limitation may be in two forms.

1. The insurers may undertake to pay indemnity only if the loss or liability exceeds a specified sum.—This is the most common form of limited liability in motor insurance practice. As has been seen (*u*), there is no distinction in principle between limiting liability in this way and limiting it in the manner next described. Either therefore both are legal under the

(*h*) *Ante*, p. 94. (*i*) See Anson on Contract, 19th Edn., pp. 267 *et seq.*
 (*k*) E.g. his wife (see *ante*, p. 551) or a friend to whom the car was lent (see *ante*, p. 96 and pp. 527 *et seq.*).
 (*l*) (1933), 103 L. J. K. B. 250. (*m*) [1935] 1 K. B. R. 238.
 (*n*) (1940), 67 Ll. L. R. 136. (*o*) (1924), 19 Ll. L. R. 29, 58.
 (*p*) Which they had collected from the underwriter.
 (*q*) By ROWLATT, J., 10 Ll. L. R., p. 58.
 (*r*) Following *Legge v. Byas, Mosley & Co.* (1901), 7 Com. Cas. 16.
 (*s*) *I.e.* during its currency.
 (*t*) E.g. not more than £1000 in respect of any one accident.
 (*u*) *Ante*, p. 195.

Road Traffic Acts, or neither is. But provided that the limitation—whether of the first or second type—is carried into effect by a clause which says that the assured shall repay the excess of one sum over another, and not that the insurers shall not pay any sum, the limitation does not, it is suggested, violate the spirit or the letter of the requirements of section 36 of the Road Traffic Act, 1930.

A limitation carried into effect by requiring the assured to repay sums which the insurers have paid in discharge of a third party liability in respect of death or bodily injuries, is of exactly the same nature as clauses requiring repayment of sums paid by reason of section 38 of the Act of 1930 (a), or section 12 of the Act of 1934—clauses which are expressly allowed by those sections.

As regards indemnities other than those in respect of liabilities required to be insured against by the Act of 1930 (b), no question as to their legality can arise, in whatever form they are framed. Thus a clause requiring the assured to bear the first £x of any loss of or damage to the vehicle is perfectly valid.

2. The insurers undertake to be liable only for a limited sum during the whole currency of the policy or only for a specified sum in respect of any one occurrence.—An account is given below (c) of a vehicle insurance case in which the insurers' liability was limited to a specified sum in respect of any one accident, and which showed that this limitation does not necessarily apply to the costs of defending an action brought by third parties in respect of one accident.

The chief difficulties which arise under this type of policy are in determining what is meant by "one accident" or "any one occurrence" and other similar phrases. Requirements of space forbid any discussion of the authorities, a collection of the most important of which is printed in the footnote (d). The policy may of course provide that not only is a maximum sum payable for one accident, but also that the total liability during the currency of the policy is limited (e).

In *Allen v. London Guarantee and Accident Co., Ltd.* (f), under a policy covering liability to third parties arising out of the use of the insured vehicle on the road, the indemnity for damages, costs or expenses was limited to £300 in respect of third party claims "arising out of one occurrence."

The policy contained the following clause :

"That the company was to be entitled, in the name of and on behalf of the assured, to take over, and during such period as they should think proper, have the absolute conduct and control of all the negotiations and proceedings which might arise in respect of any accident or claim and the settlement of the same, and the assured was to give the company all necessary information and assistance for the purpose."

The assured became liable to two third parties for personal injuries sustained by them in one accident. Each brought an action against the

(a) See *ante*, chapter IV, p. 219.

(b) E.g. loss or damage to vehicle, personal accident benefits, etc.

(c) *Allen v. London Guarantee and Accident Co., Ltd.* (1912), 28 T. L. R. 254. Cf. *Eclipse Policies v. Marchbank*, *post*, chapter X.

(d) *South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402; *Captain Boylton's World's Water Show Syndicate, Ltd. v. Employers' Liability Assurance Corporation, Ltd.* (1895), 11 T. L. R. 384; *Allen v. London Guarantee and Accident Co., Ltd.* (1912), 28 T. L. R. 254.

(e) See, for example, *British General Insurance Co. v. Mountain* (1919), 36 T. L. R. 171.

(f) (1912), 28 T. L. R. 254.

assured. The Company defended these proceedings on his behalf, and the only part he took in them was to give such facilities as he could (g).

In the result the two third party plaintiffs recovered judgments for the total sum of £375 damages against the assured and the total sum of £218 for costs. The insurers paid the amount of the damages to the third party, but not the costs. The assured was obliged to pay these, and brought an action against the insurers for an indemnity in respect of them under his policy. The insurers contended that as the assured's liability arose out of one occurrence, their obligation to indemnify was limited to £300, which they had discharged. It was held by PHILLIMORE, J., that this was so, but that they were liable for the costs, on the grounds stated in the following extract from his judgment :

" On the question of who was liable to pay the costs of the two actions, " the insurance company contended that so long as they fought in good faith " they could involve the assured in unlimited liability for costs; but all " that they could be called upon to pay was £300. This was not, in my " judgment, a reasonable construction of the clauses in the policy. If the " insurance company defended an action in the name of the assured without " the consent of the assured they incurred a common law liability for the " costs. It might or might not be for the benefit of the company to defend " the action, but they accepted the risk."

The position as to the assured's own costs and the case of *Eclipse Motor Policies v. Marchbank* are discussed later (h).

PART 6.—MOTOR TRADERS' INSURANCE

Motor dealers and others who desire to use cars on the road for a short time, but do not wish to go to the trouble or expense of taking out an ordinary policy in respect of each vehicle, are accommodated by insurers with various types of policy which give what is known as "floating cover" (i). The essential feature of this type of policy is that it does not insure a specific vehicle, or the driving of a specific vehicle, but insures all vehicles which come within the class which it specifies (k). Provision for the issue of insurance certificates under the Road Traffic Act, 1930 (l), for this kind of policy is made by the regulations under that Act (m).

1. Ticket policies.—Of this type of policy that known as the "ticket policy" has previously been described (n), and the effect upon it of section 12 (o) of the Road Traffic Act, 1934, considered.

Apart from "ticket" policies the most common forms of motor traders' policies are the "named driver" policy and the "trade plate" policy.

2. The named driver policy.—Under this policy any number of vehicles may be insured, but these are not "on risk" (q) except when being driven by one of the drivers whose names are specified in the policy. It is important to note that under this policy only third party liability incurred by the driving of one of the named drivers is covered, and consequently

(g) His driver who caused the accident gave evidence.

(h) Chapter X, *post*.

(i) Cf. *Waters and Steel v. Monarch Life Assurance Co* (1856), 5 E. & B 870.

(k) Often the vehicles covered are not the property of the assured, but merely in his custody. In so far as insurable interest is still necessary the motor vehicle insurance (as to which see *ante*, chapter II, pp. 77 *et seq.*), the mere custody gives the assured a sufficient interest to support the insurance. See *ante*, p. 82.

(l) *Ante*, chapter IV.

(m) *Ante*, chapter IV, p. 214.

(n) *Ante*, chapter V, p. 325.

(o) *Ante*, chapter V, pp. 316 *et seq.*

(q) *I.e.* not covered by the policy; see *ante*, p. 283.

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any other person driving the vehicle, such as a prospective customer, is without insurance.

3. Trade plate policy.—This policy insures any vehicle which is being used under a specified trade number plate, and only while such number plate is attached to the vehicle. Insurers may also require that cover only extends to the vehicles while they are being used for the purposes for which the trade number plate is granted to the assured. These purposes are narrowly confined by the *Registration and Licensing Regulations, 1941* (r), and the cases of *Griffiths v. Studebakers, Ltd.* (s), *Westover Garage, Ltd. v. Deacon* (t), and *Green v. Dynes* (u) are examples of use of such trade vehicles outside that permitted by the regulations.

4. Register policies.—Besides the above, there is a third type of floating policy issued to motor traders. Under this policy a vehicle is only on risk if particulars of it have been entered in a special book provided for the purpose before it is taken on to the road. The entry must be made on each occasion on which the vehicle is taken out on different days (a). The premium payable under this policy fluctuates and is adjustable at the end of the policy year in accordance with the number of vehicle-days (b) actually used and the number of such days estimated in the proposal (c).

In *Laycock v. Road Transport and General Insurance Co.* (d) the defendant insurers pleaded that particulars of a car belonging to a garage proprietor to whom a register policy had been issued, had not been entered in the register. This car had run down the plaintiff and killed her child, and she was claiming against the insurers for a declaration of indemnity. The action was settled, but it seems fairly clear that the vehicle was not on risk at the time of the accident.

5. Hire driver policies.—Policies issued to cover persons who hire cars to drive themselves are of two kinds. First, there is the policy, or cover, issued separately to each hirer by the owner, who acts as the agent of the insurers. This is often carried out by the insurers issuing a general policy to the owner which gives him the right to issue what may be called "sub-policies" to each hirer. These involve no special difficulties, and their validity and effect are determined by the general principles applicable to motor insurance contracts (e). Second, there is the type of policy issued to the owner of the hire vehicles, which purports not only to cover the use of the hired vehicle by customers but to give such customers an indemnity against third party liability which may be incurred by them whilst driving the hired vehicle (f).

In *Richards v. Port of Manchester Insurance Co.* (g) the defendant Brain hired out cars for driving by customers. He was insured with the defendant

(r) S. R. & O., 1941, No. 1149, Part II, dealing with the terms on which General Trade Licences and Limited Trade Licences will be granted.

(s) [1924] 1 K. B. 102 (carriage of more than two persons beside the driver).

(t) [1931], 47 T. L. R. 509 (delivery of demonstration goods by prospective purchaser in trade on his own).

(u) [1938], 159 L. T. 168 (using car for tuition of learner for payment).

(a) *I.s.* if taken out twice on one day only one entry is necessary, which must, however, be made before the first outing.

(b) A vehicle-day is constituted by one or more outings of one vehicle on any one day.

(c) See *ante*, p. 325, as to the effect of this section on "ticket" policies.

(d) [1940] 67 Ll. L. R. 250.

(e) See *ante*, chapter II, pp. 105 *et seq.* And see, as to agency in motor insurance, *ante*, chapter VII, p. 473.

(f) See, e.g., *South East Lancashire Insurance Co., Ltd. v. Croisdale* (1931), 40 Ll. L. R. 22.

(g) (1934), 50 Ll. L. R. 88.

company under a policy which entitled him, as their agent, to issue sub-policies in the form of cover-notes. The head policy contained a clause to the effect that it did not cover driving by Jews, actors, actresses, Air Force officers, turf commission agents, undergraduates or foreigners. A car was hired to X, and a cover notice issued to him, a Jew. X incurred liability in respect of bodily injuries to Richards. The company repudiated liability on the ground that X was a Jew. Richards brought an action against both defendants on the ground that they had caused or permitted X to drive, and that he had suffered damage by reason of X's inability through lack of insurance to compensate him for his injuries. GODDARD, J., held (*h*) that there was no cause of action against the insurers, but that there was, on the basis of *Monk v. Warbey* (*i*), against Brain. The Court of Appeal upheld this decision (*k*).

Besides being a concrete illustration of the application in practice of the principle of *Monk v. Warbey* (*l*) and of the limits of such application, this case raises questions of interest as to the effect of such clauses which exclude certain classes of persons. These are :

- (1) Are such clauses void as being against public policy ?
- (2) Are such clauses void for uncertainty ? (*m*)

1. It is suggested that it might be regarded as against public policy to exclude British subjects of a particular race or religion or members of a particular branch of His Majesty's forces (*n*). In some countries, such as South Africa, where there are constitutional enactments prohibiting any discrimination between different classes of British subjects, this might well be so. It is submitted, however, that the rule of public policy would not be strong enough to override the principle—which is also one of public policy—that people must be at liberty to make whatever contract they please.

2. The second question raises difficulties of real practical importance.

(i) *Who is a Jew ?*—Is the test race, or religion, or both (*o*). Thus a person of Jewish origin who had adopted the Christian faith would be in a doubtful position. So to a greater degree would a Jew who had abandoned his own faith without adopting any other. Persons of mixed parentage would also be in a doubtful case.

(ii) *Actors and Actresses*.—Are amateur actors included ? Does a retired actor come under the ban ?

(iii) *Air Force Officers*.—Who are these ? Are only regular officers aimed at, or does the exclusion cover members of the reserve and auxiliary forces ? Are officers in foreign services excluded ?

(iv) *Turf Commission Agents*.—The definition of this class would present less difficulty.

(v) *Undergraduates*.—What undergraduates are included ? Does a man of 50 with a faultless driving record of 30 years who happens

(*h*) On the trial of a preliminary issue on points of law.

(*i*) [1935] 1 K. B. 75.

(*k*) (1934), 50 Ll. L. R. 132.

(*l*) There have been cases in the law of landlord and tenant where it has been held that a landlord acts unreasonably if he refuses his consent to an assignment of the lease to Jews.

(*m*) The authorities on uncertainty are not numerous and are mostly to be found in cases on restraint of trade clauses in service agreements. In one sense this exclusion of classes is the restraint of trade, but it is submitted that the rule in regard to that would not apply.

(*n*) Note that the *ejusdem generis* rule of construction cannot, it is submitted, be applied to this clause.

(*o*) Cf. the policy in *Spraggon's Case*, discussed below, where the exclusion was of those of the Jewish faith.

never to have taken a degree come within the class? Are only undergraduates of Oxford or Cambridge referred to, or would that status in any university in the world apply?

(vi) *Foreigners*.—An attempt to define this class raises in their most acute form the difficulties suggested above. Is an Irishman a foreigner? Is a citizen of the U.S.A.? Is a naturalised British subject? (p) These questions have been referred to in another context in the last chapter, where it will be seen that their solution appears from a legal, if not from the common-sense, point of view, almost impossible.

It is suggested that these difficulties of application (apart from the difficulty of ascertaining whether a particular person in fact comes within one or other of these classes when they have been accurately defined) might well be held to render such clauses void for uncertainty. Nevertheless, as Sir WILFRED GREENE, M.R. (q), said in *Spraggon v. Dominion Insurance Co.* (r), in many ways it is in the public interest that insurance companies should be able to limit the cover in the case of car-hirers—a very special class—to certain approved classes of people. The excluded classes should, however, be clearly defined.

Richards v. Port of Manchester Insurance Co. (supra), never came to final trial, but the points raised by GODDARD, J. (s), in that case as to the extent of the authority of the hirer-out of the cars to issue a cover note to the hirer driver came up for decision in *Spraggon v. Dominion Insurance Co.*; *Dominion Insurance Co. v. Tomrley* (t), a consolidated action, in which an injured third party who had recovered judgment against the hirer-driver, Tomrley, for personal injuries in a running-down action, sought to obtain the judgment sum from the insurers (u), while the insurers sought a declaration against the third parties and the hirer-driver that the hirer-driver was never a person insured by the policy.

The car which Tomrley was driving was a car which he had hired from one Warnes, who owned cars which he let on hire to persons who proposed to drive themselves. The Dominion Insurance Company had issued to Warnes a policy by the terms of which they undertook to indemnify any person hiring one of the specified cars, subject to certain limitations. One of these limitations was that the hirer must not belong to certain specified classes of persons, such as undergraduate students, turf accountants, members of the armed forces or members of the theatrical or musical professions, publicans, jockeys or members of the Jewish faith. The hirer himself had to be over 25 and under 60 and to be free from any physical defect. He could never have had any motor proposal or policy declined or cancelled, and he must have held a driving licence free from indorsements for at least 12 months prior to the date of hire. Further, the policy stated that no person should be a hirer who had not satisfied the insured (Warnes) by an actual driving test that he was a careful and competent driver, and who had not, immediately on passing the driving test, forwarded the hirer driving proposal form to the company by registered post. The proposal form required the hirer-driver to state that he had driven motor cars regularly for 12 months, that he had never been prosecuted under the Road Traffic Acts, to warrant that the answers were true and to undertake to post the proposal form to the insurance company by registered post to its head office. The insurance certificate was issued to Warnes.

(p) See note (w), p. 653, *ante*.

(r) (1941), 69 Ll. L. R. 1, at p. 3, *vide infra*.

(t) (1940), 67 Ll. L. R. 529; on appeal (1941), 69 Ll. L. R. 1 (C.A.).

(u) Under s. 10 (1) of the Road Traffic Act, 1934; chapter V, *ante*.

(q) Now Lord GREENE, M.R.

(s) Now Lord GODDARD, C.J.

Tomrley failed conspicuously to pass through the narrow gap left by these exclusions and conditions to attain cover under the policy. His licence was endorsed for a speeding offence, he passed no driving test before Warnes' eyes and, though he signed the proposal and the declaration therein contained, the proposal was never sent to the insurers, by registered post or otherwise. His driving was clearly not a liability covered by the terms of the policy, and STABLE, J., confirmed by the Court of Appeal, found against the injured pedestrian Spraggon, and for the insurance company. On appeal, the point was taken that Warnes had been put into such a position by the insurance company that he was empowered by them to represent to persons who hired cars from him that he could in their name insure them against the risks specified in the Road Traffic Act. In fact Warnes had told Tomrley before the car was driven by Tomrley that he, Tomrley, was insured. The Master of the Rolls (a) dealt with the point by saying that the scope of Warnes' authority to accept hirers on the footing that they should be insured was strictly limited, as appeared on the very face of the documents. Warnes had no actual authority to bring Tomrley, who was not capable of fulfilling the required conditions, within the benefit of the insurance. Nor was there any ostensible authority, and it could not be said that Warnes had been held out by the insurance company as having authority to represent to persons like Tomrley that they were insured. The ostensible authority and the actual authority were in this case the same, and they both appeared on the face of the document handed by Warnes to Tomrley to sign. Nor, lastly, was it possible to construct out of the proposal form and the document referred to in it as a "usual type of policy," a contract between the Dominion Insurance Company and Tomrley. He was on the face of it not a competent party to enter into such a contract.

The case is a good example of the pitfalls lying in the way of would-be hirer-drivers (b). As was emphasised by Lord GODDARD, C.J., in *Knowler v. Rennison* (c), a duty lies on every driver of a motor vehicle to make sure *himself* that he is covered by the terms of some policy before he takes the vehicle on the road. It is clear from *Spraggon's Case* that he should not rely on the word of the person who hires the car to him.

6. Motor traders' customers' risk.—Where the assured delivers his car to a motor trader (d) for repair or sale he is often obliged to sign a document or otherwise bind himself by contract (e) to the effect that any use of the car by the trader is at his risk. Thus in *Rutter v. Palmer* (f) the owner of a car who had agreed that it should be at his risk when in the hands of repairers was unable to recover damages for injury to the vehicle caused by the negligence of the repairers' servant.

In such cases the question arises as to what are the owner's duties in regard to third party insurance? Each case must be decided according to the agreement entered into in that case, but the following general propositions should be borne in mind:

(1) The owner who delivers his car to a repairer will be liable to a third party who sustains personal injuries and is unable to recover from the repairer because the repairer has no insurance (g).

(a) (1941), 69 Ll. L. R. 1, at p. 3.

(b) See also the very similar case of *Haworth v. Dawson* (1947), 80 Ll. L. R. 19; chapter IV, *ante*, p. 285, note (H).

(c) [1947] K. B. 488; [1947] 1 All E. R. 302.

(d) Cf. the custody of an innkeeper. See *ante*, p. 82.

(e) E.g. he may find himself bound by the terms of a notice displayed in the garage.

(f) [1922] 2 K. B. 87.

(g) *Monk v. Warbey*, [1935] 1 K. B. 75.

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(2) The owner's policy will not as a rule cover any use by the repairer (h).

(3) An agreement binding on the owner may constitute the repairer's (or his servant's) driving of the car driving on behalf of the owner, so as to make the owner directly liable to an injured third party (i). In this case the owner's liability to the third party would *not* be contractual liability (h).

(4) The owner may be directly responsible for negligent driving if he is present in the car at the time (l), and in this case his policy will probably (h) not cover him.

(5) The agreement made with the repairer may bind the owner to indemnify the repairer against any liability incurred by the repairer to third parties (m).

This will be a contractual liability (n) and will not as a rule be covered by the owner's policy (o), and on the other hand is not required by statute to be covered (p).

(6) The case of *Rutter v. Palmer* (q) did not decide (r) that where the owner leaves the car with a dealer on terms that it is to be driven "solely at customer's risk" the owner is directly liable to third parties for negligent driving by the dealer or his servants (s), but in *Wilson v. Ford* (t) it was held that the owner must indemnify the dealer for such liability.

PART 7.—TERMINATION OF POLICY OTHERWISE THAN BY REPUDIATION

1. Generally.—Apart from repudiation, the effect of which upon the continuing existence of a motor policy is considered later (a), a policy may, be determined in any one of the following modes. Termination is here used of course, as signifying termination of the policy as regards future rights and liabilities thereunder. The modes of termination described, do not

(h) If it contains, as it usually will, an exclusion against use for the purposes of the motor trade, or is limited to use for "private pleasure" or, etc. See *ante*, chapter IX, pp. 570 *et seq.*

(i) See *Reichardt v. Shard* (1914), 31 T. L. R. 24; *Parker v. Miller* (1916), 42 T. L. R. 408; *Britt v. Galmoye and Nevill* (1928), 44 T. L. R. 294; *Barnard v. Sully* (1931), 47 T. L. R. 557.

(l) And therefore not exempt from the insurance required by s. 36 (1) (b) of the Road Traffic Act, 1930. *Ante*, chapter IV, p. 188.

(f) *Pratt v. Patrick*, [1924] 1 K. B. 488; *Samson v. Asthison*, [1912] A. C. 844; *Dewar v. Tasker & Sons, Ltd* (1907), 23 T. L. R. 259; *Harris v. Fiat Motors, Ltd.* (1907), 23 T. L. R. 504; cf. *Smith v. Moss*, [1940] 1 K. B. 424; [1940] 1 All E. R. 469; and see *ante*, p. 48.

(m) See note (r) *infra*.

(n) Since the driver will usually be the dealer's servant, and the rule "a man cannot serve two masters" applies. But exceptions may occur, as, for example, when the owner, present in the car driven by the dealer's servant, urges the servant to an excessive speed to show the car's paces to a prospective purchaser.

(o) Most policies expressly except contractual liability.

(p) S. 36 (1) (b) (iii), Road Traffic Act, 1930, *ante*, chapter IV, p. 189.

(q) [1922] 2 K. B. 87.

(r) The point decided was that the dealer was not liable to the owner for damage to the car. In the accident which caused that damage a third party's property was also injured, but the report does not show who was responsible to the third party, or who paid for this.

(s) But the Court was of opinion that the owner thereby indemnifies the dealer against third-party risks and this view was applied in the case next cited.

(t) Unreported save in *Pratt & Mackenzie on Highways*, 18th Edn., p. 817, which see, and cf. the other cases there cited.

(a) Both of insurers or of assured. See *post*, pp. 664 *et seq.*

with the exception of insolvency (b) and cancellation by special agreement (c) affect rights or liabilities accrued due at the date of determination.

Return of Certificate.—The insured is under a statutory duty (d), for the failure to observe which he can be prosecuted (e), to return his motor insurance certificate whenever his policy comes to an end *with his consent* (f) otherwise than by effluxion of time, or is cancelled by mutual consent or by virtue of any provision in the policy (g). The insurers' duty to notify the Minister of Transport upon termination of the policy is described elsewhere (h).

2. By effluxion of time.—The policy comes to an end at the expiry of the period for which it was issued, unless renewed (i).

3. By cancellation or mutual agreement.—Cancellation under a cancellation clause has been described in detail before (k) and a sufficient account of cancellation by mutual consent given. It should be noticed that cancellation by mutual consent is often effected in pursuance of an agreement compromising accrued rights and liabilities. Moreover, as has been pointed out, what purports to be an alteration of the policy may in law amount to the rescission of the policy (l).

4. By the destruction or transfer of interest in the assured vehicle.—In considering this mode of determination the effect of sub-section (4) of section 36 of the Road Traffic Act, 1930, upon the necessity for insurable interest in motor insurance cases must be remembered. It has been submitted, however, that although insurable interest is not now altogether essential the extinction of the assured's whole interest in the subject matter of the policy (m) will determine the policy itself (n), in so far as the possession of that interest formed the basis of the contract (o).

If the insured vehicle is completely destroyed or if the assured parts with the whole of his interest in it, the policy automatically determines (p). It seems doubtful whether the transfer of part, or an alteration in the character of, the assured's interest in the vehicle will operate to determine the policy (q). Each case must depend upon the particular terms of the policy (of which the partial transfer of interest may be a breach) (r) and upon the extent of the transfer (s).

(b) *Post*, p. 658.

(c) See text above.

(d) By Regulation 14 of the Motor Vehicles (Third Party Risks) Regulations (S. R. & O., No. 926 of 1941), *ante*, chapter IV, p. 217; and see section 14 of the Road Traffic Act, 1934, *ante*, chapter V, p. 334.

(e) See *ante*, chapter IV, p. 266.

(f) It is extremely doubtful what this means. Does it, for example, include determination by transfer of the vehicle or death? (*post*, p. 661).

(g) See *ante*, p. 334.

(h) *Post*, p. 686.

(i) As to renewal, see *ante*, chapter VII, p. 408.

(k) *Ante*, p. 602.

(l) *Ante*, p. 630.

(m) See *ante*, p. 639.

(n) As to partial extinction it depends upon whether the risk is affected. See note (q) *infra*.

(o) See *Rogerson v. Scottish Automobile and General Insurance Co.* (1931), 48 T. L. R. 17.

(p) See *Rogerson v. Scottish Automobile and General Insurance Co., Ltd.* (1931), 48 T. L. R. 17; *Rayner v. Preston* (1881), 18 Ch. D. 1; *Castellain v. Preston* (1883), 11 Q. B. D. 380; *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1938] 2 All E. R. 267; *Tattersall v. Drysdale*, [1935] 2 K. B. 174.

(q) See *Welford on Accident Insurance*, 2nd Edn., p. 136.

(r) E.g. a breach of a statement in the proposal form having continuing promissory force that the vehicle belongs to the assured only.

(s) E.g. if the assured sells the vehicle, but retains it and uses it for some time before delivery to the buyer.

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Thus in *Jenkins v. Deane* (f) GODDARD, J., held that the taking in of a new partner did not terminate a motor policy issued to a firm. The decision, however, can safely be regarded as not a direct authority on this point, being directed to another aspect of the matter (u). It is important to consider separately the termination of the policy by sale and by loss. The operation of a sale to determine the assured's interest in the vehicle has been summarized in an earlier chapter (a). It should be added that there the assured is entitled to an indemnity from his insurers in respect of the loss or destruction of the vehicle and is also entitled to the purchase money from the buyer, he cannot, in the event of the indemnity becoming payable, retain both. If he is paid the purchase money he cannot claim the indemnity; if, not having been paid the purchase money he receives the indemnity, he must refund it if afterwards he receives the purchase price (b). The difficult question which might arise in these circumstances under a valued policy where a car insured for £500 is sold for £200 is referred to later (c).

Hire Purchase.—As has been seen, where the insured vehicle is being acquired by the assured under a hire purchase agreement, the policy generally provides by an endorsement (d) that it shall come to an end on the termination of the hire purchase agreement otherwise than by purchase of the vehicle by the assured (e).

Loss of Car.—The mere loss of the insured vehicle will not necessarily determine the policy since the assured is not thereby deprived of his interest in it. Where, however, after a reasonable time has expired, it may be assumed that the vehicle has been abandoned by the assured, it may be assumed that he has lost his interest in it. The assured whose vehicle is stolen cannot therefore go on driving a borrowed or hired car indefinitely under a policy extending to driving cars other than his own.

5. (a) Insolvency of the assured.—The effect of the insolvency (f) of the assured has been fully considered in a previous chapter.

(b) Insolvency of insurers.—It is generally held (g) that the order for winding up of a company automatically determines any policy covering risks of the various classes—now including motor insurance—which come within the Assurance Companies Act, 1909 (h). This assumption rests upon the authority of the decision in *Re Law Car and General Insurance Corporation* (i), in which it was held that where there was an unliquidated sum due to the assured in respect of an indemnity under the policy, that sum could not be taken into account in estimating the assured's proof, because by section 17 of the Assurance Companies Act, 1909, it was provided that the value of the policy should, for the purposes of proof, be calculated in the manner specified therein. In that case NEVILLE, J., held that section 17 had no application to actual losses which occurred, since the winding up did not automatically terminate the contract.

His decision was reversed by the Court of Appeal, who held that the assured could not make any claim in respect of accidents which had occurred since the order, the indemnity in respect of which had not been quantified.

(f) I.e. alteration of risk.

(g) *Ante*, chapter II, p. 81.

(c) *Post*, chapter X.

(e) As to the effect of this, see *ante*, p. 633.

(f) Insolvency = bankruptcy of an individual or liquidation of a company.

(g) See, e.g., Wellford on Accident Insurance, 2nd Edn., p. 133, and Wellford & Otter-Barry on Fire Insurance, 4th Edn., p. 477.

(h) 2 Halsbury's Statutes 724, as amended by s. 42 (1) of the Road Traffic Act, 1930, and the Assurance Companies Act, 1946; see p. 227, *ante*.

(i) [1913] 2 Ch. 103.

(u) See Chalmers' Sale of Goods Act, 1893.

(b) *Castellain v. Preston* (1883), 11 Q. B. D. 380.

(d) As to endorsements see *ante*, p. 631.

BULKLEY, L.J., dissented, but appeared to agree that it must be assumed that the winding-up order automatically terminated the policy. It should be noted, however, that this part of the decision was not strictly necessary to the main point decided, viz. that the proof in respect of claims under the Workmen's Compensation Act for which the indemnity had not been quantified could not be admitted. Indeed, COZENS-HARDY, M.R. (h), expressly distinguished damages recovered against the assured as not being required to be valued so as to come within section 17 of the Assurance Companies Act. This decision was followed by the Court of Appeal in *Re United London and Scottish Insurance Co., Ltd., Brown's Claim* (l), where a ship insured under a policy covering fire only was destroyed by that event a few days after winding-up order of the insurance company had been made. In this case it seems to have been assumed that the decision in *Re Law Car and General Insurance Corporation* (m) would apply—though it can only be inferred upon what grounds—and the only question argued was as to whether the policy came within the Assurance Companies Act, it being unsuccessfully contended that it was a marine policy to which the Act does not apply.

The effect of winding up upon a motor policy cannot therefore be said to have been determined by either of the cases mentioned above. Suppose, for example, that after the winding-up order has been made, or after the date to which it relates back, an assured incurs liability to a third party (n). If the winding-up order operates automatically to determine the policy as from the date upon which it was made or from that to which it relates back, no question arises, since the policy is not in force, and the extent of the assured's proof in respect of the termination of his policy is clearly limited to a proportion of the unexpired premium as held in the *Law Car Case* (o). It is submitted, however, that there is nothing in the Assurance Companies Act, 1909, which affects the ordinary rule that the winding up of a company does not automatically determine the contract (p), and that the *Law Car Case* (o) did not necessarily decide that there was.

" If the Act means that the valuation in the manner prescribed by the Act is to be universal it would apply equally to the case of the voluntary winding-up of a solvent company in which a solvent company would be able to free itself from all future liabilities under its policies by returning to the policy holders the proportion of premium unexhausted at the date of winding-up " (q).

The matter is of academic interest since the coming into operation of the M.I.B. Agreements (r) and the Assurance Companies Act, 1946 (s).

6. Assignment of policy.—It will have been noticed that the specimen policy which was examined in the last chapter (t) did not contain an assignment clause. But a motor policy is, apart from any term therein,

(h) *Re Law Car and General Insurance Corporation*, [1913] 2 Ch. 103, at p. 118.

(l) [1915] 2 Ch. 167.

(m) *Supra*.

(n) Other than a " Road Traffic Act liability " In the unlikely event of an insurer being unable to meet his liabilities under third party motor insurance policies issued by him, M.I.B. will, if the liabilities arise after July 1st, 1946, satisfy the judgments obtained by the third parties against the assured under the M.I.B. Agreements—see chapter VI, *ante*.

(o) *Re Law Car and General Insurance Corporation*, [1913] 2 Ch. 103.

(p) See Chitty on Contracts, 8th Edn., p. 222, and *Re Northern Counties of England Fire Insurance Co., MacFarlane's Claim* (1880), 17 Ch. D. 337.

(q) *Per* NEVILLE, J., in *Re Law Car and General Insurance Corporation*, [1913] 2 Ch. 103, at p. 112.

(r) See chapter VI, *ante*.

(s) As to the stringent requirements of this Act as to the financial stability of authorised insurers, see chapter IV, *ante*, p. 231.

(t) *Ante*, pp. 498 *et seq.*

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unassignable without the consent of the parties (a), and that this is so whether the assignment is by act of the party (b) or by operation of law (c). It follows that assignment can only be affected by novation, which will terminate the policy so far as the original assured and policy are concerned.

Assignment of the policy must of course be distinguished from assignment of the right to claim payment of monies accrued due under the policy. This right is always assignable unless expressly prohibited by the policy, and passes by operation of law equally as by agreement (d). Thus in *Jenkins v. Deane* (e) the assured assigned his right to claim payment of an indemnity for third party liability to the third party to whom the liability had been incurred, and the same transaction took place in *Barrett v. London General Insurance Co.* (f) and *Taylor v. Eagle Star Insurance Co.* (g).

Many policies, however, contain a clause which expressly prohibits assignment without the consent of the insurers, or defines the limits within which it may be effective. An example of such a clause is given here, since it contains features of special interest, which are considered below.

"Policy not assignable.—This policy is a contract personal to the assured and is not assignable in any case whatsoever, and no person save the assured, or, in the case of his death, his legal personal representative, shall have any right against the underwriters, either as assignee or transferee of any interest in the subject-matter hereof or of any right to receive moneys payable hereunder either before or after loss and whether admitted or not or in any other case whatsoever, save as appears by endorsement hereon and signed by the underwriters."

This clause has the following important features :

(1) It apparently excludes the transfer to third parties of the assured's rights by operation of the Third Parties Act, 1930 (h). In so far as it purports to do this, the clause is, it is submitted, void (i).

(2) It is not clear whether it preserves the policy after the assured's death so as to entitle the assured's personal representative to drive or to enable some person on his behalf to drive the insured car under the policy. It is submitted that it does not, but merely preserves the personal representative's right to claim payment under the policy of a sum accrued due to the assured before his death.

(3) It not only prohibits assignment of the policy but (with the exception noted) prevents assignment of the right to claim monies due under the policy. Thus apparently the assured's trustee in bankruptcy would have no right to claim payment for the loss of a car destroyed by fire before the bankruptcy. This however is doubtful.

The questions as to the effect of assignment upon an arbitration clause (j), and as to how far the purported assignment of a policy containing a prohibition such as the above constitutes a breach of contract, are considered

(a) I.e. it cannot be assigned by either assured or insurers without the consent of the other. *Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1938] 2 All E. R. 267, chapter II, p. 93, *ante*.

(b) I.e. by agreement between assignor and assignee.

(c) I.e. upon death, bankruptcy, or under the Third Parties (Rights against Insurers) Act, 1930, *ante*, chapter III.

(d) See further, *ante*, p. 646.

(e) (1933), 103 L. J. K. B. 230.

(f) [1935] 1 K. B. 238.

(g) [1940], 67 Ll. L. R. 136.

(h) Third Parties (Rights against Insurers) Act, 1930, *ante*, chapter III, p. 120.

(i) See *ante*, chapter III, p. 120.

(j) I.e. as to how far the arbitration clause is binding, upon assignment of monies accrued due under the policy, as between insurers and assignee.

elsewhere (m). Where assignment of the policy in the full sense is permitted, this is usually effected by endorsement, and operates as novation (n)—that is, a new contract—the endorsement therefore requiring stamping (o).

7. **Death of the assured.**—It is submitted that the death of the assured automatically puts an end to the policy, at any rate in so far as it covers third party liability. This, it is submitted, follows from the personal nature of the contract (q), which prevents its assignment without the insurers' consent (r). Thus, after the assured's death nobody can lawfully drive the ex-insured car on the road (s), since, if he does so and incurs third party liability, he will be unable to enforce any indemnity under the policy (t).

It has been suggested (u), however, that those benefits of a current policy might pass to the executor of the deceased assured granted in respect of fire and theft. With regard to third party liability and damage caused to the insured vehicle by the driving thereof, three instances may be given (v):

(i) The assured, driven by his chauffeur, has a heart attack and dies. The chauffeur, while driving his deceased master back to his home, has an accident. On the authority of *Digby v. General Accident Fire and Life Assurance Corporation, Ltd.* (w), it is submitted that the chauffeur, having permission and authority to undertake that journey, would be covered.

(ii) The assured has stated in the proposal form that his wife will normally drive the car as well as he himself. Two weeks after the assured's death, the wife drives, without informing insurers of her husband's death, and has an accident. It is submitted that in law she would not be covered by the policy (x).

(iii) The assured is killed in a motor accident, and his car is damaged, though not badly. A helpful bystander undertakes to drive the car to the assured's home (not to a garage for repairs) and on the way has an accident. In law, again, it is submitted that he would not be covered (y).

As in the case of assignment, a distinction must be drawn between the effect of death upon the policy and the effect of death upon rights accrued due under the policy to the assured before his death. As regards these last they clearly pass to the deceased assured's personal representatives (a). Thus, if the assured before he died incurred liability to a third party, the indemnity due to him in respect thereof would pass to his personal repre-

(m) And whether, if it is a breach, it entitles the insurers to repudiate liability under the compendious condition precedent clause. As to the arbitration clause, see *ante*, p. 611, and as to breach of contract, *ante*, p. 623.

(n) As to novation, see 7 Halsbury's Laws, 2nd Edn. 314.

(o) *Royal Exchange Assurance Co. v. Hope*, [1928] Ch. 179, and see *ante*, p. 632.

(q) See last page.

(r) See *ante*, p. 93.

(s) *I.s.* under s. 35 of the Road Traffic Act, 1930, chapter IV, p. 163.

(t) See also *ante*, p. 134. It should be noted that this has nothing to do with the rule *actio personalis moritur cum persona*, and is unaffected by the Law Reform (Miscellaneous Provisions) Act, 1934; 27 Halsbury's Statutes 220.

(u) *Ante*, p. 115, by analogy with the position of a bankrupt assured.

(v) There is apparently no legal authority of direct bearing on this point.

(w) [1943] A. C. 121; [1942] 2 All E. R. 319; see Chapter VIII, *ante*, p. 520.

(x) *Sed quære*: if she had general authority to drive the car, could she not, by *Digby's Case* (*supra*), continue to exercise that authority during the currency of the policy?

(y) The point has never been taken by insurers, and it is most unlikely that it ever will be, unless the volunteer driver should be clearly unfitted to drive any car.

(a) See further, *ante*, pp. 646 *et seq.*

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sentatives. The rights of a third party under the Third Parties Act, 1930 (b), are expressly preserved by that Act in cases where the assured dies (c), and the rights of a third party under section 10 of the Road Traffic Act, 1934 (d), are not affected, and, of course, the third party to whom the deceased has incurred a liability may obtain judgment in respect of it against his personal representatives (f).

The procedure to be taken if there are no personal representatives of the deceased is suitably considered here. In *Watts v. Official Solicitor* (g) the widow of a man killed in a motor accident sued two defendants. After the issue of the writ one of these was killed in another motor accident. The plaintiff desired to continue her action against his estate in order to obtain against his insurers the benefits of section 10 of the Road Traffic Act, 1934. The plaintiff applied under R. S. C., Order XVI, rule 46, for the appointment of a representative, and the Official Solicitor was appointed in that capacity. The solicitors for the deceased defendant, who had been instructed to act on his behalf by his insurers, desired to continue the action as solicitors on behalf of the estate. But the Official Solicitor had decided to act in that capacity himself, and had given notice of change. The solicitors for the insurers requested him to withdraw that notice, relying *inter alia* upon a clause in the deceased defendant's policy which obliged him to be represented by solicitors nominated by insurers. It was held by the Court of Appeal that the Official Solicitor had the right to act as solicitor in defence of the action continued against him as representative of the deceased defendant's estate, and that there was no jurisdiction to order the removal of his name as solicitor upon the record.

The procedure adopted in this case should be compared with that in *In the Estate of Simpson*, and *In the Estate of Gunning* (h). In these cases the persons named died intestate leaving a cause of action subsisting and surviving against their estates by virtue of section 1 of the Law Reform Act, 1934. In neither case was there any personal representative who could be made defendant to the action.

The Court was asked to appoint, and did appoint, on the motion of the proposed plaintiff in each case, an administrator under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by section 9 of the Administration of Justice Act, 1928, who could be sued as defendant. In each case the administrator appointed was the nominee of the proposed plaintiff (i).

The Official Solicitor cannot be added to a pending action under Order XVI, rule 46, without his consent (k), and he may require, where application is made for the grant to him of letters of administration of the estate of the deceased assured, that the grant be limited to appearing as defendant in the proposed action (l). Finally, in an application for grant of letters of administration of the estate of the deceased assured to an accountant under Order XVI, rule 46, notice of motion should, it appears, be served on insurers, as they are indirectly affected.

(b) Third Parties (Rights against Insurers) Act, 1930, *ante*, chapter III, p. 120.

(c) As to these rights, see fully *ante*, chapter III, p. 134.

(d) See *ante*, p. 278.

(f) By virtue of the Law Reform (Miscellaneous Provisions) Act, 1934; see chapter I, *ante*, pp. 55 *et seq.*

(g) [1936] 1 All E. R. 249.

(h) [1936] P. 40.

(i) See also *Leon v. Alston*, [1947] K. B. 467; [1947] 1 All E. R. 261.

(k) *Pratt v. London Passenger Transport Board*, [1937] 1 All E. R. 473 (C.A.).

(l) *In the Goods of Knight*, [1939] 3 All E. R. 928.

PART 8.—RETURN OF PREMIUM

The right to return of premium is always subject to any express term there may be in the policy governing it (*n*). It may be stated that as a general rule the assured will be entitled to a return of premium in the circumstances where the insurers have never been on risk (*o*).

It should also be noted, *first*, that the premium or part of it may be returnable, although the insurers have a claim for damages (*p*) or other monies (*q*), and *second*, that the assured may often have a right to claim other monies (*r*) or damages (*s*) in addition to his claim for return of premium.

1. Full return.

1. *Where there has been a failure of consideration due to no fault on his part.*—For example, where there was never any real contract between the parties, they not having been in real agreement (*t*), or where he insures a car he is about to purchase and the purchase falls through.

2. *Where the insurers have committed some wrong, entitling the assured to declare that it is void (a) ab initio.*—An example of this would be where the insurers had to disclose that they were insolvent (*b*) or had falsely represented that they were and had thereby committed a breach of the implied duty of good faith, or had obtained the policy by fraud (*c*).

3. *Where the insurers validly repudiate the whole policy on the ground that it is void ab initio.*—Where the insurers seek to repudiate the whole policy on the ground that it is void *ab initio* either because the assured has failed to make full disclosure of or has misrepresented material facts, or because he has committed some breach of the fundamental terms (*d*) of the policy, it seems that the assured is entitled to a return of the premium. This is based on the principle that the insurers were never on risk (*d*). It seems doubtful how far this can be said to apply to motor insurance, having regard to the risks to which the insurers are subject in respect to third party claims under section 10 of the Road Traffic Act, 1934 (*e*).

By reason of that section they may be obliged to pay large sums to a third party, although as between themselves and the assured the policy is void. The insurers are therefore always on risk once they have issued a motor policy.

In practice insurers nearly always, when seeking to avoid liability under a motor policy, rely upon a breach of the express terms of the contract by the assured, and do not declare the policy void *ab initio*. Where this is done,

(*n*) For example, the cancellation clause, *ante*, chapter VIII, p. 602, which usually provides for a return of a proportionate part of the premium on cancellation.

(*o*) See cases cited in note (*d*), *infra*.

(*p*) E.g. for breach of warranty, see *ante*, pp. 433 *et seq.*

(*q*) E.g. monies paid to third parties by reason of the operation of the Road Traffic Acts, *post*, p. 687.

(*r*) E.g. an indemnity due under the policy.

(*s*) E.g. special damage, see *post*, p. 680.

(*t*) *Idem* Cf. *South East Lancashire Insurance Co., Ltd. v. Croisdale* (1931), 40 Ll. L. R. 22.

(*a*) Cf. *post*, the position where the assured treats a breach as putting an end to the policy.

(*b*) Or perhaps that they were about to go into voluntary liquidation.

(*c*) See *Refuge Assurance Co., Ltd. v. Kettlewell*, [1900] A. C. 243. It seems doubtful how far in such cases the assured can claim the return of the whole premium, since the insurers have been on risk until the policy is declared void. It is submitted that where a loss had occurred only a proportionate part of the premium would be returnable.

(*d*) See *Anderson v. Thornton* (1853), 8 Exch. 425, *per* PARKE, B., at p. 427, and *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863; *London Assurance v. Mansel* (1879), 11 Ch. D. 363.

(*e*) *Ante*, chapter V, p. 278.

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the assured cannot claim a return of the premium. But there is no principle of equity upon which the insurers can be ordered to repay the premium when they obtain a declaration under subsection (3) of section 10 of the Road Traffic Act, 1934 (*f*). Another distinction between the position in proceedings under that section and cases where, in claiming a declaration of avoidance on the ground of innocent misrepresentation or concealment, insurers have been ordered to return the premium, is that in the latter cases the insurers were not obliged to show that the policy had been obtained by the representation or non-disclosure relied upon (*g*). Moreover, in proceedings under the section it is apprehended that insurers will in many, if not in most, cases be well content to submit to an order to repay the premium if they can set off that sum against any costs awarded to them or against the nominal damages to which it is suggested they will usually be entitled in respect of the assured's breach of contract (*h*).

In *Evans v. Employers' Mutual Insurance Association, Ltd.* (*i*), the contention that insurers were estopped from relying upon avoidance of the policy by failing to return the premium was rejected.

2. Partial return.

1. *Where the insurers being a company go into liquidation.*—In this case the assured will be entitled to claim only a proportionate part of the premium, namely:

"Such portion of the last premium paid as is proportionate to the "unexpired portion of the period in respect of which the premium was "paid" (*h*).

2. *Where the policy is cancelled under a cancellation clause.*—In this case the cancellation clause usually provides for a proportionate return of premium (*l*).

3. *Where the insurers wrongfully repudiate, and their repudiation is accepted by the assured as a cancellation of the policy.*—The circumstances under which a policy may come to an end in this way are explained later (*m*). Where the policy is so treated by the assured he may, it is submitted, claim as part of his damages for wrongful repudiation, or breach of contract, a sum representing the premium for the unexpired term of the policy (*n*).

PART 9.—REPUDIATION

A proper understanding of the implications and effect of repudiation by insurers of a contract of motor insurance is made extremely difficult by the confusion and inconsistency in application in the phraseology commonly used to describe the various elements upon which repudiation may be based. There has been a similar confusion and inconsistency in the use of the word "repudiation" itself. It was not until the House of Lords delivered judgments in *Heyman v. Darwins, Ltd.* (*o*), that the confusion arising from

(*f*) *Ante*, chapter V, p. 303.

(*g*) See *ante*, chapter V, as to the onus in proceedings under the section.

(*h*) *I.e.*, either a breach of the express "warranty of truth clause" or of the implied duty to make full and truthful disclosure.

(*i*) [1936] 1 K. B. 505.

(*l*) Assurance Companies Act, 1909, s. 17; 2 Halsbury's Statutes 733. And see *ante*, p. 658.

(*j*) See *ante*, chapter V, p. 602.

(*m*) *Post*, p. 679.

(*n*) He may also, as will be seen (*post*, p. 681), claim damages for any loss which he has been caused by the wrong; thus where he only desired to insure his car up to the date of the repudiated policy, he could claim a sum representing a premium at "short period" rates.

(*o*) [1942] A. C. 356; [1942] 1 All E. R. 337.

certain dicta made in two cases formerly decided by the House of Lords (*p*), and in one case decided by the Privy Council (*q*) was finally resolved. This case, in which was considered the effect of "repudiation" of various kinds on an arbitration clause, has been fully discussed already (*r*), and the reader is referred to the several judgments therein. The different types of repudiation mentioned in that case are set out *serialim* in this section, and the rights and duties of the parties to an insurance contract under each type of repudiation are collated. It is proposed in this section to analyse and define the meaning of "repudiation," and of the terms used to describe the matters upon which it may be based, and then to give an account of the various grounds upon which repudiation may be sustained.

1. Meaning of "repudiation."—Repudiation may have one or both of two meanings. These are :

- (1) Repudiation of liability under the policy ;
- (2) Repudiation of the whole policy.

Thus in *Stebbing v. Liverpool and London and Globe Insurance Co., Ltd.* (*s*), Lord READING, C.J., pointed out (*t*) :

" In the present case the insurers are claiming the benefit of a clause in the contract when they say that the parties have agreed that the statements (*a*) are material and that they induced the contract. If they succeed in escaping liability that is by reason of one of the clauses in the policy. In resisting the claim they are not avoiding the policy but relying on its terms " (*b*).

Of these in turn :

- (1) *Repudiation of liability*.—This may be either :
 - (a) Repudiation of a liability for a particular claim (*c*) ;
 - (b) Repudiation of liability for a particular claim and for all future claims (*d*) ;
 - (c) Repudiation of liability for all claims under the policy, whether past, present or future (*e*).

(2) *Repudiation of the policy*.—This implies a declaration that the policy is, or an announcement of intention to treat it as, void of all contractual force, either from its inception (*f*) or after a particular date (*g*). Whilst repudiation of the whole policy appears in effect to be the same thing as

(*p*) *Johannesburg Council v. Stewart*, [1909] S.C. (H.L.) 53, and *Jureidini v. National British and Irish Millers Insurance Co., Ltd.*, [1915] A.C. 499.

(*q*) *Haji Mulji v. Cheong Yue S.S. Co.*, [1926] A.C. 497.

(*r*) *Ante*, pp. 611 *et seq*.

(*s*) [1917] 2 K.B. 433.

(*t*) *Ibid.*, at p. 437, quoted with approval by STESSER, I.J., in *Stevens v. Timber and General Mutual Accident Insurance Association* (1933), 45 Ll. L.R. 43, and in *Heyman v. Darwins, Ltd.*, [1942] A.C. 356 ; [1942] 1 All E.R. 337, by Lords WRIGHT and PORTER.

(*a*) *I.e.* statements in the proposal form.

(*b*) The statement of the L.C.J. which preceded the words quoted, to the effect that in avoiding the policy in the true sense the insurers would have to rely upon some matter *dahors* the policy, is not strictly applicable to motor policies in the common form, as they can usually be avoided in the strict sense by reliance upon an express term of the policy, *e.g.* the "basis" clause. See further, *ante*, pp. 611 *et seq*, and *post* p. 666.

(*c*) For example, on the ground that a condition as to notice has not been complied with.

(*d*) *E.g.* on the ground that a condition precedent to any liability on the policy has been broken.

(*e*) On the ground that a condition precedent to liability has never been complied with.

(*f*) *I.e.* void *ab initio*.
(*g*) *E.g.* on the ground that the policy, although originally valid and fully effective, has been determined. As to termination of policy, see *ante*, p. 656.

repudiating all liabilities under it, it must in fact be carefully distinguished from that.

(a) Repudiation of the whole policy *may* be based upon some ground *dehors* the express (h) or implied (i) terms of the contract or upon some breach of those terms (j).

(b) Repudiation of a liability or of some or all liabilities under the policy *can only* be based upon the breach of some express or implied term of the policy (k).

2. Meaning of "void."—Some of the variety of meanings given to this word have already been explained (l).

A. *Strict sense*.—In the strict sense the word "void" as applied to a contract signifies that the contract has never in fact existed—that is, it is void *ab initio* and barren of any contractual force—a mere nullity (m).

B. *General sense*.—In the sense in which it is generally used the word "void" means invalid either from the beginning (n) or from a particular time (o). In this sense the contract was never a mere nullity, but was one which was never after a certain date binding upon one or both of the parties and might have been repudiated by him or them at any time (p) after that date.

3. Meaning of "voidable."—Strictly speaking, therefore, there is no such thing as a "voidable" contract. The word "voidable," however, is frequently used. When it is, it is generally impossible to say whether the user is employing it as applying to "void" in a loose sense of that word or as signifying "capable of being treated at will (q) as if it were for some purposes void" (r). Whichever sense is in the mind of the user, the word "voidable" may have one or any combination of the following meanings:

(1) It may mean that the party repudiating has the choice to treat the contract as either

(i) void in the strict sense (s) indicated; or

(ii) void of all future effect after a certain date (t).

(2) The second meaning it may bear is that the party repudiating has the option of treating the contract either

(i) as void in the strict sense indicated (u); or

(ii) as *void of effect* in regard to a particular claim.

(3) It may imply that the party repudiating has the choice to treat the contract as if it were void in the general sense indicated or to treat it as completely valid (v).

(h) This can rarely be done in motor insurance cases.

(i) *E.g.* the implied term of continuous good faith. See *ante*, pp. 384, 639.

(j) *E.g.* a clause which says that the policy shall be void in certain events.

(k) Except, of course, in so far as the repudiation of a liability concurs with repudiation of the whole policy.

(l) *Ante*, chapter III, p. 137.

(m) See Anson on Contracts, 19th Edn., p. 17.

(n) *I.e.* invalid from the beginning because of failure to perform some condition precedent upon which the whole contract is based—*e.g.* the "basis" clause. See *Dawsons, Ltd. v. Bonnin*, [1922] 2 A.C. 413.

(o) *I.e.* invalid as from a particular date when the contract was determined or where the assured committed some breach of a condition subsequent upon which the binding force of the whole contract depends.

(p) *I.e.* at any time upon discovering the ground of avoidance. After that discovery they may become estopped. See *post*, pp. 691 *et seq.*

(q) *I.e.* at the choice of the party so treating it.

(r) Since if it is wholly void in the strict sense it cannot be treated otherwise.

(s) *I.e.* a mere nullity.

(t) *E.g.* after the date upon which he learns of its invalidity.

(u) *Supra*.

(v) This, of course, is impossible if the word void is in the strict sense indicated.

In the view of the author the last of the meanings enumerated above is the only sense in which the word "voidable" should properly be used, and it is in that sense only that it is used in this section of this chapter.

4. Meaning of "avoid."—The ambiguity and inconsistency (*w*) with which this word is used has been pointed out elsewhere (*x*). Its correct meaning is "to declare or render the policy void" (*y*). It must, however, be noticed that where the word "avoid" is used as describing some act on the part of the insurers, as in the phrase "The insurers can avoid the policy," it applies only to certain grounds of avoidance (*z*). If the policy is void by mistake or illegality, or has been determined by death or bankruptcy or by transfer of the insured vehicle (*a*), there is no choice but to treat it as void, and it can only be revived by a new contract (*b*).

5. Grounds of avoidance.

A. Strict meaning.—There are only two grounds upon which a contract can, strictly speaking, be said to be void (*c*)—they are: mistake and illegality (*d*). The latter may be ignored for the purposes of this book, since it would be only in the rarest of circumstances that it would be of importance in motor insurance cases. The topic of mistake as vitiating contracts has been sufficiently explained in the first chapter (*f*). This generally occurs where the assured proposes for one set of terms in his policy and the insurers mistakenly imagine he is proposing for another (*g*). It should be noted that whilst neither fraud nor innocent misrepresentation nor non-disclosure renders a contract void in the strict sense, non-disclosure or misrepresentation may in some cases produce mistake and so result in a void contract (*h*).

Thus in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (*i*), the assured had failed to disclose his real name and the fact that he had had a conviction for a motoring offence. The insurers had, as they thought, issued a policy to A without a conviction, whereas in fact the proposed assured was B with a conviction. There was therefore a mistake as to the identity and personality of the assured. There were, however, other elements which, when present, sometimes preclude the possibility of treating the contract as a nullity (*k*). It was for this reason, it is suggested,

(*w*) It is often used as meaning "evade liability." See *per* READING, C.J., in *Stebbing v. Liverpool and London and Globe Insurance Co., Ltd.* [1917] 2 K. B. 433, at p. 436, where, however, his application of the strict meaning of the word is not accurate. Cf. *ante*, p. 665, note (*b*).

(*x*) *Ante*, chapter V, p. 280.

(*y*) Using void in the general sense indicated above, and see *Stebbing v. Liverpool and London and Globe Insurance Co., Ltd.* (*supra*).

(*z*) These are mostly based on some wrong committed by the assured.

(*a*) Or the other modes of termination detailed in a previous section, *ante*, p. 656.

(*b*) See *ante*, chapter I, p. 7.

(*c*) I.e. void in the sense of "never having existed."

(*d*) Illegality at Common Law or under some statutes. Many statutes declaring that certain contracts *shall be void* are interpreted in a loose sense of the word "void." See *Anson on Contracts*, 19th Edn., pp. 16 *et seq.*

(*f*) *Ante*, chapter I, p. 5.

(*g*) See, e.g., *Fowler v. Scottish Equitable Insurance Society and Ritchie* (1858), 28 L. J. Ch. 225; *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399.

(*h*) See, as to whether this is not always the case, and therefore the real basis of the rule that non-disclosure or misrepresentation vitiates the *consensus ad idem* which is required before a contract of insurance comes into existence, *ante*, pp. 388-9.

(*i*) (1934), 49 Ll. L. R. 361.

(*k*) See *Cundy v. Lindsay* (1878), 3 App. Cas. 459; *Smith v. Wheatcroft* (1878), 9 Ch. D. 223; *Boulton v. Jones* (1857), 2 H. & N. 564; *Gordon v. Street*, [1899] 2 Q. B. 641; *Phillips v. Brooks, Ltd.*, [1919] 2 K. B. 243.

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that the Lords Justices in the Court of Appeal observed that there was some doubt as to whether the contract was void (l) or voidable (m).

But cases may well occur where non-disclosure produces mistake so as to render the contract a nullity. In cases where the non-disclosure is entirely innocent, the assured will be offering, and intending to offer, one thing, whilst the insurers will intend to accept something different (n). Thus if the assured innocently (o) but inaccurately declares that his chauffeur has no physical infirmity, he and the insurers who accept his proposal will both intend to insure driving by a sound and not an infirm man. In this case the mistake would be mutual; there is no *consensus ad idem*, and the contract is a nullity (p). Cases in which mistake occurs, or in which misrepresentation or non-disclosure coincides with mistake (q), will be comparatively rare in motor insurance cases.

B. *General meaning of "void."*—Using the word "void" in its more popular sense, a motor policy may be avoided upon any of the following grounds:

- (1) Breach of any express term going to the root of the contract (r);
- (2) Breach of any implied term going to the root of the contract (s);
- (3) Fraud.

C. *Examples of avoidance.*—The policy may be avoided in the sense explained on the ground that there has been a breach or non-fulfilment of one of its fundamental terms. The distinction between these and non-fundamental terms has previously been explained (ss).

(1) *Breaches of express terms*, the breach of which entitles insurers to avoid the contract, are, *inter alia*,

- (a) The "basis" clause in the policy or proposal form (l);
- (b) Any term which provides that the insurers shall be entitled to avoid it (u) if that term is broken or not fulfilled (u).
- (c) Breach of any term which shows an intention not to be bound by the contract (uu).

(2) *Breaches of implied terms*, the breach of which entitles insurers to avoid the contract, are, *inter alia*,

- (a) The implied condition (v) that the assured shall disclose every material fact;

(l) Using "void" in its strict sense.

(m) Another and perhaps the real ground was that the insurers were relying upon a clause in the policy which said that in the event of concealment or misrepresentation the policy should be void. The word as there used could not mean "void" in the strict sense of being a nullity.

(n) See *Fowler v. Scottish Equitable Life Insurance Society and Ritchie* (1858), 28 L. J. Ch. 225. But see note (p), *infra*.

(o) I.e. not "innocently" in the sense that he ought not to have known of the infirmity, but "ignorantly" in the sense that in fact he did not know of it.

(p) *Ante*, p. 390. See, however, *Anson on Contracts*, 19th Edn., p. 159, where mistake as to the terms of the contract is distinguished.

(q) Assuming that non-disclosure does not always produce mistake. See note (h), p. 667.

(r) E.g. breach of the "basis" clause. See *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(s) E.g. the implied term that the assured has an insurable interest in the vehicle.

(ss) *Ante*, chapter VIII, p. 497.

(t) *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413.

(u) E.g. the term to that effect in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1924), 49 Ll. L. R. 361. See note (o), *supra*.

(v) Or that the policy "shall be void," this term being construed as meaning "shall be voidable" and not as rendering the policy *ipso facto* void upon its breach.

(uu) As to this, see *post*, p. 673, where it is more conveniently treated as a ground of repudiation.

(v) Assuming that the duty of disclosure and truth is an implied condition. As to which, see *ante*, chapter VII, p. 389.

- (b) The implied condition that the assured shall continuously deal with his insurers in good faith (*w*).
- (3) *Grounds of avoidance dehors the contract.*
 - (a) Mistake (*x*) ;
 - (b) Illegality (*y*) ;
 - (c) Non-disclosure and misrepresentation if these are *not* implied conditions (*z*) ;
 - (d) *Termination of the policy* (*a*).

It should be noted that the above grounds may often, and under the usual form of motor policy usually will, coincide. Thus fraud in the making of the contract will generally constitute a non-disclosure (*b*) and be a breach of the "basis" clause (*c*), as well as amounting to the tort of deceit (*d*).

6. Grounds of Repudiation.

(a) **Repudiation of policy.**—The grounds upon which the whole policy may be repudiated are :

The grounds of avoidance given above (c).—When there is repudiation upon any of these grounds the policy may be avoided in the sense of that word defined above.

It should be recollected that usually (*f*) a ground for repudiating the whole policy will also entitle the insurers to repudiate liability under it. Where they have this choice, they may be bound by the course which they elect to take (*g*).

(b) **Repudiation of liability under the policy.**—Liability in respect of one, of all, or of some liabilities under a motor policy may be repudiated by insurers without *avoiding* the policy, on the grounds set out below. But again, insurers will be bound by their election, and if for example a ground for repudiating all present and future liability arises, and they rely upon it only for the purpose of repudiating an existing claim, they may be precluded from repudiating future claims on this ground (*h*).

1. *Non-fulfilment of terms describing or limiting risk.*—The non-fulfilment of a term which merely describes (*i*) or limits (*j*) the risk is not necessarily a breach of contract. In refusing to recognise a claim on this ground the insurers are not, strictly speaking, relying on any breach of contract and are not repudiating any liability, because there is not and could not possibly be any liability (*k*). The difference between the three classes of terms in a motor policy has already been explained (*l*). It should be observed again that a term which describes or limits the risk may also be a term having contractual force, the breach of which will entitle insurers to repudiate liability (*m*).

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- (w) As to which, see *ante*, p. 645.
 - (x) See *ante*, chapter I, p. 5.
 - (y) E.g. insurance for an illegal purpose.
 - (z) As to whether these are not, see *ante*, chapter VII, p. 389.
 - (a) It is doubtful whether this is strictly a ground of avoidance where the policy is cancelled, or expires by effluxion of time.
 - (b) See *ante*, chapter VII.
 - (c) *Ante*, chapter VIII, p. 498.
 - (d) As to which, see *ante*, chapter I, p. 5.
 - (e) *Ante*, pp. 667 *et seq.*
 - (f) For the exceptions see *ante*, p. 665.
 - (g) See *post*, pp. 691 *et seq.*
 - (h) As to waiver, election, and estoppel, see *post*, p. 691.
 - (i) E.g. the schedule giving particulars of the insured vehicle. See *ante*, chapter VIII, p. 582.
 - (j) E.g. The "limitation of use" clause, *ante*, chapter VIII, p. 570.
 - (k) This, however, gets dangerously near to hair splitting, since the same might be said of other grounds of repudiation. But see the cases cited in the text, *ante*, pp. 434 *et seq.*
 - (l) *Ante*, chapter VII, p. 433, and chapter VIII, p. 493.
 - (m) E.g. *Dawsons, Ltd. v. Bonnin*, [1922] 2 A. C. 413, as explained by SCRUTTON, L.J., in *Re Morgan and Provincial Insurance Co.*, [1932] 2 K. B. 70.

2. *Breach of an express term.*—Examples of a term the breach of which would have this effect are to be found amongst, *inter alia*, the "conditions" of an ordinary motor policy, which were explained in the last chapter (n). The breach of these may, as has been seen, entitle the insurers to repudiate liability in respect of any claim—past, present or future—under the policy, or in respect of all claims arising after the breach, or only in respect of the claim with which the breach is connected. In some cases the breach may not be a ground for repudiating any claim. In each case it is a question of construction (o). Three illustrations only need be given here.

(i) *Breach of a condition requiring notice to be given.*—The breach of this condition by itself will, as a rule, entitle insurers to repudiate liability only in respect of the claim of which notice should have been given. It will hardly ever (p) entitle them to repudiate liability in respect of claims made before the breach (q). But a motor policy may, and usually does, contain a clause to the effect that the fulfilment of all terms, conditions and clauses shall be a condition precedent to the insurers' liability in respect of any claims under the policy (r). Where the clause is present, the breach of the term requiring notice may—and again it is entirely a question of the construction of each policy (s)—entitle insurers to repudiate liability not only in respect of the claim with which the failure to give notice is connected, but in respect of all claims arising after such failure (t).

(ii) *A clause relating to the safe condition of the vehicle.*—The effect of the breach of such a clause depends entirely upon the wording of that clause and upon the presence or absence of the compendious "condition precedent" clause described above (u). The "dangerous condition" clause may merely provide that the insurers shall not be liable for any loss or liability caused by the dangerous condition of the vehicle (v). In this case, the presence of the "condition precedent" clause makes no difference, and the insurers can repudiate liability only in respect of one claim—namely, the claim for indemnity against loss (w) or liability caused by the dangerous condition. But if the clause provides that "the assured shall at all times maintain the vehicle in an efficient condition" it is a question of construction in each case whether the breach of it will entitle the insurers to repudiate liability only for claims in respect of matters caused by such condition, for claims in respect of loss or liability arising during the unsafe condition, or for any claims made at any time after the clause has been broken (x). When the clause is in this form and the policy contains a "condition precedent" clause, it seems clear that insurers can repudiate liability (y) for any claim made after the clause has been broken (x).

(n) Chapter VIII, *ante*, p. 493, and see also pp. 433 *et seq.*

(o) See *per* Lord BUCKMASTER in *Re Morgan and Provincial Insurance Co* (*supra*), *per* SCRUTTON, L. J., *ibid.*; and *per cur.* in *Dawsons, Ltd v Hornin* (*supra*).

(p) Again it is a question of construction. See last note.

(q) Assuming, of course, that the condition was complied with in regard to such prior claims.

(r) For this type of clause and its effect, see *ante*, chapter VIII, p. 623.

(s) See note (o), *supra*.

(t) Subject, of course, to the operation of waiver or estoppel (as to which, see *post*, p. 691), which would usually prevent this.

(u) For examples of such clauses which may be either conditions or exceptions, see *ante*, chapter VIII, pp. 606 *et seq.*

(v) See, e.g., the clause in *Bonney v. Cornhill Insurance Co* (1931), 40 Ll. L. R. 39.

(w) I.e. loss of or damage to the vehicle.

(x) See *Jones and James v. Provincial Insurance Co., Ltd.* (1929), 46 T. L. R. 71.

(iii) The breach of a clause prohibiting assignment of the policy without the insurers' consent will not, as a rule, be a good ground for repudiating liability to the original assured at all (a). This will, however, depend upon the exact terms of the assignment clause in each case (b), and upon the presence or absence of a "condition precedent" clause in the policy. But it is submitted that in general an attempt to do what the policy says cannot be done will be a mere nullity, and even if it be a breach of contract (c) will not give the party relying on the breach any greater right than to claim compensation for such damage as has actually been caused by it.

3. *Breach of implied term.*—The terms which may be implied in a motor policy have been discussed elsewhere (d). Whether the breach of an implied term will entitle insurers to repudiate liability only for a claim with which the breach is connected, for any claim arising after the breach, or for all claims, depends upon the nature of the implied term. But in general the breach of an implied term will either entitle the insurers to repudiate the whole policy (e) or enable them merely to resist payment of a particular claim. Thus, if it be an implied term that the vehicle shall not be used for an illegal purpose (f), this may entitle the insurers to repudiate liability for any claim arising after the breach, or only for a claim in respect of loss or liability caused by the breach.

4. *Renunciation by assured or insurers (g).*—The breach by one party of one of the terms of the policy, although not by itself entitling the other to avoid the policy or to repudiate any claim not connected with it, may amount to evidence of an intention on the part of the party in breach not to be bound by the policy (h), or of an attitude on his part to regard the contract as no longer binding upon him, or as being void (h). Where this occurs the insurers or assured, as the case may be, are entitled to accept the renunciation, and accordingly to treat the policy as no longer in existence after the date of the acceptance of renunciation. But they must in this case elect within a reasonable time after it occurs as to which course they adopt (i). If they elect to disregard the renunciation, or fail within a reasonable time to show that they have accepted it, they may be taken to have disregarded it and will be bound by the policy although they may be entitled to treat the breach constituting renunciation as ground for repudiating liability (k). For example, if the policy provides that the assured shall at all times maintain the vehicle in an efficient condition, and the insurers after six months discover that he has consistently neglected to observe this clause, they may be entitled to say, "You by your neglect to comply with one of the fundamental conditions of it have shown that you do not regard yourself as bound by the policy: we accept this attitude and for our part declare that we also are not bound by the policy from this time onwards."

(y) Again, subject to the operation of waiver or estoppel.

(a) Since motor policies may not in any case be assigned without the consent of the insurer (*Peters v. General Accident Fire and Life Assurance Corporation, Ltd.*, [1938] 2 All E. R. 267), the person to whom the policy has been wrongfully assigned may make no valid claim against insurers under the policy. See p. 659 and chapter II, p. 93.

(b) For examples of assignment clauses, see *ante*, p. 659.

(c) As to which, see *ante*, pp. 623-4.

(d) *Ante*, p. 639.

(e) As, e.g., in the case of a fraudulent claim.

(f) As to which, see *ante*, p. 643.

(g) This should strictly be regarded as a ground of avoidance; cf. *ante*, p. 669.

(h) See *Frost v. Knight* (1872), L. R. 7 Exch. 111; *Hochster v. De La Tour* (1853), 2 E. & B. 678; *Messy Steel and Iron Co. v. Naylor, Benson & Co.* (1884), 9 App. Cas. 434.

(i) See *post*, p. 691, as to election, waiver and estoppel.

(k) See *Avery v. Bowden* (1856), 6 E. & B. 953; *Cort v. Ambergate, Nottingham, Boston and Eastern Junction Rail. Co.* (1851), 17 Q. B. 127.

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The same principle applies to repudiation by the insurers, and its effect is discussed later (l).

7. Effects of repudiation.—The effect of repudiation must be considered separately under the following heads :

(a) Justifiable repudiation by insurers.

(a) *Of the whole policy.*—Where the insurers are entitled so to do, and repudiate the whole policy, the policy in all cases ceases to be in force or effective in respect of any loss or liability arising after the date of repudiation save as regards third parties protected by the Road Traffic Act, 1934 (m).

(i) *On the ground that the policy was void from the beginning (n).*—If the repudiation is on the ground that the policy was void from its inception, whether in the strict or general (o) sense, it has never been in force and the insurers are entitled to recover any loss or indemnity which they may have paid unless they are estopped from doing so (p), and the assured may recover the premium (q). In this case the insurers are not entitled to rely upon any term in the policy (r).

(ii) *On the ground that the policy has become void.*—When the insurers repudiate the policy on the ground that it has become void as from a certain date, either by breach or by termination (s), both parties are entitled to rely upon any term of the policy as binding up to the date of avoidance (t).

(b) *Repudiation of liability.*—Where there is rightful repudiation of liability it would seem that the policy remains in force for all purposes. Even if the repudiation is based upon a ground which could be used for repeated repudiation in respect of future claims (u), the policy will remain effective for all purposes save one, and binding upon the assured, who will be obliged to continue to observe its terms and, for example, to pay any premiums which may become due thereunder (v). The exception referred to is, however, of vital importance. It is, as is submitted, that where there is repudiation of liability upon a ground which will entitle the insurers repeatedly to repudiate future claims, the policy will cease to be sufficiently "in force" for the purposes of section 35 of the Road Traffic Act, 1930 (w), since the assured will not have an enforceable right to indemnity thereunder (x). On the other hand the insurers will as a rule be estopped from adopting this attitude (a).

(l) *Post*, p. 673.

(m) I.e. those who can take advantage of s. 30 of that Act. See *ante*, p. 278, and *post*, p. 690. See also the effect of the M.I.B. Agreements, chapter VI, *ante*.

(n) I.e. *ab initio*.

(o) As to these senses, see *ante*, p. 667.

(p) As to estoppel, see *post*, p. 691.

(q) As to recovery of premium, see *ante*, p. 663, and *post*, p. 679.

(r) Since the policy never in law existed as a contract.

(s) As to the different modes in which a policy may be determined, see *ante*, p. 656.

(t) Including the arbitration clause, see *Heyman v. Darwins, Ltd.*, [1942] A.C. 356; [1942] 1 All E.R. 337, and see p. 611, *ante*.

(u) For example, if a condition precedent, such as a warranty of truth, has not been fulfilled and the insurers elect to treat this as a ground for resisting payment of one claim, reserving their right to rely upon it in regard to future claims.

(v) If, however, the premium is accepted the insurers will be estopped from further reliance upon this ground. See *post*, pp. 691 *et seq.*

(w) *Ante*, chapter IV, pp. 188 *et seq.*

(x) Cf. *ante*, p. 189.

(a) See *post*, pp. 691 *et seq.*

(b) Wrongful repudiation by insurers.

(a) *Of the whole policy.*—Where the whole policy is wrongfully repudiated the effect depends upon whether the assured accepts the repudiation as a renunciation (b) or refuses to recognise it and treats the policy as still in force.

(i) *Where the repudiation is accepted.*—If he takes the former course the policy will be determined as from the date of his acceptance of the renunciation. In this case, the effect of the repudiation will be the same as in the case of rightful repudiation and determined in the same manner—namely, according to the ground upon which the repudiation purports to be based. The assured will not be affected by the operation of any clauses in the policy (c) after the date of his acceptance of renunciation (d), with the exception of the arbitration clause (e). Whilst no loss or liability arising *after* the date of the termination of the policy (f) will be covered by it, it is doubtful whether the assured will not be entitled to claim as damages for breach of contract an amount equivalent to the indemnity to which he would have been entitled in respect of such loss or liability if the policy had remained in force. It is submitted, however, that whilst clearly entitled to indemnity in respect of any loss or liability which occurred before the date of his acceptance of the renunciation, whether as money accrued due under the policy or as damages for breach, he would in general be estopped from claiming any indemnity in respect of a loss arising after his acceptance of the insurers' renunciation (ff). In this case also there would, after the date of the assured's acceptance of the repudiation, be no policy "in force" for the purposes of the Road Traffic Act, 1930 (g).

(ii) *Where the renunciation is not accepted.*—Where the assured does not accept the repudiation as a renunciation of the whole policy, he may, as he is entitled to do, treat the policy as still subsisting (h). In this case he will remain bound by all its terms, and if later he commits a breach of them, such breach will, except in so far as the insurers are estopped (i), be as effective against him as if there had never been any wrongful repudiation by the insurers (j). If, for example, the insurers wrongfully repudiate the policy in respect of a claim A on the ground that the assured failed to disclose a material fact, and the assured chooses to treat the policy as continuing in force, he must observe all the terms of the policy in regard to claim B. Thus, if he fails to give notice of claim B he cannot

(b) The assured is in the same position as insurers (see p. 672, *ante*) in regard to treating a breach of contract as a repudiation.

(c) E.g. a "condition precedent" clause. See *Strong v. Harvey* (1825), 3 Bing. 304; *Re Coleman's Depositories, Ltd., and Life and Health Assurance Association*, [1907] 2 K. B. 798.

(d) He will of course remain bound by the operation of conditions which he had failed to observe before the repudiation. (e) See *post*, p. 681, *ante*, p. 611.

(f) I.e. the date on which the assured accepts the renunciation.

(ff) See *Re Law Car and General Insurance Corporation*, [1913] 2 Ch. 103.

(g) S. 35, *ante*, chapter IV, p. 163.

(h) See *Player v. Anglo-Saxon Insurance Association, Ltd.* (1930), 38 Ll. L. R. 62.

(i) As to estoppel, see *post*, p. 691.

(j) See *Avery v. Bowden* (1856), 6 E. & B. 953.

claim to be indemnified in respect of it (*k*). But it is doubtful how far he is bound by all the terms in regard to claim A. The insurers who have repudiated a claim may be precluded (*l*) from relying upon a failure to observe the terms relevant to that claim *after* (*m*) repudiation (*n*). Apart from this the policy would be binding and effective for the purposes of section 36 of the Road Traffic Act, 1930 (*o*).

(*b*) *Of liability under the policy.*—Where liability under the policy in regard to a particular claim is wrongfully repudiated, a breach of contract will have been committed by the insurers. In some circumstances—as where, for example, the ground relied upon is non-disclosure (*p*)—repudiation may amount to evidence of such an intention not to be bound by the whole policy as entitles the assured to treat it as a renunciation, with the consequences already described. But in many cases mere repudiation of liability under the policy—as, for instance, where the insurers refuse to recognise a claim on the ground that notice thereof was not given in time—will not be sufficient evidence of an intention not to be bound by the policy as will entitle the assured to regard it as a renunciation. In this case the policy remains in force for all purposes (*q*), and the wrongful repudiation will, save in so far as it creates an estoppel (*r*), have no other effect than to give the assured a right to damages for its breach (*s*).

8. Effect of repudiation in regard to third party proceedings.—

At the outset it must be remembered that the Road Traffic Acts only apply to certain classes of liability (*t*) and only to certain classes of third parties (*u*). Cases will still arise (*v*), therefore, where insurers who have repudiated leave the assured to deal with a third party claim himself. It should also be observed that, whilst insurers who repudiate in practice often take over the conduct of the assured's defence, they are not entitled to insist upon doing so, at any rate where the repudiation is accepted by the assured as a renunciation of the policy (*w*).

When the insurers wrongfully repudiate the policy or liability under it, and leave the assured to his own devices in regard to a third party claim which has been made against him, the question arises as to his position in regard to that claim. It is submitted that the position will vary according to whether the assured treats the repudiation as a renunciation (*x*), or whether

(*k*) See *Player v. Anglo-Saxon Insurance Association, Ltd.* (1930), 38 Ll. L. R. 62, and see *Avery v. Bowden*, (1855), 25 L. J. Q. B. 49.

(*l*) By estoppel or waiver, as to which, see *post*, p. 691.

(*m*) E.g. a clause requiring him to make no admission to or settlement with a third party. See further, *post*, p. 675, and see *Tustin v. Arnold & Sons* (1915), 84 L. J. K. B. 2214; *Hulton (E.) & Co., Ltd. v. Mountain* (1921), 37 T. L. R. 869.

(*n*) See *Strong v. Harvey* (1825), 3 Bing. 304. *Re Coleman's Depositories, Ltd. and Life and Health Assurance Association*, [1907] 2 K. B. 798.

(*o*) *Ante*, chapter V, pp. 163 *et seq.*

(*p*) I.e. upon a term making full disclosure a condition precedent to the right to make any claim under the policy.

(*q*) For an example, see *Player v. Anglo-Saxon Insurance Association, Ltd.* (1930), 38 Ll. L. R. 62.

(*r*) As to estoppel, see *post*, p. 691.

(*s*) Save, perhaps, for the operation of clauses relevant to the claim repudiated. See last paragraph in text above, and note (*m*), *supra*.

(*t*) E.g. they do not apply to damage to property.

(*u*) They do not apply, e.g., to voluntary passengers.

(*v*) When the third party claim is one in respect of which insurers are liable to satisfy the judgment under s. 10 of the 1934 Act (*ante*, p. 278) they usually, when repudiating, take control of the proceedings "without prejudice," if the assured allows them to do so.

(*w*) See *post*, pp. 675 *et seq.*

(*x*) See *ante*, p. 673.

the policy remains binding upon him (y). He is under a general duty to minimise any loss occurring under the policy (z), and he is also obliged, if a breach of contract has been committed, to minimise the damage caused thereby (a). Two things must be recollected here. In the first place the policy insures against third party liability, and not against claims (b). Secondly, as a rule the policy gives no indemnity against the costs of defending third party claims (c). The rights and liabilities between the parties as to costs are considered later (d), and it is here proposed only to state what is suggested are the assured's duties (e) in regard to the defence of third party proceedings brought against him in respect of a liability covered by the policy. The rules set forth below have been formulated as guides which will, it is submitted, protect the assured if he follows them. The failure to observe these rules, the consequences of which failure are considered later (f), will not necessarily disentitle the assured from recovering, but may in certain cases make it more difficult for him to do so (g). It need hardly be added that the assured must in all cases act honestly (h). The position may be summarised thus:

(a) **Where the assured does not or cannot treat the repudiation as a renunciation of the whole contract (i)**—In this case, as has been seen (j), the policy and all its terms remain binding upon the assured. The question then arises as to his duty in regard to third party proceedings. On the one hand he is bound by the terms of the policy which usually (k) say that he is not to settle, compromise or admit any third party claim, and on the other he is bound to minimise the loss whether regarded as a loss under the policy (l) or as damage caused by breach of contract (m). At the same time the insurers as a rule expressly undertake to pay only costs incurred with their written consent (n). It is suggested that the answer to this riddle depends upon the nature and exact wording of the clause which prohibits any admission to or settlement made with the third party (o). If that clause amounts to an independent condition (p), either because its fulfilment is by

(y) See *ante*, p. 673.

(z) Either under an express term to that effect or under an implied term. As to the implied term, see *ante*, p. 640, and as to the express, p. 606.

(a) As to the general duty to minimise damages, see *Mayne on Damages*.

(b) Cf. most newspaper libel policies which insure against claims. See, e.g., *Hulton (E.) & Co., Ltd. v. Mountain* (1921), 37 T. L. R. 800.

(c) See last note. Such policies expressly cover the assured's own costs.

(d) *Post*, chapter X, p. 728.

(e) There is apparently no direct authority upon the assured's rights and duties in these circumstances save, perhaps, *James v. British General Insurance Co.*, [1927] 2 K. B. 311. As to recovery of costs incurred in defending claims by third parties, see *Pictorial Machinery, Ltd. v. Nicolls* (1930), 67 Ll. L. R. 524; *Allen v. London Guarantee and Accident Co., Ltd.* (1912), 28 T. L. R. 254; *Knight v. Hosken* (1943), 75 Ll. L. R. 74. These cases are discussed, *post*, p. 728, but indirectly they throw light on the duty of the assured where insurers repudiate third party claims.

(f) *Post*, p. 681.

(g) See *post*, p. 681.

(h) And must not act in collusion with the third party.

(i) E.g. where a claim is rejected on the ground that no notice thereof has been given.

(j) *Post*, p. 681.

(k) See *ante*, chapter VIII, p. 606, for the common form of this clause.

(l) By virtue of an express or implied term to that effect. See *ante*, p. 646.

(m) See *ante*, p. 646.

(n) As to costs, see further, *post*, p. 728.

(o) The only reported cases in which the policy contained a clause prohibiting admissions, etc., and the assured, left by repudiating insurers to look after himself, settled a claim with the third party, are *Tustin v. Arnold & Sons* (1915), 84 L. J. K. B. 2214, in which the point was apparently not taken, and *Whitwell v. Autocar Fire Insurance Co.* (1927), 27 Ll. L. R. 418.

(p) I.e. a condition the performance of which by one party is required irrespectively of performance by the other party.

another clause made a condition precedent to the insurers' liability in respect of any claim—as will usually be the case—or for any other reason, the assured is bound to perform it if he relies upon the contract (*q*). In these circumstances it is submitted that, at any rate where due fulfilment of all its terms is a condition precedent to liability on the policy, the assured is bound to contest the third party proceedings, both as to liability and as to amount, even if it would be otherwise unreasonable to do so, and even if the policy gives him no indemnity as to his own costs (*r*). The question then arises as to whether he is obliged to employ legal assistance in defending the proceedings. Unless there is an express term in the policy requiring him to do so, it is submitted that he need not. He will, however, be in a safer position if he does (*s*). The question as to whether, if he does, he can recover the costs thereof is considered elsewhere (*t*). Although in these circumstances the assured is obliged to defend the proceedings and not to make any admission, this does not extend to admissions made in the witness box where he must tell the truth (*u*). Moreover the insurers may be precluded by estoppel from relying upon a particular breach (*uu*).

(b) Where the assured is entitled to and does treat the repudiation as a renunciation of the policy (*v*).—The position here is that the assured no longer relies upon the terms of the policy, but in any claim against his insurers claims damages for breach of contract.

(c) The assured ought not to allow the third party's claim as to damages to proceed uncontested by him.—As will be seen, the assured may in certain circumstances be entitled to allow judgment in respect of liability to go against him by default, but it is submitted that he ought always to contest the claim as to damages, at any rate where damages for personal injuries are claimed. The only cases where the assured would be justified in allowing damages to be assessed in default would be when only ascertainable sums were claimed, such as for example loss of earnings, medical fees, or repairs to a vehicle, and the assured had checked these and satisfied himself that they could not be disputed. Although the assured's liability to the third party may be clear, the amount claimed in respect of it may be exorbitant. The assured should therefore attend at any proceedings—whether before a sheriff's jury or before the registrar—in order to make sure that the third party's claim as to damages is not exaggerated. A third party allowed to produce unchecked and uncontroverted evidence as to the injuries suffered by him might obtain an award of damages out of all proportion to the assured's real liability in respect thereof. It is suggested that in cases of difficulty, or where the damages, if not efficiently contested,

(*q*) See Anson, 19th Edn., p. 324, and see *Playter v. Anglo-Saxon Insurance Association, Ltd.* (1930), 38 Ll. L. R. 62.

(*r*) See as to whether he can recover his own costs, *post*, chapter X.

(*s*) See *post*, p. 677, as to whether an assured in these circumstances, if unable to afford legal assistance, ought to apply for it under the Poor Persons Rules. In *Knight v. Hoshen* (1943), 75 Ll. L. R. 74, *post*, p. 734, the assured did not, owing to lack of means, attend before a referee to contest an assessment of damages, but the amount awarded against him had really been quantified prior to the reference by the terms of the judgments in the Court of Appeal and no damage was incurred by underwriters by his non-appearance.

(*t*) *Post*, chapter X, p. 731, and *Pictorial Machinery, Ltd. v. Nicolls* (1940), 67 Ll. L. R. 524, *post*, p. 732.

(*u*) Since in so far as any clause required the assured to commit perjury it would be illegal, and, if severable, *pro tanto*, void.

(*uu*) This will depend upon the facts of each case. See *post*, pp. 691 *et seq.*

(*v*) See *ante*, p. 673, as to the circumstances in which he is entitled to do so.

are likely to be large, the assured ought to employ legal assistance, or, if he cannot afford it, apply for legal aid under the Poor Persons Rules (x).

(d) **The assured may compromise proceedings if it is reasonable to do so.**—The assured may settle with the third party both the question of liability and the quantum of damages if it is reasonable that he should do so (y). What is reasonable will be a question of fact in each case, but in general it will be reasonable to settle if he is advised so to do by competent legal advisers (z). In *Whitwell v. Autocar Fire Insurance Co.* (zz) and *Tustin v. Arnold & Sons* (a) the assured, left to look after himself by repudiating insurers, settled the third party claim, and succeeded in recovering the amount from the insurers. Where he acts without legal advice, it may be more difficult for him to show that the settlement, in particular in regard to amount (aa), was reasonable, but the absence of legal advice will not be conclusive (b).

(e) **The assured may and sometimes must allow judgment in respect of liability to go against him by default if it is reasonable to do so (c).**—As has been pointed out, the assured ought as a rule not to allow the damages to be assessed against him in default. Where he has clearly no defence on the issue of liability he should, it is submitted, allow judgment on that issue to go by default, since by contesting it he would increase the amount payable to the third party in respect of costs (d). Where the issue as to liability is doubtful the assured may allow judgment in respect of it to go by default if it is reasonable to do so in order not to increase the third party's costs (d). The test of reasonableness will be the degree of doubt, but it is suggested that it must be more than a mere probability that the third party will succeed on this issue (e). Here again the assured will act reasonably if he follows the advice of competent legal advisers (f), and, if he does not obtain or follow such advice, will find it more difficult to show that his conduct was in fact reasonable.

(f) **The assured may and sometimes must defend the third party proceedings as to liability.**—The assured may defend the third party proceedings if it is reasonable for him to do so (g). The considerations mentioned under the last head as to what is reasonable may be applied here (h). It will be reasonable to defend, if it would not be reasonable to allow judgment as to liability to go by default (i).

(x) For example, when there are difficult questions of medical evidence, such as a doubt whether a death was caused by the accident in question. Cf. *Knight v. Hasken* (1943), 75 Ll. L. R. 74.

(y) See *James v. British General Insurance Co.*, [1927] 2 K. B. 311.

(z) *Ibid.*

(zz) (1927), 27 Ll. L. R. 418.

(a) (1915), 84 L. J. K. B. 2214.

(aa) As to settling the amount, see remarks in previous paragraph above as to allowing damages to be assessed in his absence when the amount claimed is ascertainable and has been checked by the assured.

(b) He must, of course, always act honestly and must not collude with the third party.

(c) See generally as to the consequences of failure to follow these suggested rules, *post*, p. 680.

(d) See *James v. British General Insurance Co.* (*supra*), where the insurers objected that the assured ought not to have contested the third party action, and where he did at an early stage give notice admitting liability.

(e) Since, unless the assured is liable to the third party, there is no liability under the policy, and the assured ought to be most careful in making a decision where his interests conflict with his insurers'.

(f) See *James v. British General Insurance Co.*, [1927] 2 K. B. 311, *per* ROCHE, J.

(g) *James v. British General Insurance Co.* (*supra*).

(h) E.g. as to legal advice.

(i) I.e. where there is considerable doubt whether the third party will succeed.

Where it is clear that there is no liability to the third party it is submitted that the assured is bound to defend proceedings brought against him. If he does not the position will be that there never was any indemnity payable under the policy. In this connection it is submitted that the indemnity given under most policies against "all sums which the assured shall become legally liable to pay" does not cover sums the legal liability to pay which he has incurred by his own default in failing to defend proceedings.

9. Effect of repudiation on other claims under the policy.—The effect of repudiation upon the assured's position in regard to other claims under the policy depends largely upon whether, either because he must or may do so, he treats the policy as still subsisting (j). In this case the assured must observe all the terms of the policy (k). The respective rights and liabilities of the parties in these circumstances is well illustrated by the case of *Player v. Anglo-Saxon Insurance Association Ltd.* (l). In that case the assured's policy contained a clause to the effect that the assured should not order any repairs exceeding the cost of £10 without the insurers' permission; the insured car was involved in an accident, putting it out of action and causing damage the cost of repairing which considerably exceeded £10.

The insurers repudiated liability under the policy. In the meantime the assured, who relied on the policy, could not effect the repairs himself and was deprived of the use of his car which he required for business purposes. In these circumstances the assured gave the company notice that unless they repaired the car within twelve days (which was held to be a reasonable time) he would hire another car in its place. After the expiry of the twelve days the assured hired another car and later threatened to commence proceedings to enforce his policy, whereupon the insurers admitted liability thereunder. In an action to recover the hire of the car the County Court Judge held that the assured was entitled to the hire of the car from the expiry of the twelve days until the date upon which he should as a reasonable man have commenced proceedings to enforce his policy. This decision was upheld by a Divisional Court (m).

(j) See *ante*, pp. 673-4, as to when this must or may be done.

(k) See *Player v. Anglo-Saxon Insurance Association, Ltd.* (1930), 38 Ll. L. R. 62.

(l) (1930), 38 Ll. L. R. 62.

(m) *SWIFT and ACTON, JJ.* The report of the case seems inadequate if not inaccurate. But in so far as it is accurately reported it seems too difficult to reconcile with general principles. In the first place there seems no reason why the assured should not have performed his duty to minimise the loss arising from a breach of contract by having his car repaired. It is difficult to see how by so doing he could be affected by the provisions of the clause in his policy which prohibited his ordering repairs exceeding £10, since in an action for repairs ordered in such circumstances he would not be claiming under the policy, but upon a breach of it, and in any case the insurers would presumably be estopped from relying upon that clause. The position here is quite different from that where the assured is left to defend third party proceedings, since in that case the insurers are generally under no obligation to defend, or to pay the assured's costs of defending, whereas they are bound to pay for repairs to the car, and the words "such consent not to be unreasonably withheld" must be implied in order to give business efficacy to the indemnity (cf *Hulton (E.) & Co., Ltd. v. Mountain* (1921), 37 T. L. R. 869). On the other hand, if (as was held) the assured was entitled to hire a car, it seems difficult to understand why he should not be entitled to the hire of it during the whole period during which the insurers were in breach. In the decision he was held not entitled to the hire of the car (i) during a reasonable time within which the insurers should have allowed the repairs; (ii) during the period between the date upon which he ought reasonably to have commenced an action on the policy and the date when the insurers ultimately admitted liability; (iii) during the period taken to repair the car after such admission of liability. The last two periods might well have amounted to a much longer time than that during which the assured was held entitled to the hire, and they were equally periods during which the assured was wrongfully deprived of the use of his car by the insurers' breach of contract.

Where, however, the assured is entitled to and does treat the policy as having been put to an end by the insurers' repudiation, he is no longer bound by its terms (n). In this case, in such circumstances as those in the case last cited, the assured would have been obliged (o) promptly (p) to order the repairs to the car himself, and claim the reasonable cost thereof as damages for breach of contract.

10. Remedies of assured for wrongful repudiation.—Where the insurers wrongfully repudiate the policy or liability under it, the assured may recover damages for this breach of contract.

A. Where he treats the policy as still subsisting.—Where he does not treat the repudiation as putting an end to the contract he will be entitled to recover nominal damages for this breach. Any sums claimed in respect of an indemnity given by the policy will be recoverable as monies due under the policy, although equivalent sums may in circumstances where the amount payable in respect of the indemnity is quantified be claimed as damages for the breach of contract in refusing to pay them (q). Where the amount of an indemnity due under the policy has not yet been quantified—as, for example, where the amount due in respect of a third party liability has not been determined—the assured, as a rule, can recover nominal damages for breach of contract, and will be entitled to a declaration as to his rights under the policy (r). Cases may occur, however, where the assured has been caused actual damage by the wrongful repudiation apart from or in addition to any damages he may be entitled to claim for refusal to pay the indemnity (s).

For example, where insurers in pursuance of their statutory duty (t) so to do inform the Minister of Transport that the assured's policy is no longer effective for the purposes of the Road Traffic Act, 1930 (u), the result may be that the assured is obliged to defend a prosecution for using a car on the road without having a policy in force (v). Again, he may be obliged to forgo use of his car until his rights under the policy are determined and, if he uses it for business purposes, to hire another car (w), since he would often be unable to obtain other insurance (x).

The question as to whether the assured can recover the costs of defending third party proceedings brought in respect of a liability covered by the policy is considered elsewhere (y).

B. Where the assured is entitled to and does elect to treat the policy as rescinded.—In this case the assured can claim damages for breach of contract, the measure of damages being not only the loss he has actually suffered, but also the prospective loss which he may suffer as a result of the insurers' breach in the future. He will, it is submitted, not be entitled to claim

(n) See *ante* (o) Obligated under the general duty to minimise damage.

(p) *I.e.* he could not claim for the hire of another car after he treats the contract as at an end, unless this is made necessary by the insurers' repudiation. For an example, see *ante*, p. 678.

(q) See *per* ROCHES, J., in *James v. British General Insurance Co.*, [1927] 2 K. B. 311, and see *per* GREEN, L. J., in *Golding's Case* (1932), 43 Ll. L. R. 487. See *ante*, pp. 616 *et seq.*

(r) See *ante*, pp. 338-9.

(s) Such as in *Player v. Anglo-Saxon Insurance Association, Ltd.*, *ante*, p. 678.

(t) Under Reg. 15 of the Motor Vehicles (Third Party Risks) Regulations, 1933, *ante*, p. 213.

(u) *Ante*, chapter IV.

(v) As to such prosecutions in these circumstances, see *post*, p. 683.

(w) Cf. *Player v. Anglo-Saxon Insurance Association, Ltd.* (1930), 38 Ll. L. R. 62.

(x) It would be no answer for the insurers to say that, if their repudiation was wrongful, the assured ought to have disregarded it and continued to use the vehicle under their policy.

(y) *Post*, chapter X, p. 739.

anything in respect of a loss or liability occurring after the date on which he accepted the insurers' repudiation of the policy (z). He may, in addition to damages in respect of any indemnity due under the policy before its breach (a), be entitled to recover in respect of any loss directly caused by the wrongful repudiation. The example of having to defend criminal proceedings has been given above. Again, the assured may be unable to obtain any other insurance until the validity of the repudiation has been decided, and this may necessitate his hiring a car and chauffeur (b). Or he may have to pay an enhanced premium either on account of the added risk (c) or because he only wants a short-period policy (d). In addition to the above and other similar losses directly caused by the insurers' breach, the assured will always be entitled to a sum equivalent to the premium payable in respect of the unexpired period of his policy (e). In some cases he is entitled to the return of the whole premium. These cases are explained in a separate section in this chapter (f).

11. Enforcement of assured's rights after repudiation (g).—Where after repudiation the assured seeks to enforce his rights under a policy (h) in respect of losses of or damage to his own property, or for personal accident benefits, no special difficulty arises. But where he claims in respect of a third party liability he may have difficulty in proving, first, the fact of that liability, and second, its amount. It will be a question of fact in each case, and the onus of proving these facts will rest upon the assured. As has been seen (i), the position will differ according to whether the assured has treated the policy as still subsisting, or has effectively (k) treated the repudiation as terminating the policy. It is suggested that if he can show that he has observed the rules laid down above he will have sufficiently discharged the burden of proof, and that the insurers could not in that case call upon him to prove the existence and amount of the third party liability as it would have to be proved in a running-down action between plaintiff and defendant. Where the assured has failed to observe the rules which it has been suggested above he ought to follow when left to defend third party proceedings himself, no question arises if by such failure he has broken a term of his policy and is thereby precluded from recovering under it. But if he has broken no such term, as where for example he accepted the insurers' repudiation as a renunciation of the contract, his failure to observe the rules laid down above will not necessarily disentitle them from recovering the amount of the third party liability.

The effect of any such failure is, it is suggested, twofold :

(1) In the first place it will be necessary for the assured in some cases to prove strictly the fact or amount, or both, of the third party liability.

(z) See *Re Law Car and General Insurance Corporation, Ltd.*, [1913] 2 Ch. 103; *Re Northern Counties of England Fire Insurance Co., Macfarlane's Claim* (1880), 17 Ch. D. 337.

(a) Whether quantified or not before breach, e.g. a third party liability indemnity occurring before breach but the sum due in respect thereof not ascertained until after.

(b) Cf. *Player v. Anglo-Saxon Insurance Association, Ltd.* (1930), 38 Ll. L. R. 62.

(c) I.e. added risk in the eyes of insurers.

(d) Which are only issued at special rates.

(e) See *ante*, p. 663, and cases there cited.

(f) *Ante*, p. 663.

(g) The assured's remedies—declaration, money due under policy, damages for breach of contract, return of premium, etc.—have been considered elsewhere and are referred to in the preceding section of this chapter.

(h) Either in an action or arbitration initiated by him or in proceedings brought against him by insurers or by a third party.

(i) *Ante*, p. 663.

(k) As to when he can do this effectively, see *ante*, p. 673.

(2) In the second place, even if the assured discharges this heavy burden, he will not always be entitled to recover the whole sum which he has become legally liable to pay to the third party (l).

For example, if he has allowed the third party's damages to be assessed in his absence, it does not necessarily follow that he will not be entitled to recover the amount so assessed. But this failure will, it is submitted, entitle the insurers in any case to dispute the quantum of liability and disentitle the assured from recovering more than the sum which the third party would have been awarded in contested proceedings. Again, if the assured unreasonably defends third party proceedings, it seems doubtful whether the insurers can be made to pay an indemnity in respect of the third party's costs.

12. Effect of accepted repudiation on arbitration clause.—The effect of repudiation on an arbitration clause, and the authorities relevant thereto, have already been discussed (m), to which reference should be made.

13. Third party procedure.—The nature and scope of third party procedure have been described in a previous chapter (n). An assured who is sued by a third party in respect of a liability covered by his policy may not, except in special circumstances, bring in his insurers by third party procedure if either

- (i) The action is to be tried by a jury (o) ; or
- (ii) There is an arbitration clause in the policy binding on the assured (p).

Apart from these two exceptions leave can generally be obtained to bring in insurers as third party whenever it is not embarrassing or unjust to the plaintiff in the action that there should be such joinder (q). Moreover the different character of the issues between the plaintiff and defendant and the defendant and his insurers may in some cases make it undesirable that insurers should be brought in as third party.

In special circumstances the assured may be allowed to bring in his insurers as third party, although the case is to be tried by jury. Thus in *Lothian v. Epworth Press* (r) this was allowed by the Court of Appeal. In that case the plaintiff claimed damages for personal injuries arising out of a motor accident. Appearance was entered by one Sharpe, who was insured with the British General Insurance Company against third party risks under a motor policy and who described himself in the action as "trading as Epworth Press." The insurers claimed that they were not liable in respect of this claim, since their policy covered Sharpe and not the Epworth Press. The Master and Judge stayed third party proceedings issued by Sharpe against his insurers on a point of law, but the Court of Appeal decided that,

(l) *I.e.* where by his unreasonable conduct he has increased the loss. See *City Tailors, Ltd. v. Evans* (1921), 91 L. J. K. B. 379.

(m) *Ante*, chapter VIII, pp. 611 *et seq.*

(n) *Ante*, chapter III, p. 148.

(o) *Gowar v. Hales*, [1928] 1 K. B. 191. But even this rule is doubtful after *Harman v. Crilly, Zurich General Accident and Liability Insurance Co., Third Parties*, [1943] K. B. 168; [1943] 1 All E. R. 140; discussed *post*, chapter X.

(p) *Jones v. Birch Brothers, Ltd.*, [1933] 2 K. B. 597. But see *Harman v. Crilly, Zurich General Accident and Liability Insurance Co., Third Parties*, *supra*, where the point at issue was whether the insurers were bound at all by a policy issued by them but assigned to the first defendants by the assured. The plaintiff, an injured third party, sought a declaration that insurers were bound to indemnify the assignees of the policy, and this, it was agreed, could only be decided by action, in spite of the presence of a *Scott v. Avery* arbitration clause in the policy. See *post*, p. 751.

(q) See Order 16A, R. S. C., and the notes thereto in the current Annual Practice.

(r) [1928] 1 K. B. 199.

in the special circumstances of the case, they must go on. The following extract from the judgment of SCRUTTON, L.J. (s), shows upon what grounds:

"I personally have never heard of an insurance company insuring a motor car being brought in as third party.

"The defendant who brings in the insurance company as third party is generally asking for trouble. The defendant who advertises to the jury (t):

"'I am insured' is pretty certain to get a verdict against him. For these reasons, defendants, being usually sensible, do not usually rush in and ask for third party proceedings; still less do defendants generally rush in and ask for third party proceedings when there is a *Scott v. Avery* (u) difficulty hanging about the horizon; and consequently a defendant who is usually sensible does not generally ask for trouble. I never heard before of a defendant being rash enough to ask to bring in an insurance company in third party proceedings. However, this defendant is asking for trouble and my impression is he is going to get a good deal more than he bargains for, but that is his look out and not mine. I have to decide whether if he does ask for trouble he is on the wording of the rule entitled to get it, subject to this, that, if it is a matter of discretion in the judge and the master below, this court will not usually interfere with the discretion."

It is not recorded how this case came to trial, and it may well be that the trial of the running-down action took place separately.

The object of bringing in insurers as third party where they have repudiated is to make it certain that the question whether there was in fact any liability in respect of which the indemnity given by the policy comes into operation shall be decided between the parties. Thus, in *Harman v. Crilly, Zurich General Accident and Liability Insurance Co., Third Parties* (v), the plaintiff had been injured by a vehicle driven by Crilly and owned by A. W. Robey, Ltd. The insurers, brought in as third parties by the defendants, had issued a policy to Mr. A. W. Robey, who had assigned his business, including the insured vehicle, to the second defendants, who claimed indemnity from the insurers. The insurers alleged that there was no policy of insurance in existence between them and the second defendants at the date of the accident, by which the insurers were bound. In the circumstances, they could not rely upon a *Scott v. Avery* arbitration clause in the policy when applying for a stay of the third party proceedings. Lord GREENE, M.R., in his judgment (w) expressly stated that, while the question whether the insurers were bound by the policy was one that could only be decided by action, the effect of the *Scott v. Avery* clause on the subsequent proceedings (between the defendants and the insurers) if the insurers were held to be bound by the policy was not a matter which concerned the Court. The remarks of SCRUTTON, L.J., in *Lothian v. Epworth Press* (r), noted above, are very much relevant to this point (x).

14. Effect of repudiation on assured's capacity lawfully to drive (a).

A. Where the repudiation is wrongful and has not been accepted by the assured as a renunciation of the policy no question arises.

Proof of invalidity of policy.—If the assured is prosecuted for driving without having a policy in force (a), the onus of showing that it is not in

(s) [1928] 1 K. B. 199, at pp. 201, 202.

(t) But see *Harman v. Crilly, Zurich General Accident and Liability Insurance Co., Third Parties*, [1943] K. B. 168; [1943] 1 All E. R. 140, *post*, p. 751. At present juries are not called upon to decide running-down actions, and in any event most members of a jury are aware of the need for compulsory insurance against third party risks.

(u) (1856), 5 H. L. Cas. 811.

(v) [1943] K. B. 168; [1943] 1 All E. R. 140.

(w) As reported [1943], 74 Ll. L. R., at p. 142.

(x) The main point at issue in *Harman's Case* was whether it was inconvenient or unfair to insurers to be brought in as third parties in a running-down action. This aspect of the case is considered later, *post*, chapter X, p. 751.

(a) Under s. 35 of the Road Traffic Act, 1930, *ante*, p. 163.

force will rest upon the prosecution, who will not be able to discharge that onus merely by showing that the insurers have repudiated the policy or liability under it (b). The prosecution will be obliged to prove that the repudiation is valid, and that the ground upon which it is based constitutes a ground either for repudiating the whole policy or for repudiating all future claims under it. In this case the fact that the ground is not one upon which the insurers could resist payment to a third party claiming under section 10 (c) of the Road Traffic Act, 1934, or upon which they could obtain a declaration of avoidance in an action under that section against the assured, is apparently immaterial (e).

Adjournment pending result of civil proceedings.—The practice in these cases of adjourning the hearing of the summons until the validity of the insurers' repudiation has been tested seems doubtful.

The persons who instigate a prosecution of this sort ought to be ready to prove their case when they issue the summons. On the other hand, a decision in favour of the insurers by an arbitrator or even by the Court is not entirely conclusive in criminal proceedings (f). It may be conclusive that as from the date on which the decision was given the policy is no longer "in force," for clearly after that date the assured is no longer covered by the policy. But it is submitted that it is not only not conclusive as to the commission of an offence before that date, but that the assured might successfully object to the admission of any evidence concerning the result of civil proceedings between him and his insurers (g). Conversely, the decision of the arbitrator or Court in his favour is not conclusive though it may be admissible evidence that on a particular date the assured was driving with an effective policy.

Proof of possession of policy or certificate.—Although, as submitted above, the burden is upon the prosecution to prove the invalidity of a policy, it appears that he is obliged to show that he is in possession of a policy (h) or certificate (i) or both which covers the use of the vehicle charged. Thus in *Williams v. Russell* (k) the Divisional Court (l) held that the prosecution could give secondary evidence of the contents of a policy or certificate without having given the assured notice to produce those documents (m), and one member of the Court (n) appears to have thought that in these cases the assured is obliged to show that he has a policy or certificate and that it covers

(b) It is not sufficient for the prosecution to prove that there exists a ground upon which the insurers have the option of repudiating, if they have not in fact exercised that right (*Goodbarne v. Buck*, [1940] 1 K B 107, *per* HILBERRY, J). On the other hand, proof of a ground which gives the insurers no choice, such as termination of the policy by transfer of interest in the vehicle, would be sufficient. As to such grounds, see *ante*, pp. 657 *et seq.*

(c) See chapter V, *ante*, p. 278.

(e) Since the policy is not "in force," though effective in the sense of still giving the required protection to third parties.

(f) See Powell on Evidence, 10th Edn., p. 163.

(g) As being *res inter alios acta*. See Powell on Evidence, 10th Edn., pp. 163 *et seq.* Prosecution proceedings must be brought within 6 months of the offence or within 3 months from the date when the knowledge of the offence has come to the prosecutor and within one year from the commission of the offence, whichever period is the longer (s. 35 (3), Road Traffic Act, 1930, *ante*, chapter IV). Presumably knowledge that the offence has been committed cannot be acquired by the prosecutor until proceedings to render the contract void *ab initio* have been successfully concluded by insurers.

(h) Under s. 35 of the Road Traffic Act, 1930, *ante*, chapter IV, p. 163.

(i) Under s. 40 of the Road Traffic Act, 1930, *ante*, chapter IV, p. 249.

(k) (1933), 49 T. L. R. 313.

(l) HEWART, C. J., and CHARLES and TALBOT, JJ.

(m) Following *Marshall v. Ford* (1908), 72 J. P. 480; and *Marlin v. White*, [1910] 1 K. B. 665.

(n) TALBOT, J.

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the use charged (o). However this may be, it is submitted the assured need go no further than this, and need not show that there is no ground upon which his insurers could repudiate, or, if they have repudiated, that the repudiation is wrongful. Yet, if by the terms of the certificate the particular use of the vehicle is not covered, the prosecution need go no further than to produce the certificate. The assured, if he wishes to show that the terms of the policy nevertheless do cover that use, must produce the policy, and a letter from insurers to that effect may not be sufficient (p).

B. Where the repudiation is wrongful, but has been treated by the assured, as determining the policy.—In this case the assured commits an offence if he drives (without having obtained another policy) after the date on which he accepted the insurers' renunciation, but not before.

C. Where the repudiation is valid.—Where the repudiation is not wrongful the effect upon the assured's capacity lawfully to drive depends upon the character of the repudiation. If it is of the whole policy, or of all liabilities present and contingent under the policy, the assured can be convicted of an offence in respect of any use of the car after the date to which the repudiation relates back (q). Thus if the policy is void on the ground of fraud or non-disclosure, it was never from its inception valid and in force. If it is repudiated on the ground that as from a certain date it was determined by the transfer or destruction of the insured vehicle (or by any of the modes of termination given previously) (r), the assured can be convicted for driving at any time after that date (s). But if the repudiation is only of a particular claim under the policy, as, for example, on the ground that the use out of which it arose was not covered by the policy (t), the assured can only be convicted in respect of his driving on the occasion out of which the repudiated claim arose, or, in the example given, upon other similar occasions. The proof required in proceedings of this sort was considered under the last head.

D. Voidable policy.—Where the policy is merely voidable or repudiable at the option of the insurers, it will be sufficiently "in force" for the purposes of section 35 (u). Until insurers exercise their right to repudiate, the policy is just as valid as if no ground of avoidance or repudiation had ever arisen, and in many cases insurers will not exercise this right (u). But in some cases insurers cannot waive avoidance (a). In these cases the policy cannot be revived except by a new contract (b), and such new policy cannot be made to relate back to the date on which the old was determined (c). Where, therefore, the assured is prosecuted for driving after transfer of his interest in the vehicle, or termination of his policy by any other similar cause, no assistance from his insurers (d) can save him.

(o) On the authority of *R v. Turner* (1810), 5 M. & S. 206, and other cases which show that where a person is charged with doing an act without authority it is for him to show that he has authority.

(p) *Egan v. Bowler* (1939), 63 Ll. L. R. 266. *Sed quare*: in that case the letter from insurers was not properly proved in evidence, and therefore was disregarded. See chapter IV, p. 243, *ante*.

(q) Since the policy has not, since that date, been "in force."

(r) See *ante*, p. 656.

(s) *I.e.* after the date of termination.

(t) Strictly speaking, as pointed out *ante*, p. 669, this is not repudiation.

(u) Of the Road Traffic Act, 1930. See *ante*, chapter IV, p. 177. *Goodborne v. Buck*, [1940] 1 K. B. 107, *per* HILARY, J.

(a) *E.g.* where the policy has been determined by death or bankruptcy. See *ante*, pp. 656 *et seq.*

(b) Supported on all the necessary elements of contract, including consideration.

(c) See *Ocean Accident and Guarantee Corporation, Ltd. v. Cole*, [1932] 2 K. B. 100.

(d) Who can be prosecuted "if they issue a policy which purports to date back so as to cover driving which was not in fact covered." See *Ocean Accident and Guarantee Corporation, Ltd. v. Cole* (*supra*).

Return of certificate.—It should be noted that there is no obligation upon the assured to return his certificate where the policy terminates without his consent (e) unless it has been determined "by virtue of any provision therein" (f), and even if there were it is submitted that the duty would only arise where the validity of the insurers' repudiation had been finally decided by an arbitrator or the Courts.

15. Rights and duties of insurers in regard to repudiation.

A. Repudiation of whole policy.—Where a ground for avoidance of the whole policy arises, the insurers are usually entitled either to repudiate the whole policy at once, to do nothing, or to disregard the ground and treat the policy as unaffected by it. The effect generally of election, and of waiver or estoppel, is considered later (g). The exceptions are, where the policy is void *ab initio* on the ground of mistake (h), or illegality (i) or has been determined in any of the ways set forth above (k), as, for instance, by death, bankruptcy, transfer of interest in the vehicle, or expiry of the period of the policy (k). In these cases, since the contract either never existed or has automatically ceased to exist, the insurers cannot treat the policy as binding without entering into a fresh (l) agreement to that effect with the assured.

On the other hand, it must be carefully observed that the terms of a motor policy nearly always give insurers the option to treat a ground of avoidance of the whole policy as merely a ground for repudiating liability under it (m). This may be briefly illustrated by one example. A non-disclosure or a false representation concerning a material fact will be a breach of either the express or the implied terms of the policy (n). If the policy contains (as it usually does) either a clause stating that the due fulfilment of all its terms shall be a condition precedent (o) to the insurers' liability under it, or a clause to the effect that the truth and accuracy of every statement in the proposal form shall be conditions precedent to any liability (a), or both these terms (b), the insurers instead of declaring that the policy is void on the ground of non-disclosure or misrepresentation may simply refuse to recognise any claim made by the assured on the ground that he has failed to satisfy the condition precedent (c).

B. Repudiation of liability under the policy.—Where the insurers adopt the course indicated in the last sentence they (d) will be treating the policy as valid and subsisting. There are cases where the most that they can do is to repudiate liability in respect of a particular claim (e). In such cases they

(e) And then not if by effluxion of time. See Reg. 14, Motor Vehicles (Third Party Risks) Regulations, 1941 (S. R. & O. No. 926 of 1941), *ante*, chapter IV, p. 215.

(f) See *ante*, p. 334 as to whether this includes unilateral cancellation.

(g) *Post*, p. 691.

(h) *Ante*, p. 669.

(i) See *ante*, p. 669.

(k) *Ante*, pp. 656 *et seq.*

(l) Insurers may not antedate a policy or a cover note, or the certificate will be false in a material particular. See *The Times*, March 24, 1939.

(m) See *post*, p. 691, as to election, waiver, or estoppel generally.

(n) See *ante*, chapter VII, p. 389, as to whether it is a breach of an implied term.

(o) For a common example of such a clause, see *ante*, chapter VIII, p. 623.

(a) See *ante*, chapter VIII, p. 623, for an example of this type of clause.

(b) As a rule the policy will contain both.

(c) And this is the course they are usually held to have adopted, even when their solicitor expressly says, "the policy is void from its inception." See *Stevens v. Timber and General Mutual Accident Insurance Association* (1933), 45 Ll. L. R. 43; but cf. *Toller v. Law Accident Insurance Society, Ltd.*, [1936] 2 All E. R. 952.

(d) But not necessarily the assured, who may treat this repudiation as complete renunciation terminating the policy. See *ante*, p. 673.

(e) Apart from cases where, as has been seen, repudiation is not strictly applicable, such as losses or liabilities which do not come within the description of risk, this does not often occur in motor insurance cases owing to the now general practice of inserting a compendious "condition precedent" clause in the policy.

will have the choice between repudiating a particular liability or accepting it (*f*).

(a) **Duty to inform Minister of Transport.**—Where a motor policy ceases to be effective without the assured's consent for any reason other than death or expiry of time the insurers are under a statutory duty (*g*) to inform the Minister of Transport of that fact (*h*). The question at once arises as to what is meant by "ceases to be effective"? It is submitted that it implies "ceases to be effective for the purposes of the Road Traffic Acts, 1930-1934" (*i*), and that a policy so ceases to be effective whenever

(1) any ground with the exception (*j*) of death (*k*) or effluxion of time (*l*) becomes known to the insurers upon which they have no option but to treat the policy as void *ab initio* (*m*) and as having been determined (*n*);

(2) a ground becomes known to the insurers upon which they are either

(i) entitled to avoid the whole policy; or

(ii) entitled to repudiate all liabilities under it occurring in the future; and

(iii) the insurers make up their minds (*o*) to treat the policy as void or to repudiate any future liability under it (*p*).

The consequences of a breach of the above duty, apart from those resulting from a prosecution, are considered later (*q*).

(b) **Obtaining return of certificate.**—Although there is not at the moment of writing (*r*) any statutory rule expressly imposing upon insurers the duty of informing the assured of the invalidity of the policy or of demanding the return of the insurance certificate when the policy ceases to be effective for any reason, it is apprehended that prudent insurers will so inform the assured and demand the return of that document whenever they become, in the circumstances summarised in the last paragraph, obliged to inform the Minister of Transport that the policy has ceased to be effective (*s*). If insurers do not do this, they will be liable to third parties under section 10 (*t*) of the Road Traffic Act, 1934 (*u*), in the circumstances in which that section comes into operation (*v*). On the other hand, the saving

(*f*) See as to election, estoppel or waiver generally, *post*, p. 691

(*g*) For the breach of which they can be prosecuted; *ante*, chapter IV, p. 266

(*h*) Bv Reg. 13, S. R. & O. No. 926 of 1941. See *ante*, chapter IV, p. 215

(*i*) *Ante*, chapters IV and V

(*j*) These being expressly excepted from the requirements of the Regulation. It is hard to see why death should be excluded more than any other ground—the deceased assured's relatives or driver are very likely to use the car not thinking that a new policy is immediately necessary. As to how far it is necessary, see *ante*, p. 661

(*k*) As to death terminating a policy, see *ante*, p. 661

(*l*) As to effluxion of time terminating a policy, see *ante*, p. 657

(*m*) *E.g.* on the ground of mistake.

(*n*) *E.g.* on the ground of the assured having parted with his interest in the vehicle.

(*o*) See *post*, p. 693, as to how soon they must make up their minds.

(*p*) See as to election generally, *post*, p. 691

(*q*) *Post*, p. 693

(*r*) It must always be remembered that the Statutory Rules and Regulations relating to compulsory motor insurance may at any time be altered, added to, or superseded by fresh regulations.

(*s*) See *post*, p. 693, as to the possible estoppel or waiver which may arise from their failure so to do.

(*t*) Subsec. (1). See *ante*, chapter V, p. 278.

(*u*) And also by virtue of their obligation arising from the Domestic Agreement to discharge M.I.B.'s duty to satisfy a third party's judgment under the Annexed Agreement; see chapter VI, *ante*.

(*v*) *I.e.* upon judgment against their assured.

clauses in subsection 2 of that section (*w*) can be brought into operation by repudiating the policy before the third party liability has been incurred, and by complying with the requirements of those clauses as to the surrender of the certificate (*x*).

(c) Proceedings against assured.—The proceedings which insurers may take against an assured whose policy they have repudiated have been described in various other parts of this book.

They may be summarised here for convenience of reference :

(i) Proceedings for a declaration that the policy is void on any ground or that the insurers are entitled to repudiate any liability under it (*y*). These cannot be taken unless the assured asserts the validity of the policy or his right to make a claim under it (*z*).

(ii) Proceedings for a declaration under section 10 (3) of the Road Traffic Act, 1934 (*a*).

(iii) Proceedings for the return of the insurance certificate under section 14 of the Road Traffic Act, 1934 (*b*).

(iv) *Recovery of sums paid under a void policy or by mistake.*—Where the policy is void *ab initio*, and when it is founded on mistake or vitiated by non-disclosure, or becomes void subsequently, as by termination (*c*) or breach of an express (*d*) or implied (*e*) condition, it is submitted that insurers who have paid sums in ignorance of the avoidance can recover these from the assured, provided they are not precluded from doing so by estoppel (*f*) waiver, or election (*g*).

The ground upon which the right to recover in such circumstances is based is that the money has been paid under a mistake of fact—namely, as to the existence or validity of the policy (*h*). In similar circumstances the assured may in some cases recover the premium (*i*). Thus insurers could recover, besides sums paid to the assured, money paid to third parties in discharge of his liabilities, or costs paid or incurred in defending proceedings on his behalf (*j*).

(a) See chapter V, *ante*, p. 275.

(x) See chapter V, *ante*, p. 334. The subsection provides for cancellation "by virtue of any provision" in the policy. It is submitted this includes unilateral cancellation by repudiating insurers if an express (and possibly an implied) term is relied upon.

(y) *Ante*, p. 630.

(z) See *ante*, p. 407, and see *Spærenborg v. Edinburgh Life Assurance Co.*, [1912] 1 K. B. 195; *London Passenger Transport Board v. Moscrop*, [1942] A. C. 332; [1942] 1 All E. R. 97.

(a) *Ante*, chapter V, pp. 303 *et seq*.

(b) *Ante*, chapter V, p. 334.

(c) *E.g.* by death.

(d) There is not often any express term in a motor policy which upon breach avoids the policy subsequently.

(e) *E.g.* a fraudulent claim made in breach of the implied condition of continuous good faith. See *ante*, p. 645.

(f) In principle it would also apply to payment of a claim in ignorance of a ground for repudiating that claim only, but in the absence of concealment by the assured the insurers would generally be estopped by having failed to make enquiries in such cases. See *post*, pp. 691 *et seq.*, and cf. *Zurich General Accident and Liability Insurance Co., Ltd. v. Morrison*, [1942] 2 K. B. 53; [1942] 1 All E. R. 529.

(g) As to election, see *post*, pp. 691 *et seq.*

(h) See *Lower Rhine and Württemberg Insurance Association v. Sedgwick*, [1899] 1 Q. B. 179; *Kelly v. Solari* (1841), 9 M. & W. 54; *De Hahn v. Hartley* (1786), 1 Term. Rep. 343. *Sed quaere*, where the mistake arose as to insurers' legal position under the policy of *Re Diplock's Estate*, *Diplock v. Wmille*, [1947] Ch. 716; [1947] 1 All E. R. 522.

(i) See *ante*, p. 663, as to recovery of premium.

(j) Cf. *post*, p. 689, as to costs incurred after repudiation.

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Similarly, sums paid in mistake as to the existence (k) or amount (l) of the loss may be recovered (m).

The mistake must be of fact, and not of law (n), and though in some circumstances insurers may be precluded by estoppel or waiver from relying upon it, the mere fact that they failed at the time to make enquiries which would have revealed the mistake makes no difference, however negligent the failure may have been (o), and even if the facts were actually within the knowledge of the insurers when they paid (o).

But it must be shown that but for the mistake the money would not have been paid. Thus in *Home and Colonial Insurance Co., Ltd. v. London Guarantee and Accident Co., Ltd.* (p), insurers paid money under policies which at the time of payment they believed to be valid and binding on them. It was proved that even if they had known of the invalidity of the policies they would still have paid, and held that in these circumstances the money could not be recovered.

Similarly if insurers waive all enquiry, intending to pay money whether it is due or not (q) or pay *ex gratia* (q) or under compulsion (q), they cannot recover unless the assured has deliberately misled them as to the true facts (r).

The recovery of monies in these circumstances must be carefully distinguished from the recovery of sums paid by reason of section 38 (s) of the Road Traffic Act, 1930, or sections 10 (u) or 12 (v) of the Act of 1934, which sums may be paid with full knowledge of the ground of non-liability as between insurers and assured (x).

(v) *Proceedings for damages for breach of contract.*—It is submitted that any breach of contract constituting a ground of avoidance of the policy, or of repudiation of liability under it, gives the insurers a right to claim damages (y).

Where, however, there is no avoidance, the insurers could not as a rule (z) recover more than nominal damages (a) in respect of the breach relied upon. Apart from the important exception noted below (z), an example where they might be able to recover more would be where the assured's breach consisted in failing to take adequate steps to minimise the loss (b), as where,

(k) See *The Dora Forster*, [1900] P. 241; and cf. *Holmes v. Layne*, [1930] 2 K. B. 301.

(l) The sum recoverable in this case is of course only the excess of the amount paid over the real loss or liability. See *Irving v. Richardson* (1831), 2 B. & Ad. 193.

(m) See *North British and Mercantile Insurance Co. v. Moffatt* (1871), L. R. 7 C. P. 25.

(n) It is frequently difficult to say what is a mistake of fact as distinguished from one of law, and the mistake of a person as to his legal rights under a particular contract may in some circumstances be treated as a mistake of fact. This kind of mistake is never a ground for the recovery of money, which must always be founded on a mistake of fact. See *Skyring v. Greenwood* (1825), 4 B. & C. 281; *Kelly v. Solari* (1841), 9 M. & W. 54; *Townsend v. Crowdy* (1860), 8 C. B. (N. S.) 477; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A. C. 49; *Re Diploch's Estate, Diploch v. Wills*, [1947] Ch. 716; [1947] 1 All E. R. 521.

(o) See cases cited in last note and cf. *Kelly v. Solari* (*supra*), per PARKE, B., at p. 59.

(p) (1928), 45 T. L. R. 134.

(q) *Kelly v. Solari* (*supra*).

(r) *Ward & Co. v. Walls*, [1900] 1 Q. B. 675.

(s) *Anis*, chapter IV, p. 219.

(u) *Anis*, chapter V, p. 313.

(v) *Anis*, chapter V, p. 328.

(x) See *post*, p. 689.

(y) *Anis*, chapter V, p. 303.

(z) The exception is the recovery of costs in certain cases; see below (in text).

(a) Apart, of course, from the recovery of sums paid under statutory compulsion, or in ignorance of the breach; see above.

(b) As to his duty to do this, usually imposed by an express term in the policy, see *ante*, pp. 608, 646, and see per SCARLETON, L.J., in *City Tailors, Ltd. v. Evans* (1921), 91 L. J. K. B. 379, at p. 380: "The condition: 'the assured shall do all things reasonably practicable to diminish the loss' adds nothing to the ordinary obligation of the assured." Cf. *Lind v. Mitchell* (1928), 98 L. J. K. B. 120.

for example, he drove on after an accident, leaving a third party to die of exposure on a lonely road. In this case, the insurers would if it is submitted, be entitled to recover as damages the difference between the sum payable in respect of the third party's death and the sum which would have been payable in respect of his injuries had he been properly attended to by the assured and lived.

(vi) *Recovery of costs of defending Road Traffic Act claims after repudiation.*—Where the insurers have repudiated the policy or liability under it as between themselves and their assured, but by reason of the provisions of section 38 (c) of the Road Traffic Act, 1930 (d), or (e) of sections 10 (f) or (e) 12 (g) of the Road Traffic Act, 1934 (h), will be obliged to satisfy any judgment obtained against their assured by a third party, it is submitted that insurers who repudiate (i) could recover from the assured the costs of defending his third party action, provided these were reasonably incurred (j), as damages for breach of contract. The claim to these would be that the insurers being obliged to satisfy any judgment obtained by the third party under section 10 (k) of the Act of 1934, are entitled to protect themselves by defending the action so as to see that they are not made to pay anything which is not due (m).

(vii) *Proceedings for the recovery of sums paid to third parties by reason of the provisions of section 38 (n) of the Road Traffic Act, 1930.*—These proceedings are, unlike those next mentioned, taken in reliance upon an express term in the policy.

(viii) *Similar proceedings under section 10 (4) of the Road Traffic Act, 1934 (o).*

(ix) *Similar proceedings under section 12 of the Road Traffic Act, 1934 (p).*

Insurers' right to defend third party proceedings after repudiation.—In this connection it should be noted that insurers who repudiate the whole policy (q), or whose repudiation of liability under it is accepted by the assured as a renunciation of the policy, will have no right to insist upon (r) taking control of or conducting his defence in an action brought by a third party. They may thus be in a great difficulty if they cannot persuade the assured to allow them to defend his action "without prejudice" (s), since if they take over and conduct the case without saying anything about repudiation they may

(c) *Ante*, chapter IV, p. 219.

(d) *Ante*, chapter IV, pp. 188 *et seq.*

(e) *I.e.* of s. 38 and/or s. 12 plus s. 10, or s. 10 alone.

(f) *Ante*, chapter V, p. 313.

(g) *Ante*, chapter V, pp. 328 *et seq.*

(h) *Ante*, chapter V, and, in addition, the M.I.B. Agreements. See chapter VI, *ante*.

(i) The policy or liability under it.

(j) These would be reasonably incurred in the same circumstances as the assured could reasonably incur them if left to defend the proceedings himself.

(k) *Ante*, chapter V, p. 313.

(l) See next paragraph in text as to their right to take over the assured's defence after repudiation, and see *Crossley v. Road Transport and General Insurance Co.* (1925), 21 Ll. L. R. 219, and *post*, p. 693, as to whether they are estopped from later repudiation or recovery of these costs if they take over or continue assured's defence after knowledge of ground of repudiation.

(m) *Ante*, chapter IV, p. 219.

(n) *Ante*, chapter V, p. 313.

(o) *Ante*, chapter V, p. 328.

(p) As to repudiation of the whole policy and the grounds thereof, see *ante*, p. 669.

(q) Either under a clause in the policy giving them that right or otherwise.

(r) As to liability for costs where proceedings are conducted by insurers "without prejudice," see *post*, chapter X. But see *Crossley v. Road Transport and General Insurance Co.* (1925), 21 Ll. L. R. 219.

find that they are estopped from repudiating later (t). Insurers who can repudiate liability on a ground which does not entitle the assured to treat the repudiation as a renunciation of the policy, or who only discover the ground of repudiation during the course of (u) or after the third party action will be in a more fortunate position (v).

16. Effect of repudiation on rights of third parties.

A. *Road Traffic Act claims*.—The effect of repudiation upon the rights of a third party to whom the assured has incurred liability in respect of death or bodily injuries and to whom (w) the Road Traffic Acts apply is now governed by the provisions of section 10 of the Road Traffic Act, 1934 (x), which have been explained elsewhere (y), and by the M.I.B. Agreements (a).

B. *Is a collusive judgment or one obtained by fraud binding on insurers under section 10?*—Although, under section 10 of the Road Traffic Act, 1934, insurers are obliged to satisfy any judgment to which the section applies, it is submitted that if it can be proved by them that the judgment was obtained by collusion between their assured and the third party, or by the third party's fraud, they will not be bound by it. The onus of proving such collusion or fraud will of course rest upon the insurers who assert it, and the onus will be extremely heavy in cases where the insurers have had charge of the assured's defence. In addition, as has been noted (b), even where there is no fraud or collusion, but the assured has not contested the third party proceedings which, owing to failure to inform insurers, have gone by default against the assured with no contest as to damages, insurers may, by virtue of Order 27, rule 15, apply to have the default judgment set aside and the question reopened between the third party and insurers (c).

C. *Claims not covered by the Road Traffic Acts or the M.I.B. Agreements*.—The rights given to third parties by that section and these agreements only arise where the third party has obtained judgment against the assured, and do not apply to claims made by persons against liability to whom insurance is not compulsory, as, for example, voluntary passengers—or to liabilities in respect of damage to property. In all these cases repudiation will be as effective against a third party as it is against the assured—no more, and no less (d). The rights of a third party claiming under the Third Parties (Rights against Insurers) Act, 1930 (e), have been discussed elsewhere (f), but it should be again stressed that where he is claiming under that Act in respect of liabilities other than those against which insurance is compulsory he may meet with exactly the same defences as are available against the assured. For example, if the assured has allowed the damages to be assessed in default, the insurers may be entitled to re-open the question (g), or if by so doing the assured committed a breach of condition binding on him the third party may be able to get nothing.

(t) As to estoppel, waiver, and election, see *post*, p. 691.

(u) As in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361.

(v) Since they will not then be estopped by going on with the proceedings without announcing their repudiation. See case cited in last note.

(w) *I.e.*, not, *g.g.*, a voluntary passenger.

(x) Chapter V, *ante*.

(y) *Ante*, chapter V, pp. 313 *et seq.*

(a) See chapter VI, *ante*.

(b) *Ante*, pp. 296–7.

(c) *Windsor v. Chalcroft*, [1939] 1 K B 279; [1938] 2 All E. R. 751, following *Jacques v. Harrison* (1883), 12 Q B D. 136, *ante*, p. 297.

(d) See *ante*, chapter III, pp. 120 *et seq.*

(e) Chapter III, *ante*.

(f) Chapter III, *ante*, pp. 148 *et seq.*

(g) See *ante*, and p. 286.

PART 10.—LOSS OF RIGHT TO REPUDIATE BY ESTOPPEL, WAIVER OR ELECTION

In certain circumstances insurers have been precluded from establishing their right to repudiate an assured's claim to be indemnified under a policy of motor insurance by the operation of the doctrines of estoppel, waiver or election. In order to understand fully the cases in which this has happened, it is necessary to explain shortly the principles on which these doctrines are based.

1. **Estoppel** arises when a person is not allowed to allege the untruth of a certain statement of fact, whether in reality it be true or not. Estoppel is not a cause of action, a fact which cannot be too strongly stressed, for much confusion has arisen owing to this basic principle being overlooked. "Estoppel is only a rule of evidence. You cannot found an action upon it" (h).

Of the three types of estoppel (i), the third and most common type is estoppel in pais, more commonly known as estoppel by representation. This is the only kind of estoppel with which it is necessary to deal in this work. It arises where

(1) The party against whom it is set up has by statement or conduct made a representation as to a matter of fact with the actual or apparent intention that the party to whom it is made shall act upon it (k);

(2) The party to whom the representation is made is induced to act, and does act upon it (l);

(3) The party so induced and acting acts to his detriment (m).

Where these conditions are co-existent, the party who has made the representation is precluded from denying the truth of that representation as against the persons who were intended to act and have acted upon it (n). Lastly, estoppel, if established, may assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it another way) by preventing a defendant from asserting the existence of some fact, the existence of which would destroy the cause of action (o).

2. **Waiver**, on the other hand, is wholly distinct from estoppel. Waiver is contractual, and may constitute a cause of action. It is an agreement to release or not to assert a right. If an agent, for instance, with authority to make such an agreement on behalf of his principal, agrees to waive his principal's rights, then (subject to any other question such as consideration) the principal will be bound, but he will be bound by contract, not by estoppel. There is no such thing as estoppel by waiver (p).

(k) *Per* BOWEN, L. J., in *Low v. Houwerre*, [1801] 3 Ch. 82, at p. 105, and see *Nippon Yusen Kaisha v. Dawson's Bank* (1935), 51 Ll. L. R. 147, quoted *infra*.

(l) The other two are estoppel by record and estoppel by deed. See 8 Halsbury's Laws, 2nd Edn., 343 *et seq.*, and the arguments in *Stitch v. Burns*, [1943] 2 All E. R. 441.

(m) *Wing v. Harvey* (1854), 5 De G. M. & G. 205; *Edwards v. Aberayron Mutual Ship Insurance Society* (1876), 1 Q. B. D. 503; *Yorkshire Insurance Co. v. Craine*, [1922] 2 A. C. 341; *Rugby S.S. Corporation, Ltd. v. Commercial Union Assurance Co.* (1933), 46 Ll. L. R. 265; *Gray v. Blackmore*, [1934] 1 K. B. 95; *Nippon Yusen Kaisha v. Dawson's Bank* (1935), 51 Ll. L. R. 147.

(n) *Re National Benefit Assurance Co.*, [1932] 2 Ch. 184.

(o) *Kaufmann v. British Surety Insurance Co., Ltd.* (1929), 45 T. L. R. 399; *Greenwood v. Martins Bank*, [1933] A. C. 51.

(p) *Freeman v. Cooke* (1848), 2 Exch. 654; *Marlaine v. Gatty*, [1921] 1 A. C. 376.

(q) *Per* Lord RUSSELL OF KILLOWEN in *Nippon Yusen Kaisha v. Dawson's Bank* (1935), 51 Ll. L. R. 147, at p. 150.

(r) *Per* Lord RUSSELL OF KILLOWEN in *Nippon's Case* (*supra*), note (o).

The doctrine of *election* in this context amounts to this : the repudiation of a contract by one party or a breach by one party going to the root of the contract does not of itself discharge the contract, but the other party has the option of treating the contract as at an end, or of treating it as still in being. The party to whom the right of election falls must signify his election to rescind in an unqualified manner and with every reasonable despatch (g). If he elects to wait, he may remain liable to perform his part of the contract, and may enable the party in default to perform the contract notwithstanding his previous repudiation of it (r).

The difficulties attendant upon a clear understanding of the distinction between the three principles are well illustrated by the case of *Crossley v. Road Transport and General Insurance Co.* (s). In that case the assured incurred liability to a third party in a motor accident. An action was brought against him by the third party, and on November 13, 1923, his insurers took over the conduct of his defence. On December 11, 1923, the insurers discovered the existence of a ground upon which they might repudiate liability in respect of this accident, but they carried on with the conduct of the assured's defence without saying anything until January 28, 1924, when they relinquished it and repudiated liability.

The assured contended that by continuing with the conduct of his case for seven weeks after learning of the grounds of repudiation, the insurers were precluded from relying on it.

Upon a case stated by an arbitrator, ROCHE, J. (t), laid down the law applicable as follows :

" The first question is whether the insurance company is estopped from relying upon their plea. The facts which raise the estoppel or preclusion, whichever word be adopted [are as stated above] . . . and upon these facts it is at least clear that the more probable ground upon which the Company may be said to be precluded from relying on the matters they do rely on is not estoppel but rather waiver or election.

" The question has been raised whether, even assuming a certain condition of the car, and that the condition with regard to it is a condition precedent, that matter has not been waived or so dealt with by election of the Company as to reduce what might be a condition precedent to another category in the realm of contract, namely, warranty. The principle is that considered and dealt with in *Bentson v. Taylor, Sons & Co.* (s), and especially, Lord Justice BOWEN's judgment (b). I believe the arbitrator really meant to raise, and I desire that he should raise, the question whether the Company are precluded by the facts from relying on the plea whether such preclusion be based upon estoppel or election or waiver or any other principle known to law."

The case was sent back to the arbitrator for further consideration, and it is not recorded what the ultimate decision was.

3. Definitions.—The following fundamental propositions are made :

1. *Estoppel, waiver and election* are each based upon the same principle—namely, a representation misleading the assured into acting to his detriment (c).

(g) *Berners v. Fleming*, [1925] Ch. 264 (C. A.). See 7 Halsbury's Laws, 2nd Edn. 229.
 (r) *Hochster v. De La Tour* (1853), 2 E. & B. 678; *Avery v. Bowden* (1856), 6 E. & B. 953. See also *Cos v. London and North Eastern Rail. Co.*, [1943] K. B. 531; *Lissenden v. Bosch (C. A. V.), Ltd.*, [1940] A. C. 412, at p. 417; [1940] 1 All E. R. 425, per Lord MAUGHAM, at p. 428, and *Young v. Bristol Aeroplane Co.* [1946] A. C. 163; [1946] 1 All E. R. 98; *Leathley v. John Fowler & Co., Ltd.*, [1946] K. B. 579; [1946] 2 All E. R. 326; *Olsen v. Magnesium Castings and Products, Ltd.*, [1947] 1 All E. R. 333 (C. A.). The last three cases are Workmen's Compensation cases.

(s) (1925), 21 Ll. L. R. 219.

(t) *Ibid.*, at p. 220.

(a) [1893] 2 Q. B. 274.

(b) *Ibid.*, at p. 283.

(c) As to the basic elements of estoppel, see *ante*, p. 68.

2. *Estoppel* means the absolute or complete preclusion from relying upon a ground of repudiation (*d*).

3. *Election* signifies the irrevocable choice between two different (*e*) courses.

4. *Waiver* means the preclusion from adopting an alternative and inconsistent (*f*) attitude, or alternative attitudes (*g*) when election has been made. Waiver therefore follows election, if it is not synonymous with it (*h*).

5. Estoppel, waiver, and election are determined by the facts in each case, and whether the insurers' conduct gives rise to estoppel, or to waiver in the senses defined above, depends in each case on the facts (*i*).

With these propositions in mind, the following examples may be given to distinguish estoppel from waiver.

4. Examples.

A. A third party sues the assured in respect of a liability not required to be covered by the Road Traffic Act, 1930 (*k*). The assured fails to give notice of the claim within the time prescribed by the policy, but in spite of this the insurers take over the conduct of his defence without saying anything about the failure to give notice. They are estopped from afterwards setting up the lack of notice in answer to a claim by the assured on the policy (*l*).

B. (1) The policy provides that the car is not "on risk" when being driven in an unsafe condition. It is being so driven at the time when an accident occurs involving liability in respect of personal injuries to a pedestrian. By reason of section 12 (*m*) of the Road Traffic Act, 1934, the insurers cannot rely upon the clause excluding unsafe conditions as a ground for evading their obligation to satisfy (*o*) any judgment obtained against their assured by the pedestrian.

(2) The insurers do not repudiate liability, but take over the defence of the third party action.

(3) Later, they claim to recover from the assured under section 12 (*p*):

(i) Sums which they have paid in discharge of the third party's judgment;

(ii) The costs incurred to their solicitor for conducting the assured's defence.

It is submitted that they would not be held to be precluded by estoppel or waiver from recovering the sums paid to the third party, but that the application of one of these principles might preclude their recovering the costs of the assured's defence (*q*).

(d) I.e. relying upon it for any purpose. (e) See the examples given in text above.

(f) "Conditions precedent may be waived by a course of conduct inconsistent with their continuing validity"—per SCRUTTON, L.J., in *Toronto Rail Co. v. National British and Irish Millers Insurance Co., Ltd.* (1914), 111 L. T. 555, at p. 563.

(g) Strictly speaking there can never be more than one alternative.

(h) It is often used as signifying the same thing. See the extract from ROCHE, J.'s judgment in *Crossley v. Road Transport and General Insurance Co.*, ante, p. 692.

(i) See ante, p. 68.

(k) I.e. s. 36 thereof; see ante, chapter IV, p. 188.

(l) See *Hammonds v. Sceptre Life Association, Ltd.* [1905] 1 Ch. 365; *Yorkshire Insurance Co. v. Craine*, [1922] 2 A. C. 541.

(m) Ante, chapter V, p. 327.

(o) I.e. their obligation under s. 10 (1) of the Road Traffic Act, 1934 (*supra*).

(p) Ante, chapter V, p. 327.

(q) Since the undertaking of the defence would almost certainly be held to be mainly for their own benefit; see *Knight v. Hoshon* (1943), 75 Ll. L. R. 74.

Where, however, insurers undertake by virtue of the M.I.B. Agreement (r) the defence of the "assured" although they know of a ground which would entitle them to declare the policy void *ab initio* (cf. for material misrepresentation or non-disclosure), it is apprehended that unless the "assured" is informed that the defence is undertaken without prejudice to that right to avoid, and unless he agrees to that course being taken, insurers may well be taken to have waived their right to rely thereafter on that ground of repudiation (s).

One of the chief difficulties in the application of these doctrines is that election or waiver does not necessarily imply a choice between alternative or inconsistent courses. Thus in the example B above, the courses open to the insurers were not alternative but cumulative. They might have relied upon both clauses in the policy. Nor is it necessary that the choice should be between *inconsistent* courses (t). On the other hand, it is suggested that although the courses chosen from need not be inconsistent, the *attitude* adopted must be (u) so in fact, as judged by what might be reasonably expected from honest persons in the circumstances (v).

The following propositions may be made:

1. There can be no estoppel—
 - (a) unless the ground of repudiation is known to the insurers (w),
and
 - (b) until a time reasonably sufficient for them to make up their
minds as to what attitude they desire to adopt in regard to it
has expired (x).
2. A waiver, to be operative so that a party's claim is estopped,
must be—
 - "unequivocal, definite, clear, cogent, and complete, to quote the
"language of Mr Justice LITTLEDALE in *Re Sulkeid and Slater and
"Harrison* (a), so as to invite an irresistible inference that the parties
"intended to adopt one of two courses open to them and to discard
"or waive the other, so that they could be said to affirm that this
"contract was binding and ought not to be avoided (b)."

The question as to whether insurers who defend upon behalf of their assured third party proceedings brought against him can be said to be estopped from repudiating liability in respect of the claim which they are defending has arisen in two other motor insurance cases (c), besides that mentioned above (d), but in each of these the estoppel was raised as between the third party and the insurers. In the first, *Vandepitte v. Preferred Accident*

(r) See chapter VI, *ante*, p. 364.

(s) See chapter VI, *ante*, p. 379.

(t) The courses open to the insurers in the example given were not inconsistent with one another.

(u) See *per* SCRUTTON, L. J., in *Toronto Rail Co. v. National British and Irish Millers Insurance Co., Ltd.* (1914), 111 L. T. 555, and see note (g), *ante*, p. 613.

(v) For example, going for a walk with my wife is not inconsistent with going alone, but if I start out alone and then turn back to fetch her, my conduct is inconsistent with my intention as originally expressed.

(w) *Eichell, Congdon and Muir, Ltd. v. Eagle Star and British Dominions Insurance Co., Ltd.* (1928), 72 Sol Jo 242.

(x) *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361.

(a) (1840), 12 Ad. & El. 767.

(b) *Per* SLEMMER, L. J., in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361, at p. 371.

(c) *McCormick v. National Motor and Accident Insurance Union, Ltd.* (*supra*) and *Vandepitte v. Preferred Accident Insurance Corporation of New York*, [1933] A. C. 70. See also *Nairn v. South-East Lancashire Insurance Co., Ltd.*, [1930] S. C. 606, where the same estoppel was also ineffectually raised.

(d) *Crosley v. Road Transport and General Insurance Co.* (1925), 21 Ll. L. R. 219.

Insurance Corporation of New York (e), the Privy Council intimated that there could not be any estoppel as between insurers and assured by reason only of the insurers defending proceedings in regard to which they could repudiate liability. In the second, *McCormick v. National Motor and Accident Insurance Union, Ltd.* (f), it was held that no estoppel could arise in the circumstances of that case because the insurers were entitled to a reasonable time after learning of the ground of repudiation in which to elect as to whether they would repudiate or not.

5. Cases on waiver and estoppel.—Besides those of which an account has been given above (g), the following cases illustrate how these doctrines (h) will operate in practice in motor insurance cases.

(a) Estoppel.

In *Etchells, Congdon and Muir, Ltd. v. Eagle Star and British Dominions Insurance Co., Ltd.* (i), the insurers defended a third party claim on behalf of their assured, discovering later that the claim was not covered by the terms of the policy. It was argued that they were estopped, by having treated the claim as if it were covered, from afterwards repudiating it. MACKINNON, J., held that there was no estoppel since there can be none unless the party to be estopped has acted with full knowledge of the facts.

The dicta in *Vandepitte v. Preferred Accident Insurance Corporation of New York* (k) upon the same point has been set out elsewhere (l).

In *Yorkshire Insurance Co. v. Craine* (m) a claim was made under a fire policy in respect of the loss of motor cars. The policy contained a condition to the effect that the assured was to give immediate written notice of any loss, and that in the absence thereof the insurers should be under no liability in respect of it. The policy further contained a clause to the effect that the company should not be taken to have waived any rights under the policy, unless waived by them expressly in writing. It was held, nevertheless, by the Privy Council that on the facts (n) the company could estop themselves from relying upon the assured's failure to comply with the clause requiring notice.

This case was a decision upon peculiar facts and an uncommon form of policy, but it shows that whatever may be the express terms of the policy either party may by his conduct be estopped from relying upon them. With this case that of *McConnell v. Poland* (o), of which an account has been given (p), may usefully be compared. In *Jester-Barnes v. Licenses and General Insurance Co., Ltd.* (q), it was argued that the insurers were estopped from relying upon a breach of a condition in the policy because they had applied to the Court to stay an action brought by the assured in breach of the arbitration clause. This was held to be a "quite impossible" contention.

In *Evans v. Employers' Mutual Insurance Association, Ltd.* (r), the assured

(e) [1933] A. C. 70.

(f) *Supra*.

(g) *I.e.* *Crossley v. Road Transport and General Insurance Co.*, *ante*, p. 692, and *McCormick v. National Motor and Accident Insurance Union, Ltd.*, *ante*, p. 694.

(h) *I.e.* estoppel, waiver, or election.

(i) [1928], 72 Sol. Jo. 242.

(k) [1933] A. C. 70.

(l) *Ante*, p. 694. See also *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361.

(m) [1922] 2 A. C. 541.

(n) They had taken possession of his premises under a clause entitling them so to do, and had otherwise represented that they did not seek to enforce their rights under the notice clause.

(o) [1926], 23 Ll. L. R. 77.

(p) *Ante*, chapter VIII.

(q) [1934], 49 Ll. L. R. 231.

(r) [1936] 1 K. B. 505.

during the currency of the policy had an accident in which serious damage was done to his car, serious injuries were caused to a woman passenger and slight injuries were caused to the assured and his sister, who was also a passenger. At the time of the accident the assured had only been driving a motor car for six weeks, but in the proposal for the motor insurance he had stated (and the truth of his answer was made the basis of the contract) that he had had 5 years' practical experience of motor car driving (s). Three days after the accident the assured signed a claim form wherein he stated the length of his driving experience at six weeks. This claim form was handed to the Claim Superintendent of the Association, and it eventually came into the hands of a clerk employed by the Association, whose duty it was to compare the statements made in the proposal with those made in the claim form. This clerk noticed the discrepancy in the answers, but did not call attention to it because he did not consider it to be of importance. Thereafter the Association took upon themselves, pursuant to a clause in the policy, the conduct of negotiations with the third parties (t) for the purpose of settlement of or defence to their claims. Learning from another source, some three months later, of the discrepancy in the answers, the Association repudiated liability, on the ground that a condition precedent had been broken by the assured. The Court of Appeal held that the Association had knowledge of the breach of condition when the discrepancy was first noticed by the clerk, and that they were estopped from saying that they had not at all material times before the actual date of repudiation knowledge of the contents of those documents. The Association, by conducting the defence of the assured after that knowledge had come to them, must be taken in law to have waived their right to repudiate liability under the policy (u).

In *Farquharson v. Pearl Assurance Co., Ltd.* (v), a claim under a life insurance policy, the policy monies were expressed to be payable provided the insurance company received the premiums on the dates specified, and it was provided that 30 days of grace were allowed for the payment of premiums. The policy was taken out as security for a loan, the mortgage providing that if the assured should at any time make default in payment of any of the premiums, it should be lawful for the claimant to pay them.

On April 9, 1936, the claimant called on the insurers and offered to pay the premium due on March 15, 1936. The district manager declined this offer, and said that he was arranging for a cheque to be paid by the assured in a few days. On April 17, 1936, the district manager received a cheque signed by the assured and post dated to April 23, 1936. The district manager in the premium account described this premium as outstanding, but he did not state that the policy had lapsed. On April 20, 1936, the assured died. The claimant claimed the policy monies, but the insurers repudiated the policy on the ground that it had lapsed owing to non-payment of the premium due on March 15. It was held on the facts that the insurers were estopped from saying that the premium due on March 15, 1936, had not been tendered on April 9, and further, although it might not have been within the scope of the district manager's authority to waive the condition requiring payment of the premium due on March 15, or within 30 days thereafter, yet the insurers ought not, after the refusal of the premium, to be allowed to raise that question.

(s) The assured had occasionally driven friends' cars five years before the date of the proposal. When he signed the proposal he had never held a licence to drive.

(t) Not, be it noted, in this case "Road Traffic Act third parties."

(u) See also, on this point, *Simon, Haynes, Barlas and Ireland v. Beer* (1945), 78 Ll. L. R. 337

(v) [1937] 3 All E. R. 124.

An example of an unsuccessful plea of estoppel is given by the report of *Davey v. Pearl Assurance Co.* (w), an interlocutory appeal to the Court of Appeal from an order that the case was to be tried before a judge and a special jury. The appellant, an injured third party, claimed indemnity under section 10 (1) of the Road Traffic Act, 1934, from insurers in respect of a judgment obtained by her against their assured. The insurers pleaded that at the time of the accident the vehicle insured, the use of which was expressed by the policy to be confined to use for the purposes of the assured's business as greengrocer, was being used as a laundry van, and therefore the liability did not come within the cover of the policy. The third party thereupon pleaded that the insurers were estopped from taking that point since the assured had represented to an insurance agent that he desired to be insured beyond the greengrocery business, for furniture removal and for other uses, so that the van was covered when carrying the property of the assured and other persons. It was alleged further that the agent knew of the use of the lorry for the purpose of the laundry, and that he did not propose a further cover. This plea was, of course, no answer in law to the insurers' contentions, and if the matter had come to trial, on the facts as stated it must have failed.

(b) Illustrations of waiver.

In *Hassett v. Legal and General Assurance Society, Ltd.* (a), a claim under the Third Parties (Rights against Insurers) Act, 1930, reference to which has already been made (b), the claimant, who had succeeded to the rights of the assured company under a policy of third party liability insurance taken out with the defendant insurance company, could not succeed as no notice of the claim in question had been sent by the assured company to the insurers, as the policy demanded. It was, however, alleged by the claimant that the insurers had knowledge of the claim, such knowledge being evidenced by a letter written by the claimant's solicitors to the insurers before judgment was obtained against the assured company, referring to the claim and inquiring whether insurers wished service of the writ to be effected on the assured company in the normal way, or whether the insurers would instruct solicitors to accept service on behalf of the insured company. To this letter the insurers never answered, and no further communication as to the claim was made to the insurers until after judgment had been obtained against the insured company. ATKINSON, J., held that in the circumstances the insurers had done nothing to relieve the insured company of their obligation to give notice as required by the policy, and therefore insurers had not waived their right to repudiate.

In *Stone v. Licenses and General Insurance Co.* (c), the facts of which are set out elsewhere (d), it was alleged by the claimant that although there might have been a breach of warranty by the assured since he was using the vehicle insured at the time of the accident for a use which was not covered by the terms of the policy (e), yet the insurers had waived their right to repudiate the claim when their agent had, with knowledge of the breach of warranty, and without consulting the assured, collected and sold the debris of the insured vehicle, after it had become a total loss through fire. The arbitrator found as a fact that the insurers had waived their right to repudiate the claim, and it was held in the High Court that there was evidence on which he could have come to that conclusion (f).

(w) (1939), 63 Ll. L. R. 54. (a) (1939), 63 Ll. L. R. 278.
 (b) *Ante*, chapter III, p. 120. (c) (1942), 71 Ll. L. R. 256. (d) *Ante*, p. 574.
 (e) *I.e.* not "exclusively for the use of H. L. Cabinet Works."
 (f) For a further case in which a plea of waiver was set up, but failed, see *Brook v. Trafalgar Insurance Co.* (1946), 79 Ll. L. R. 865, fully set out *ante*, p. 593.

CHAPTER X

POSITION OF PARTIES IN REGARD TO LEGAL PROCEEDINGS

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PART I.—SUBROGATION

The main features of the rule (a) of subrogation were explained in Chapter II (b). The basis upon which it rests is the fundamental principle that insurance is a contract of indemnity (c). Thus subrogation does not apply to insurance which is not a true contract of indemnity, such as life insurance, or the personal accident benefits and sums payable on death (d) given by some motor policies (e).

It remains in this part of this chapter to examine in some detail the practical application of this doctrine to motor insurance.

The objects of the principle of subrogation may be broadly divided into two classes :

(1) Rules limiting the amount of the assured's rights against his insurers to the amount of his loss or liability.

(2) Rules securing that the assured shall not make a profit from his loss or liability.

1. Reinstatement and abandonment.—Into the first rules limiting, as it were, the quantum of the assured's rights against his insurers, there fall the principles of insurance law which are commonly and may conveniently be termed "reinstatement" and "abandonment" respectively.

(a) Reinstatement.—Features of this principle have already been examined in connection with the terms of the clause contained in the common form of motor insurance policy whereby the insurers undertake to make good to their assured the amount of any loss or damage to the insured vehicle (f). The basis of the doctrine of "reinstatement" is that the assured cannot call upon the insurers to pay him more than is necessary to restore the insured vehicle to its former condition and repair, or to recoup him for any loss which he has suffered (g). Where the assured has already obtained recoupment of his loss from some other source the insurers are, *pro tanto*, released from their obligation to indemnify the assured (h) even though such benefit which the assured has obtained was voluntary (i).

(a) For a full history and statement of the principle, see the judgment of McCARDIE, J., in *Edwards (John) & Co. v. Motor Union Insurance Co.*, [1922] 2 K. B. 249.

(b) *Ante*, pp. 101 *et seq.*

(c) See *per* BRETT, L. J., in *Castellain v. Preston* (1883), 11 Q. B. D. 380, at p. 386. For a full description of this principle and of the meaning of indemnity, see chapter II, *ante*, pp. 71 *et seq.*

(d) For the clause in a comprehensive policy which gives these, see *ante*, chapter VIII, p. 540.

(e) See fully, as to the technical category into which this kind of insurance falls, *ante*, chapter II, p. 79.

(f) Chapter VIII, *ante*, p. 501.

(g) *Per* Lord CAMPBELL, C. J., in *Waters and Steel v. Monarch Life Assurance Co.* (1850), 5 E. & B. 870, at p. 881.

(h) Lord BLACKBURN in *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333, at p. 339. See also chapter VIII, *ante*, p. 604.

(i) "Upon the line of authorities, beginning with *Randal v. Cockran* (1748), 1 Ves. Sen. 98, and the observations of Lord HARDWICKE, and having regard to the facts of that case, and to the note to *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333, I think that it can no longer be said that the mere fact that the return of the money was a mere act of grace necessarily precludes the right of the underwriters, the insurers, to claim that that return has *pro tanto* diminished the loss. It seems to me clear, . . . that the mere fact that the return was an act of grace or a gift will not disentitle . . . insurers to claim the benefit of the return, if, in fact, it was intended by those who made it to be a restoration of property which had been seized, but which they were graciously willing to partially return. If this question had been absolutely free from authority, personally I should have had some difficulty in arriving at the conclusion that any voluntary gift could be a diminution of the loss when such voluntary gift was made subsequently to the happening of the loss. But on the authorities it is not open to discuss any such question." *Per* VAUGHAN WILLIAMS, L. J., in *Stearns v. Village, &c., Mining Co., Ltd.* (1903), 10 Com. Cas. 89, at p. 94.

The amount which the assured can get from his insurers is thus limited to such sum as, together with other sums which he may have received from other quarters (j), will recoup his whole loss (k). If insurers have in ignorance paid (l) their assured a sum which exceeds the amount of the loss or liability they may recover such excess (m).

As has been seen (n), the insurers are, unless the policy otherwise provides, bound to make good to the assured his loss in money and cannot compel him to accept any other mode of performance of their obligation (o). Thus, they cannot without his consent discharge their obligation to indemnify either by repairing or by replacing the vehicle (p); nor can they compel the assured to expend monies paid to him under the indemnity in that manner (q). Most motor policies, however, contain provisions which have already been examined, whereby the assured cannot insist upon cash payment, but which entitle the insurers to elect between paying, or themselves repairing or reinstating the damaged or lost vehicle (r). Such clauses do not as a rule entitle the assured to claim reinstatement if he desires it; they are usually framed in terms which give the insurers only the option to reinstate if they so desire (s). Subject to the terms of the policy in any particular case where insurers have this option, the doctrine of election applies, so that they must choose (t) (within a specified or reasonable time as the case may be) whether or no they propose to reinstate the property damaged (u).

(b) Abandonment and salvage.—The doctrine of abandonment, which has been imported into insurance law from the principle of average in marine insurance (v), comes into operation when the subject-matter of the risk insured is so damaged or deteriorated as to lose its original identity, thus entitling the assured to claim as for total loss of the insured property (w). A condition of the assured's right to claim as for total loss is his obligation to surrender the subject-matter of the insured risk to his insurers (x). From the nature of indemnity it follows that the assured cannot have anything more than the amount of the loss or damage of which the insurers undertook the risk (y). Thus his right to claim to be paid as for the complete destruction of his car by fire cannot be exercised if the assured desires to keep the "remains" or debris left (z). If there be debris, or salvage, even though it is of no use as a vehicle, the insurers are entitled to it as salvage and may

(j) E.g. from a third party, or from other insurers

(k) *Castellain v. Preston* (1883), 11 Q. B. D. 380

(l) As to the recovery of sums paid in mistake, see *ante*, chapter IX, p. 687.

(m) *Darrell v. Tibbitts* (1880), 5 Q. B. D. 560.

(n) *Ante*, chapter VIII, p. 507.

(o) *Rayner v. Preston* (1881), 18 Ch. D. 1.

(p) *Times Fire Assurance Co. v. Hawks* (1859), 28 L. J. Ex. 317; *Anderson v. Commercial Union Assurance Co.* (1885), 55 L. J. Q. B. 146.

(q) *Liverpool Mortgage Insurance Co.'s Case*, [1914] 2 Ch. 617.

(r) See chapter VIII, *ante*, p. 507.

(s) See further, *ante*, chapter VIII, p. 507. *Rayner v. Preston* (*supra*); *Anderson v. Commercial Union Assurance Co.* (*supra*).

(t) And they may be precluded by writing, oral words or conduct from denying that they have made a choice. See *ante*, chapter IX, p. 691, as to waiver, etc.

(u) *Times Fire Assurance Co. v. Hawks* (*supra*); *Brown v. Royal Insurance Co.* (1859), 1 E. & E. 853.

(v) *Per BARTT, L.J.*, in *Castellain v. Preston* (1883), 11 Q. B. D. 380, at p. 387. But see *per Lord ATKINSON* in *Moore v. Evans*, [1918] A. C. 185, at p. 196.

(w) *Marshall on Insurance*, 4th Edn., p. 452.

(x) *Per BARNES, J.*, in *Mitsui v. Newmford*, [1915] 2 K. B. 27, at pp. 31, 34.

(y) See *ante*, p. 699.

(z) If, as he is entitled to do, he exercises his option and elects to keep the remains, he can only claim a proportionate sum.

accordingly claim it as of their own right (a). It is in this respect that the doctrine of abandonment differs from that of subrogation, for whereas in the latter rights and remedies may only be exercised in the name of the assured, in "abandonment" the insurers become entitled in their own right to the remains of the subject-matter insured. Thus if a car be stolen or converted, the insurers who have paid for its loss can sue the thief or convertor in their own names (b).

Whilst "abandonment" is most common in marine insurance there is little doubt that it applies to all types of insurance, in so far as they are contracts of indemnity (c). Thus if the assured's car is stolen and the insurers pay on the policy, they can claim and keep the car in their own right if it is later recovered (d).

2. Principles of subrogation.—The second class of rules applicable to indemnity insurance is designed to carry the principle of indemnity to full effect as between insurers and assured (e). The assured is not entitled to recover more than such sum as is necessary to restore him, as far as money can do it, to the *status quo ante* (f). He is entitled to indemnity and not to make a profit from his loss or liability, since indemnity and not payment of a specified sum in any event is the obligation which the insurers have undertaken towards him (g). But it must be carefully observed that subrogation applies only to indemnity (h) insurance, and has therefore no bearing on the personal accident benefits (i) which a motor policy usually provides.

It follows that the insurers are entitled to stand in the shoes of their assured and take advantage of such means of recoupment as are available to him to make good his loss or damage (k). The rights of the assured to which the insurers are thus entitled to succeed may be rights under contracts, or rights of action, whether in contract or in tort, against third parties (l). It is to these that the doctrine of subrogation applies. In the special case of the assured having a right of indemnity for the same loss against other insurers the rights and liabilities *inter se* of such mutual insurers are governed by a different principle, that of "contribution" (m).

(a) That is, if the assured claims to be paid the total sum. See *per* Lord BLACKBURN, in *Rankin v. Potter* (1873), L. R. 6 H. L. 83, at p. 118; *per* Lord ATKINSON in *Moore v. Evans*, [1918] A. C. 185, at p. 196.

(b) See *per* SCRUTTON, L. J., in *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308, at p. 309. See *post*, p. 704.

(c) As BRETT, L. J., said in *Kallenbach v. Mackenzie* (1878), 3 C. P. D. 467, at p. 470, "Abandonment is not peculiar to policies of marine insurance; abandonment is part of every contract of indemnity. Whenever, therefore, there is a contract of indemnity and a claim under it for an absolute indemnity, there must be an abandonment on the part of the person claiming indemnity of all his right in respect of that for which he receives indemnity."

(d) See *Holmes v. Payne*, [1930] 2 K. B. 301.

(e) See *ante*, p. 699. *I.s.* rules securing that the assured shall not make a profit from his loss.

(f) Chapter II, *ante*, p. 101.

(g) *Ibid.* But note these principles do not apply to such part of the insurance as is not in the nature of indemnity, e.g. personal accident or friend's risks.

(h) *I.s.* indemnity in the strict sense of that word. See *ante*, chapter II, p. 71.

(i) Or insurance on life, see chapter II, *ante*, p. 72.

(j) *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333.

(k) *Castellain v. Preston* (1883), 11 Q. B. D. 380; *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308. See *post*, pp. 707 *et seq.* The rights of the insurer cannot be affected by any contract made by the assured with another insurer, except where he has agreed to the assured availing himself of that right (*Boag v. Standard Marine Insurance Co., Ltd.*, [1937] 2 K. B. 113; [1937] 1 All E. R. 714 (C. A.)). In that case, insurers on a valued policy were held entitled by subrogation to the whole of the salvage, and that no share was payable by them to other insurers who had issued a subsequent policy to the assured with an increased value.

(m) *Post*, p. 719.

Proceeding as it does from the principle of indemnity (n), subrogation applies to motor policies in so far as the risks covered relate to property, viz. loss or damage to the insured vehicle or to liability to third parties (o).

The operation of subrogation is to entitle insurers to succeed to every right, power or remedy of the assured against third parties (p) in respect of the subject-matter of indemnity, whereby the insurers can reduce or extinguish the amount paid by them in respect thereof (q).

It is necessary to consider first the conditions precedent to the application of the doctrine, and second, the effects of subrogation when a case for its application arises (r).

3. Conditions precedent.—The conditions which must be satisfied before insurers are entitled to the benefits of the doctrine of subrogation are three in number :

(a) **Valid and subsisting policy.**—The policy of insurance under which the obligation of the insurers to indemnify their assured has been discharged (s) must be one which was valid and subsisting (t) at the time of the event in respect to which the insurers' liability arose (u). In *Edwards (John) & Co. v. Motor Union Insurance Co.* (v) MCCARDIE, J., in holding that the policies in respect of which the action was brought (v) were void and unenforceable as contrary to statute (w), said :

" If then the policy before me is deemed to be a mere wager and not a contract of indemnity, it follows that there is no juristic scope for the operation of the principle of subrogation. The essential basis of subrogation is wholly absent."

This dictum is expressive of the condition under discussion. Subrogation depends upon and is auxiliary to the principle of indemnity. Where there is no indemnity in fact, there can be no basis for subrogation. Either the insurers have paid under a contract of insurance, or they have not paid. Where they have paid, as a general rule they will be entitled to the benefits of subrogation. Where they have not paid they will have failed to establish the essential basis for the equity of which subrogation is the concrete result (x).

It must not, however, be thought that wherever the insurers have paid

(n) See for a full statement of the history and nature of subrogation, *per* MCCARDIE, J., in *Edwards (John) & Co. v. Motor Union Insurance Co.*, [1922] 2 K. B. 249.

(o) But not to such insurance as covers personal injuries or the assured's friend's driving.

(p) *Castellain v. Preston* (*supra*); *Darrell v. Tibbitts* (1880), 5 Q. B. D. 560. "What is the principle of subrogation? On payment the insurers are entitled to enforce all the remedies whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against." *Per* Lord CAIRNS in *Simpson v. Thomson* (1877), 3 App. Cas. 279, at p. 284.

(q) "In order to apply the doctrine of subrogation . . . the full and absolute meaning of that word must be urged, that is to say, the insurer must be put in the position of the assured." *Per* BRETT, L. J., in *Castellain v. Preston* (1883), 11 Q. B. D. 380, at p. 388.

(r) Always remembering that it does not apply to the personal accident and death benefits given by a motor policy.

(s) The doctrine does not come into operation until the indemnity has been discharged. See *Edwards (John) & Co. v. Motor Union Insurance Co.*, [1922] 2 K. B. 249.

(t) See *post*, p. 719, as to effects of repudiation where made improperly.

(u) Cf. the difficult question as to whether the doctrine of contribution applied where the other policy, though valid at the time of the loss, becomes subsequently unenforceable, *post*, p. 719.

(v) Marine "honour" policies, i.e. policies in respect of which the assured had no insurable interest.

(w) The Marine Insurance Act, 1906, s. 4; 9 Halsbury's Statutes 832.

(x) See *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308; 45 T. L. R. 230.

their assured there will arise a case of subrogation (y). The insurers will only be entitled to the benefits of the doctrine where they have paid under a valid and subsisting policy (z). Should they make payment under a policy which is void (a), as contrary to law (b) or public policy (c), they will, it is submitted, be treated not as insurers but as mere volunteers. Thus in the case of motor policies insurers would not be entitled to the benefits of subrogation—

(1) where they have paid under a policy which is void and unenforceable on account of lack of insurable interest (d), in so far as such interest is now necessary (e) ;

(2) in the case of third party liability insurance under the Road Traffic Act, 1930 (f), where they are not " authorised insurers " through failure to comply with the requirements of that Act and of the Assurance Companies Acts, 1909 (g), and 1946 (h) ;

(3) or where the policy is void on the grounds of mistake (i) ;

(4) or where they have repudiated the policy before the event giving rise to liability occurs upon the grounds of non-disclosure or misrepresentation, innocent or fraudulent (j). In practice cases under this head would rarely occur since the second of the three essential conditions for the application of the doctrine is that the insurers must have paid their assured.

On the other hand, it is submitted that the insurers are entitled to the benefits of subrogation where, *inter alia*, they have paid the assured in respect of the loss, even though they could, had they so wished, have avoided their obligation to do so on the ground of non-disclosure or misrepresentation, or breach of the conditions or stipulations of the policy (k).

(b) Does subrogation apply to payments made on behalf of a person driving with the assured's consent ?—The question here arises as to whether subrogation would follow a payment made by insurers in discharge of a liability incurred by one who was not a party to the policy, such as a friend or relative driving the insured vehicle with the assured's consent. More often, this would give rise to the doctrine of contribution (l). But it might happen that a friend driving was involved in a collision with another vehicle in which a pedestrian or passenger was injured who subsequently recovers damages against the assured's friend and the driver of the other

(y) As to the condition of payment, see *post*, p. 706. In so far as it affects the condition under discussion payment means a payment which the insurers are *liable* to make under a policy.

(z) *Edwards (John) & Co. v. Motor Union Insurance Co.*, [1922] 2 K. B. 249.

(a) As to what is a void policy, see *ante*, chapter IX, pp. 663 *et seq.*

(b) *Cheshire (T.) & Co. v. Vaughan Brothers & Co.*, [1920] 3 K. B. 240.

(c) See *per* McCARDIE, J., in *Edwards (John) & Co. v. Motor Union Insurance Co.*, [1922] 2 K. B. 249, at p. 256. " Legal proceedings to enforce subrogative rights cannot be based on a document which is stricken with sterility by Act of Parliament."

(d) *Edwards (John) & Co. v. Motor Union Insurance Co.* (*supra*).

(e) As to which see *ante*, chapter II, pp. 79 *et seq.*

(f) S. 36; chapter IV, *ante*, p. 188.

(g) 2 Halsbury's Statutes 724, *ante*, p. 227.

(h) See chapter IV, *ante*, p. 231. *I.e.* " illegality."

(i) See chapter IX, *ante*, p. 664.

(j) See chapter IX, *ante*, p. 664.

(k) *King v. Victoria Insurance Co.*, [1896] A. C. 250; *Edwards (John) & Co. v. Motor Union Insurance Co.*, [1922] 2 K. B. 249, at pp. 256-259.

(l) See *Gale's and Loyst's Cases*, [1928] 1 K. B. 359, *Weddell's Case*, [1932] 2 K. B. 563, and *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250; [1945] 1 All E. R. 316 (C. A.), *ante*, chapter VIII, pp. 529-532, and *post*, p. 719.

vehicle jointly (m). Suppose that in this case the insurers discharge the whole liability of the friend by paying the full damages recovered by the third party. Are they then entitled to sue the driver of the other vehicle in the exercise of subrogative right? In so far as it was decided, in *Tattersall v. Drysdale* (n), that such a friend has been given a statutory right by section 36 (4) of the Road Traffic Act, 1930, to the insurers who have issued a policy purporting to cover such driving by the operation of the usual extension clause, the insurers are under a legal obligation to indemnify the friend's liability, and therefore this first condition precedent to the operation of the doctrine of subrogation is satisfied (o).

(c) **Discharge of indemnity.**—The second condition which must be satisfied before the insurers can claim the benefit of subrogation is that they must have made payment or reinstatement (q) to their assured. It may be that the event which gives rise to the obligation of the insurers to indemnify the assured imposes upon the insurers different and distinct obligations to indemnify the assured, partly, for example, for damage to the insured vehicle and partly against third party liability (r). There in order to exercise the right of subrogation the insurers must have satisfied *all* the claims of the assured arising out of the same event (s). It may be that the occurrence in which the assured sustained his loss (t) or liability (u) was caused through the fault of some other person (v). In such case, the insurers are not entitled to the benefit of the assured's rights against such other person unless they have indemnified the assured against both his claim for loss or damage to the insured vehicle and the liability incurred to the third party (s). This is the case even though his remedies against such other person of which the insurers are seeking to obtain the benefit are limited to a claim for damage to the insured vehicle or otherwise do not cover the whole of the loss insured by the policy (w).

The obligation upon the insurers to indemnify the assured against all claims in respect of the same occurrence before they are entitled to the benefits of subrogation is well illustrated by the case of *Page v. Scottish Insurance Corporation; Forster v. Page* (x). In that case the assured Forster lent his car to his friend Page. The policy contained the usual clause covering driving by a friend (y). Page drove the car negligently, colliding with another and damaging both. He was a motor repairer, and the car being on his premises, the insurers instructed him to execute the repairs to the extent of £117. In the meantime the third party had re-

(m) See, e.g., *Eclipse Policies v. Marchbank* (1934), 1 L. J. C. C. R. 365; *post*, p. 737.

(n) [1935] 2 K. B. 174, *ante*, p. 211.

(o) In *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250; [1945] 1 All E. R. 316, it was decided that s. 36 (4) of the 1930 Act gives this right to sue to the authorised driver for an indemnity not only in respect of Road Traffic Act claims, but also of all claims made by way of indemnity under the policy (i.e. claims in respect of passengers' injuries and damage to property as well).

(q) As to reinstatement, see *ante*, pp. 699.

(r) Note, the personal accident and death benefits given by some motor policies give rise to no right of subrogation whatever; see *ante*, p. 701.

(s) *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308.

(t) E.g. the damage to his vehicle in an ordinary collision.

(u) This would only occur, as a rule, (1) where two vehicles were involved and the assured is held jointly liable with the driver of the other to a third party; (2) where the assured is made liable for the negligence of his servant or agent.

(v) See last note.

(w) E.g. a special policy might cover consequential loss which would not be recoverable from a third party.

(x) (1929), 98 L. J. K. B. 308. An account of this decision upon another point has already been given.

(y) For this clause and its effect, see *ante*, p. 527.

covered judgment against the assured for £200 (z) and Page jointly. The assured claimed this sum from the insurers under his indemnity clause, and Page claimed the sum of £117 for the repairs from them and from Forster. The insurers refused to pay either, pleading that as far as Page was concerned they had a set-off in respect of Forster's claim against Page for the damage negligently caused to his car, and as far as Forster was concerned repudiating liability on the policy. Page sued the insurers for the cost of the repairs. In this action they pleaded that the repairs were ordered by them only as agent of Forster. The insurers also used Forster's name (claiming to be entitled to do so by subrogation) to bring an action against Page claiming the sum of £117 for the negligence of Page (a). At the same time Forster arbitrated his claim against the insurers, the arbitration concluding in his favour during the pendency of the actions.

It was held by the Court of Appeal (b) that the insurers' defence failed in the action against them by Page, and that in the action *Forster v. Page* the insurers had no right to use Forster's name since they had not yet become subrogated to any rights of his.

The following passages from the judgments illustrate the application to the facts concerned of the principles discussed above.

"Subrogation has to be carefully distinguished from abandonment of the property insured. On abandonment the property and all its incidents pass to the underwriter to whom it is abandoned; and it is quite possible—I have known cases myself in my own practice where underwriters have made an extremely good thing by accepting abandonment because they have got something more than the amount they have had to pay. On abandonment they acquire a title and they sue in their own name. Subrogation is quite a different thing. It is a kind of equitable right of underwriters who have indemnified the assured, seeking to minimise their loss, by using for their own benefit any legal rights which the assured could have enforced in respect of the subject-matter insured. But in the case of subrogation the underwriter cannot sue in his own name. His rights are the rights of the assured" (c).

"I always understood that the underwriter had no right to subrogation until he had fully indemnified the assured under the policy. When he had fully indemnified the assured he then had the equitable right to diminish his loss by using in his own favour and in the name of the assured any rights the assured could use against a third party in respect of the subject-matter of the loss" (d).

"Until the insurance company have proved that they have fulfilled their promise under the insurance policy, they are not entitled to bring an action based on the right of subrogation" (e).

(z) A very curious point about this case is that whilst the policies purported to cover Page in respect of his negligent driving so far as third party risks were concerned, it seems to have been taken for granted that although treated as the assured for one purpose he was to be regarded as a stranger for another.

(a) They could, but did not, claim the £200 which was payable to the third party. Certainly Forster (the assured) could have claimed this sum (or at any rate a moiety thereof) in his own right from Page. The policy presumably did not contain the usual subrogation clause purporting to entitle the insurers to prosecute for their own benefit all claims of the assured, etc. See as to the effect of such a clause, *ante*, chapter VIII, pp. 596 *et seq.*

(b) SCRUTTON, GREER and SANKEY, L.J.J., reversing SALTER, J.

(c) *Per* SCRUTTON, L.J., as reported (1929), 98 L. J. K. B. 308, at p. 311.

(d) Quoting *Castellain v. Preston* (1883), 11 Q. B. D. 380, at p. 389; *Darrell v. Tibbitts* (1880), 5 Q. B. D. 560, at p. 563; *Simpson v. Thomson* (1877), 3 App. Cas. 279, at p. 284; *Marine Insurance Act, 1906*; 9 Halsbury's Statutes, 851.

(e) *Per* GREER, L.J., as reported (1929), 98 L. J. K. B. 308, at p. 314. Note that when claiming contribution, insurers should sue in their own name. *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250; [1945] 1 All E. R. 316 (C. A.).

(d) **Payment an essential condition.**—The rule, illustrated by the case described above, that subrogation postulates initial payment by the insurers must be considered from a different aspect. Subject to the terms of any contract of insurance (*f*), the insurers are not entitled to call upon the assured to resort to any other means of saving himself partially or wholly from loss in respect of liabilities or damage which he has incurred and against which they have undertaken to indemnify him (*g*). Their liability is independent of any other rights or remedies to the exercise of which the assured may be entitled; they cannot therefore call upon him, as a condition of their liability, to resort to the enforcement of some other right to compensation which may or may not (*h*) exist in respect of the loss or damage against which they have undertaken to indemnify (*i*).

(e) **Liability of the insurers.**—Unlike guarantors, insurers are not (apart from any express term in the policy) concerned with the existence or liability of another person. As far as their obligation to the assured is concerned it will be something purely fortuitous (*j*) in character whether or not the loss or liability of which they have undertaken indemnity is one concerning which some third party has made himself in some manner liable to the assured (*k*). Initially they are not affected by such concurrent obligations to the assured (*l*); but although this is so, the insurers having satisfied the claims of the assured upon them may then through the doctrine of subrogation take the benefit of whatever concurrent liabilities exist (*m*).

From its very nature, as flowing from the principle of indemnity (*n*), the right to be "subrogated" to the claims and remedies of other persons is an "equity" begotten, as far as the person claiming title to it is concerned, by payment made by him. This condition is common to all rights of subrogation in law, whether as between lender and borrower in *ultra vires* contracts (*o*), between surety and principal creditor (*p*), or between insurer and assured (*q*).

(f) **Rights of the assured against third parties.**—The third and last condition necessary to subrogation is that the assured shall be entitled to rights or powers in respect of the subject-matter and the event of the loss, which he may have been entitled at the time of the loss or thereafter to use for the purpose of recouping himself in respect of a part or the

(f) See chapter VII, *ante*, p. 597, and see *Constructive Finance Co. v. English Insurance Co.* (1924), 19 Ll. L. R. 144.

(g) *Fifth Liverpool Starr-Bowkett Building Society v. Travellers Accident Insurance Co., Ltd.* (1893), 9 T. L. R. 221; *Dickenson v. Jardine* (1868), L. R. 3 C. P. 639.

(h) Liability may be disputed by a third party, who in legal proceedings may obtain a verdict in his favour.

(i) *Darrell v. Tibbitts* (1880), 5 Q. B. D. 560; *West of England Fire Insurance Co. v. Isaacs*, [1897] 1 Q. B. 226.

(j) Subject always, in the case of other insurers, to the rateable contribution clause which a motor policy usually contains, and, in the case of indemnity to a friend driving, to a clause excluding indemnity to him, if he is covered by other insurance. See as to this, *ante*, chapter VIII, p. 604.

(k) See *post*, p. 710, for instances of this.

(l) *Castellain v. Preston* (1883), 11 Q. B. D. 380; *Darrell v. Tibbitts* (1880), 5 Q. B. D. 560. See cases cited in notes (*n*) and (*p*), p. 702, *ante*.

(m) See *post*, pp. 707 *et seq.*

(n) *Castellain v. Preston* (1883), 11 Q. B. D. 380; *Edwards (John) & Co. v. Motor Union Insurance Co.*, [1922] 2 K. B. 249, *ante*, p. 702.

(o) 5 Halsbury's Laws, 2nd Edn. 1 *et seq.*

(p) 16 Halsbury's Laws, 2nd Edn. 1 *et seq.*

(q) Chapter II, *ante*, p. 103. See also *per* McCARDIE, J., in *Edwards (John) & Co. v. Motor Union Insurance Co.*, [1922] 2 K. B. 249.

whole of the loss which he has suffered, otherwise than by recourse to his insurers (r).

4. Operation of the doctrine of subrogation.—The results of the principles of subrogation where the three essential conditions for its working are present must be considered from three points of view—the insurers'; the assured's; and the third parties'.

(a) Position of the insurers.—The main and most important consequence of subrogation is that it entitles the insurers to the benefit of all powers, rights and remedies and proceeds thereof available to the assured for partial or complete recoupment of the loss or liability against which he has been indemnified by his insurers which relate to the subject-matter and event of such indemnity. This aspect of the principle is best illustrated by the following extract from a judgment in a well-known authority:

"Now it seems to me in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am about to endeavour to express, namely that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and whether or not such right could be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured can be or has been diminished" (s).

(i) Remedies in tort.—Where the assured is entitled to bring an action in tort concerning the subject-matter of the loss in respect of which the indemnity has been paid him by the insurers, the insurers are entitled to the benefits of such actions against the tortfeasor concerned whether such actions be founded in negligence (t), as in *Horse, Carriage and General Insurance Co., Ltd. v. Petch* (u), of which a detailed account is given later, or in fraudulent misrepresentation (r), or in conversion (w).

(ii) Remedies in contract.—The contractual rights and remedies respecting the subject-matter of the loss to which the assured may be entitled will arise under contracts wherein some third person has undertaken, expressly or by implication, to be answerable to him for loss or damage to the property insured, as where it is subject to a bailment (x). This may arise in connection with motor vehicles where the insured vehicle is temporarily in the custody of a friend (y), a garage proprietor or an innkeeper under conditions such as to impose a duty upon the bailee to take care for the safety of the assured's property (z), for a breach of which resulting in loss or damage he may be made liable. In such circumstances the insurers, having

(r) *I.e.* there must be something to which the insurers can resort by way of subrogation.

(s) *Per* BRETT, L. J., in *Castellani v. Preston* (1883), 11 Q. B. D. 380, at p. 388.

(t) *King v. Victoria Insurance Co.*, [1896] A. C. 250.

(u) (1916), 33 T. L. R. 131. See *post*, p. 711.

(v) *Assicurazioni Generali Di Trieste v. Empress Assurance Corporation, Ltd.*, [1907] 2 K. B. 814.

(w) *Employers' Liability Assurance Corporation v. Skipper and East* (1887), 4 T. L. R. 55. There is no reason why rights of action in torts of this character should not exist in relation to loss of or damage to motor vehicles. See, as to whether such loss is covered by the policy, *ante*, chapter VIII, p. 501.

(x) *Dufourest v. Bishop* (1886), 18 Q. B. D. 373; *Thomas & Co. v. Brown* (1899), 4 Com. Cas. 186.

(y) In this case the friend's duty would arise independently of any implied contract.

(z) *Aria v. Bridge House Hotel (Staines), Ltd.* (1927), 137 L. T. 299. See chapter II, *ante*, p. 85.

indemnified the assured against his loss, will be entitled to the benefit of such remedies as the assured has against the defaulting bailee (a).

But the contractual rights of the assured to the benefit of which the insurers are by subrogation entitled are by no means limited to cases in which there is some direct responsibility resting upon a third party concerning the safety of the insured property, as in the case of the bailee (b). Thus if the assured has agreed to sell his car, and after such agreement but before the time for delivery thereof it is lost or sustains damage, the assured will not be able to recover both on an indemnity against his insurers and also the agreed purchase price of the car. In such a case the insurers, having paid for the loss or damage, become subrogated to his rights to receive the purchase price to the extent to which they have indemnified him against loss or damage (c). Should the assured have received the whole of such sum from the purchaser, the insurers are entitled to recover the proper amount in proceedings against the assured; should the purchaser have refused to pay, the insurers are entitled to make use of the assured's name for the purpose of prosecuting the necessary proceedings against him for the recovery of the purchase price (d). So also if the assured's car is taken from him by theft or fraud (e) the insurers who have paid for its loss will be subrogated to the assured's rights against the wrongdoer (d).

(iii) *Subsisting rights and remedies of assured*.—The rights and remedies, and their respective limits, to which subrogation attaches are determined by reference to the time of incidence of the loss with respect to which the insurers' liability arose (f). Thus, no dealing by the assured with such rights as he may possess in respect of the subject-matter of the insurers' indemnity can affect their right to subrogation (g). It is well settled, therefore, that a release, compromise or waiver by the assured of such rights and remedies against third parties cannot prejudice the insurers *vis-à-vis* their assured (g), though it may of course affect the enforcement of the remedy against a third party.

(iv) *Rights of action*.—It is clear that amongst those rights and remedies of the assured to which the insurers succeed, and for the purposes of which they stand in his shoes, are such rights of action as he was entitled to enforce

(a) For an example, where insurers had, or would have had, this right, but tried to exercise it prematurely, see *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308.

(b) See *Employers' Liability Assurance Corporation v. Shipper and East* (1887), 4 T. L. R. 55; *Bank of Montreal v. Dominion Gresham Guarantee, &c., Co., Ltd.*, [1930] A. C. 659.

(c) *Castellain v. Preston* (1883), 11 Q. B. D. 380; the incidence of the loss or damage as between the vendor and purchaser of the insured vehicle would be determined according to the passing of the property therein, which event would usually occur on the making of the agreement to sell (Sale of Goods Act, 1893, s. 18; 17 Halsbury's Statutes 621). Notwithstanding the passing of the property the vehicle might remain in the vendor's possession and during such time sustain loss or damage, the risk of which would be on the purchaser. But the vendor having still an insurable interest in the vehicle might be entitled to enforce his indemnity for loss or damage thereto, if the policy still survived. Cf. the remarks of GODDARD, J., as he then was, in *Peters v. General Accident, Fire and Life Assurance Corporation, Ltd.*, [1937] 4 All E. R. 628.

(d) *Castellain v. Preston* (*supra*); *West of England Fire Insurance Co. v. Isaacs*, [1897] 1 Q. B. 226; *Phoenix Assurance Co. v. Spooner*, [1905] 2 K. B. 753. It is submitted that the reasoning of these authorities, concerning interests in land, is applicable to interests in chattels.

(e) See *ante*, chapter VIII, as to whether loss of the car by fraud is covered by the ordinary policy.

(f) See *Bell Assurance Association v. Licenses and General Insurance Co.* (1923), 17 Ll. L. R. 100. *Post*, p. 717.

(g) *West of England Fire Insurance Co. v. Isaacs*, [1897] 1 Q. B. 226; *Phoenix Assurance Co. v. Spooner*, [1905] 2 K. B. 753.

towards the recoupment of that loss against which his insurers have provided indemnity (i). It is equally clear, on the other hand, that the doctrine is one operative as a rule between insurers and assured only, and that the insurers are therefore not entitled to proceed in their own name against such persons as may be liable to the assured in respect of the loss or liability concerned (j). Thus, unless an express assignment of the assured's rights has been made to the insurers (k), which will entitle them without his intervention to take action against third parties, the insurers must proceed in the name of the assured (l), who may be compelled to lend it for the purpose (m).

(v) *Defences available to third party.*—The converse proposition, that subrogation is "subject to equities" outstanding against the assured, applies, subject to certain qualifications (n). The third party liable may freely use against the insurers all such defences as he could have relied upon by way of set-off, counterclaim or otherwise against the assured (o). He may set up defences of waiver, release or compromise by the assured, although such compounding of rights or remedies by the assured is a breach of duty to the insurers. This aspect of subrogation is further considered later (o).

(vi) *Insurers' right to excess.*—The last matter which remains to be discussed in this connection is the insurers' right to recover payment from the assured of any amount which the assured may receive in respect of a loss for which he has been fully indemnified by them (p). In this connection the position of an insurer who has undertaken partial indemnity differs from that of an insurer whose liability to the assured is unlimited in extent (q). In the latter instance, where the assured who has been indemnified against his loss, recovers again from a third party, the insurers are entitled to the benefit of the whole amount which he recovers, whoever has control of the proceedings. Where the assured has not, however, been fully indemnified in respect of his loss by the insurers, sums recovered will only *pro tanto* (r) accrue for the insurers' benefit (s), and the assured will himself be entitled to any excess over what has been already paid him (t).

(i) See, *inter alia*, *Castellain v. Preston* (1883), 11 Q. B. D. 380; *Edwards (John) & Co. v. Motor Union Insurance Co.*, [1922] 2 K. B. 249.

(j) *Simpson v. Thomson* (1877), 3 App. Cas. 279; *London Assurance Co. v. Sainsbury* (1783), 3 Doug. K. B. 245; *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250; [1945] 1 All E. R. 316 (C. A.). In a case of contribution, insurers must sue in their own name. *Post*, p. 719.

(k) Which under the ordinary motor policy it invariably has; see *ante*, chapter VIII, p. 598.

(l) *Mason v. Sainsbury* (1782), 3 Doug. K. B. 61; *Dickenson v. Jardine* (1868), L. R. 3 C. P. 639; *Symons v. Alukern* (1882), 46 L. T. 763.

(m) *King v. Victoria Insurance Co.*, [1890] A. C. 250.

(n) *London Assurance Co. v. Sainsbury* (*supra*), *Finlay v. Mexican Investment Corporation*, [1897] 1 Q. B. 517; *Pharrix Assurance Co. v. Spooner*, [1905] 2 K. B. 753.

(o) *West of England Fire Insurance Co. v. Isaacs*, [1897] 1 Q. B. 226; *Pharrix Assurance Co. v. Spooner*, [1905] 2 K. B. 753; *The Millwall*, [1905] P. 155.

(p) *Ranhin v. Potter* (1873), L. R. 6 H. L. 83; *North of England Iron Steamship Insurance Association v. Armstrong* (1870), L. R. 5 Q. B. 244.

(q) And see further, *post*, p. 713, especially as to the difference between the insurers' rights where there is under insurance and where there is a limited liability policy.

(r) And the assured is of course entitled to deduct the expenses to which he may have been put in recovering from the third party; see *Horse, Carriage and General Insurance Co., Ltd. v. Petch* (1916), 33 T. L. R. 131.

(s) The insurers sue the assured for money paid to their use, or for money which he holds as their trustee, or upon a consideration which has wholly failed, or upon an implied contract. See fully *Welford & Otter-Barry on Fire Insurance*, 4th Edn., pp. 358 *et seq.*

(t) *Commercial Union Assurance Co. v. Lister* (1874), 9 Ch. App. 483; *The Commonwealth*, [1907] P. 216; *Law Fire Assurance Co. v. Oakley* (1888), 4 T. L. R. 309; *Horse, Carriage and General Insurance Co., Ltd. v. Petch* (1916), 33 T. L. R. 131. *Post*, p. 711.

(vii) *Examples of subrogation in motor insurance (u).*—The general case in which insurers will be entitled to be subrogated to the remedies of the assured is where he is entitled to rights against other persons in the following, *inter alia*, circumstances :

(a) where the insured vehicle is lost or damaged whilst in the possession of a bailee for custody (*e.g.* garage proprietor or innkeeper (*v*)), work (*e.g.* repairs (*w*)) or use (*e.g.* person to whom the insured vehicle is hired or lent (*x*)) under such conditions as to make him liable for the safety of the vehicle, and impose upon him a duty with respect thereto varying with the circumstances ; or

(b) where liability to a third party in respect of which the assured has been indemnified by his insurers is caused by the negligence of such persons falling within (a) above (*y*) ; or

(c) where loss or damage is sustained by the insured vehicle at a time subsequent to the assured's having agreed to sell it and before the property therein passes to the purchaser (*z*) ; or

(d) where loss, damage or liability has been incurred by the assured in circumstances imposing a liability in tort on some other person and the insurers have indemnified him with respect thereto (*a*). Such a position would arise where an accident involving damage to the assured's property or injury to a passenger of the assured or some other person has been caused by the negligence of a third person (*b*). In such cases, common in practice (*c*), the insurers, having indemnified their assured, proceed in the assured's name against the negligent party for the purpose of recouping themselves for the sum paid by them in discharge of the indemnity (*d*).

(b) *Position of the assured.*—The main obligation of the assured who has been indemnified against a loss or liability by his insurers is to assist them to enforce the benefits of subrogation (*e*). The obligations which are thus imposed upon the assured correspond to and are designed to render effective the rights of insurers which have been discussed above.

1. *Duties.*—His various duties, each of which may be related to a corresponding right of the insurers, may be summarised as follows :

(i) *Rights of action.*—He must assist the insurers to enforce any rights of action to which they are subrogated, and to which he is entitled against

(u) It should be borne in mind that subrogation applies only to such liabilities under insurance as are in the nature of indemnity and not, *e.g.*, to personal injuries of the assured or to risks of friends driving, he not a servant or agent

(i) Cf. *Aria v Bridge House Hotel (Staines), Ltd* (1927), 137 L. T. 299. *Ante*, p. 707.

(ii) Cf. *Rutter v Palmer*, [1922] 2 K. B. 87.

(x) *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308. *Ante*, p. 704. Cf. *Jenkins v Deane* (1933), 103 L. J. K. B. 250, and see generally *ante*, p. 703.

(y) *E.g.* a friend to whom the car is lent, or the driver of another vehicle with whom the assured was held jointly liable. Cases of this character would as a rule arise only where the assured is liable to such injured third party as where he is in the relation of a master and principal. See generally, chapter II, *ante*, pp. 96 *et seq*.

(z) See *ante*, p. 707, and cf. *West of England Fire Insurance Co. v Isaacs*, [1897] 1 Q. B. 226 ; *Phoenix Assurance Co. v Spooner*, [1905] 2 K. B. 753.

(a) See *ante*, p. 702, and cases there cited. *King v Victoria Insurance Co.*, [1890] A. C. 250.

(b) *E.g.* where the assured injures a passenger or pedestrian in a collision with another vehicle for which he is held jointly responsible with the other driver.

(c) See, *e.g.*, *Eclipse Policies v Marchbank* (1934), 1 L. J. C. C. R. 365 ; *post*, p. 737.

(d) *Horse, Carriage and General Insurance Co. Ltd., v Peitch* (1916), 33 T. L. R. 131 ; *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308. *Ante*, pp. 704, 709.

(e) *Dane v. Mortgage Insurance Corporation*, [1894] 1 Q. B. 54 ; *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308.

third parties (f). This obligation is frequently covered by an express condition in a motor policy requiring the assured to permit his insurers to initiate and control any legal proceedings which he may be entitled to bring respecting the subject-matter of the indemnity given by his policy, and to enforce his remedies for their own benefit (g). Since subrogation does not operate as an assignment the insurers are not entitled to resort to such proceedings in their own name, but must proceed in the name of the assured (h). This they cannot do without his express permission. For this reason motor policies generally contain a clause of the type just indicated (i). In the absence of such an express clause in the policy an assured who refuses to allow his insurers to use his name can be compelled to do so upon their providing him with indemnity against the costs of such proceedings as they desire to take (j).

(ii) *Duty not to compromise rights against third parties.*—He must not do anything to prejudice the insurers in obtaining the benefit of such of his rights and remedies as pass by subrogation to them. The cases in which it has been held that the assured must not compromise, release or renounce his rights against third parties to the prejudice of the insurers have already been referred to (k).

This obligation resting upon the assured is illustrated by the decision in the case of *Horse, Carriage and General Insurance Co., Ltd. v. Petch* (l), where a motor policy covered the assured's life for £1,000 and also damage to the car. The assured was killed in a collision in which damage to the car costing £81 to repair occurred. The insurers paid £1,081 on the policy to the assured's executor, who brought an action under Lord CAMPBELL's Act (m) for damages for his brother's death, and included in his claim (n) the cost of repairing the car. The defendants in this action settled it by payment of £1,250 in respect of both claims. The insurers had warned the assured's executor not to settle the action in such a way as to prejudice their right of subrogation in respect of damage to the car. In an action by the insurers against the executor claiming payment of the £81 which they had paid on the policy in respect of the car as money had and received to their use, it was held by ROWLATT, J., that if the executor had so dealt with the claim that it could not be ascertained what part of the sum paid in settlement represented the cost of repairs, the insurers were entitled to treat these as being paid in full and to recover the £81 either as money had

(f) *Horse, Carriage and General Insurance Co., Ltd., v. Petch* (1916), 33 T. L. R. 131; *Page v. Scottish Insurance Corporation* (*supra*).

(g) *London Guarantee Co. v. Fearnley* (1880), 5 App. Cas. 911. See chapter VIII, *ante*, p. 597, as to how far such clauses in motor policies are valid and effective to give the insurers any greater rights or powers than they possess by subrogation in any case.

(h) *London Assurance Co. v. Sainsbury* (1783), 3 Doug. K. B. 245. *Dicken on v. Jardine* (1868), L. R. 3 C. P. 639. *Simpson v. Thomson* (1877), 3 App. Cas. 270. Cf. *Abandonment, ante*, p. 609.

(i) See above, and see last note.

(j) *Symons v. Mulhern* (1882), 40 L. T. 763. *King v. Victoria Insurance Co.* [1890] A. C. 250. But where there has been a proper assignment of such rights of action within s. 136 of the Law of Property Act, 1925; 15 Halsbury's Statutes 313, the insurers may sue in their own names.

(k) *West of England Fire Insurance Co. v. Isaacs*, [1897] 1 Q. B. 226; *Phoenix Assurance Co. v. Spooner*, [1905] 2 K. B. 753.

(l) (1916), 33 T. L. R. 131.

(m) The Fatal Accidents Act, 1846; 12 Halsbury's Statutes 335.

(n) According to the report the claim for damage to the car was irregularly joined with the claim under Lord Campbell's Act. See *ante*, chapter I, pp. 53 *et seq.*

and received to their use or as damages for wrongful deprivation of their right of subrogation.

The implied obligation resting upon the assured not to prejudice the insurers' position consequent upon subrogation is usually extended by express terms inserted in motor insurance policies which provide that, as a condition of his right to indemnity, the assured shall not make any admission, payment or settlement relating to the subject-matter of the claim without the consent of the insurers (o). Any breach by the assured of the duty under discussion, whether implied or as expressly imposed by the terms of any particular policy, will render him liable to the insurers to account for such amount of the indemnity paid to him as will recompense them for the benefits which have been lost to them by reason of the assured's breach of duty (p).

(iii) *Duty to reimburse if indemnified by a third party.*—The right of insurers who have fully indemnified the assured in respect of his loss or liability, to receive the benefit of any excess amount over such sum as may be recovered by the assured in proceedings against third persons has been already mentioned (q). If the obligation to indemnify was, however, limited in amount (r), and the assured thus only obtained partial recoupment from his insurers, he is entitled to retain such amount as he recovers in proceedings as is necessary to recoup him to the extent that the insurers are under no liability (s). Where, however, the insurance is not expressly limited, but the subject-matter thereof is under-insured, the assured is not entitled to retain the whole of such excess amount as he may recover, but must give his insurers the benefit of such amount of the excess as is proportionate to the relation between the amount of the risk insured and the value of the subject-matter (t). It thus appears that, as far as this aspect of subrogation is concerned, limited insurance gives the insurers lesser rights to claim against an excess recovered by the assured than does under-insurance. The right of insurers to claim reimbursement in these circumstances is not accurately defined in law (u), and may in some cases give rise to difficulties (v).

(iv) *Duty to sue third parties.*—As to rights of action which the assured may be entitled to exercise against third parties, he must, upon receiving proper indemnity, lend his name to the insurers for the purpose of instituting and prosecuting proceedings and do all acts in his power to assist them in such proceedings (w). This obligation, as has been seen, is commonly covered by an express term in motor insurance policies (x). Where the subject-matter of insurance concerning which the assured has been indemnified is co-terminous with the subject-matter of his rights against third parties, no

(o) See chapter VIII, *ante*, p. 596.

(p) *Commercial Union Assurance Co. v. Lister* (1874), 9 Ch. App. 483; *West of England Fire Insurance Co. v. Isaacs*, 1897, 1 Q. B. 226; *Phoenix Assurance Co. v. Spooner*, 1905, 2 K. B. 753; *Horse, Carriage and General Insurance Co., Ltd. v. Petch* (1916), 33 T. L. R. 131.

(q) *Ante*, p. 709, and cases there cited.

(r) As to limited liability policies generally, see *ante*, chapter IX, p. 649.

(s) *Commercial Union Assurance Co. v. Lister* (1874), 9 Ch. App. 483; *The Commonwealth*, [1907] P. 216.

(t) *Stewart v. Greenock Marine Insurance Co.* (1848), 2 H. L. Cas. 159; *North of England Iron Steamship Insurance Association v. Armstrong* (1870), L. R. 5 Q. B. 244; *Rankin v. Potter* (1873), L. R. 6 H. L. 83.

(u) See, for a full discussion and analysis of the authority, *Welford and Otter-Barry on Fire Insurance*, 4th Edn., pp. 353 *et seq.*

(v) *Op. cit.*, p. 355.

(w) *Ante*, pp. 710 *et seq.*, and cases there cited.

(x) Chapter VIII, *ante*, p. 596.

difficulty arises in determining with precision the rights of the insurers to control and conduct such proceedings (y).

(2) **Partial subrogation.**—But there is more difficulty in cases where

(i) the amount of the indemnity is only partial and does not cover the whole of the loss (z); or

(ii) in the more common case, the assured has a right of action against a third person for injury or damage arising out of the same occurrence which is not, or is only partly, covered by his policy (a).

This often arises where an assured sustains personal injuries and damage to the insured vehicle in the same accident (b). There his right to indemnity subsists only in relation to the possibly minor part of his rights against the party responsible, whilst as to his possibly major claim he is without benefit of insurance (c). An instance of this was the case of *Horse, Carriage and General Insurance Co., Ltd. v. Petch* (d), which has been previously discussed.

In cases of this nature there is often great difficulty in defining the precise rights of the insurers or the obligations of the assured with respect to the latter's rights of action. The following guiding principles may be considered reliable :

(i) The insurers' rights by subrogation are in such cases only partial (e); they cannot therefore seek or obtain (f) benefit from rights or remedies of the assured in respect of a claim concerning which they were under no obligation to furnish indemnity (g); always remembering that personal accidents and death benefits are not indemnity in this sense (h).

(ii) The assured, on the other hand, is not entitled to prejudice those partial rights of subrogation from which the insurers are entitled to benefit by making some settlement, arrangement or accord with the third person who is under liability to him with respect thereto (i). The force of this proposition is illustrated and borne out by the decision in *Petch's Case* (j). The assured is therefore bound by the obligations which the principles of subrogation impose upon him to render the necessary assistance to his insurers to secure the benefit of their rights, on the one hand, and to do nothing to prejudice their position on the other (k).

(y) Chapter VIII, *ante*, pp. 597 *et seq.*

(z) *I.e.* where the amount of the indemnity is limited. See chapter IX, *ante*, p. 627, on this matter as affected by the Road Traffic Acts.

(a) *E.g.* in *Horse, Carriage, &c. v. Petch* (1916), 33 T. L. R. 131.

(b) Since he is not as a rule entitled to any indemnity in respect of injuries sustained, against his insurers. Though he may be entitled to certain specific benefits in particular cases of injury. See chapter VIII, *ante*, p. 540.

(c) *I.e.* where the policy does not cover such risks. Where such risks are covered, but the insurers dispute liability in respect of a part of them, by way of repudiation or otherwise, no right of subrogation arises. See *Page v. Scottish Insurance Corporation* (1929), 98 L. J. K. B. 308, and see *ante*, pp. 704 *et seq.*

(d) (1916), 33 T. L. R. 131, and see *ante*, pp. 711 *et seq.*

(e) *Page v. Scottish Insurance Corporation* (*supra*); *Duus, Brown & Co. v. Binning* (1906), 22 T. L. R. 529.

(f) See, as to the effect of the usual clause in a motor policy purporting to empower them so to do, *ante*, chapter VIII, p. 596.

(g) The same rule will, it is submitted, apply when the insurers have repudiated liability in respect of any claim; or under the policy as a whole. Although if they have in fact paid, no such defence can be raised by the third party.

(h) See *ante*, chapter II, pp. 74 *et seq.*

(i) See *ante*, pp. 711 *et seq.*

(j) (1916), 33 T. L. R. 131, *ante*, pp. 711-12.

(k) *Ante*, pp. 711-12.

(iii) Should the insurers control such proceedings they also are subject to a similar restriction as rests upon the assured himself in the events outlined in (ii) above (*l*).

(iv) Where the insurers are not entitled to more than partial subrogation they are not entitled, subject to any term to the contrary contained in the policy (*m*), to require the assured to permit them to have the conduct or control of proceedings against third parties extending to matters extraneous to their rights of subrogation (*n*). Their position in such case is fully protected by the obligations resting upon the assured, by the operation of the general principle of subrogation, not to do anything to prejudice or diminish his insurers' rights and to render such assistance as they require of him (*o*). Indeed in *Morley v. Moore* (*oo*), Sir BOYD MERRIMAN, P., stated emphatically, though *obiter*, that no arrangements made between insurers behind the scenes (*cf.* a knock for knock agreement) should in any way derogate from the full legal rights of the assured to claim against any other party in respect of matters extraneous to the insurers' rights of subrogation. If the insurers do not wish to exercise those rights, the assured may still claim the full amount of the loss suffered by him, even though he has already been paid the whole or part of that sum by his insurers. Though he will hold any sum obtained from the third party by action or by settlement in respect of which he has already received an indemnity from his insurers, in trust for them.

(c) **Position of third parties.**—The operation of the doctrine of subrogation must be considered from the point of view of third parties, including both persons against whom the assured was entitled to exercise or enforce rights and remedies and persons to whom the appellation "third parties" is more commonly limited in motor insurance, who acquire rights against the assured or his insurers by virtue of Common Law or Statute (*p*).

(i) **Defences available to third parties.**—As far as third parties against whom the assured is entitled to exercise rights arising in contract or tort in connection with the subject-matter of the indemnity are concerned, the nature and extent of their obligations is little changed by the subrogation of insurers to an assured's rights (*q*). Whilst they are not liable to be sued by the insurers directly, save in the case of an assignment (*r*), which being "subject to equities" (*s*) would not, as a rule, prejudice the position of such third parties, they are also not permitted to set up by way of defence that the assured is not suing in his own right (*t*), or that he has already been

(*l*) *Quebec Fire Insurance Co. v. St. Louis* (1851), 7 Moo. P. C. C. 286; *Nelson (James) & Sons, Ltd. v. Nelson Line (Liverpool), Ltd.*, [1906] 2 K. B. 217; *The Welsh Girl* (1906), 22 T. L. R. 475, and *cf.* the insurers' rights under an express condition of the policy, *ante*, chapter VIII, p. 596, and *Morley v. Moore*, [1936] 2 K. B. 359; [1936] 2 All E. R. 79 (C. A.).

(*m*) As to the effect of the usual clause in a motor policy purporting to allow insurers to enforce such rights for their own benefit, see *ante*, chapter VIII, p. 596.

(*n*) *Commercial Union Assurance Co. v. Lister* (1874), 9 Ch. App. 483. See *ante*, pp. 711-12, chapter VIII, *ante*, p. 596.

(*o*) *Ante*, p. 711.

(*oo*) [1936] 2 K. B. 359; [1936] 2 All E. R. 79.

(*p*) Particularly under the Third Parties (Rights against Insurers) Act, 1930 (see chapter III, *ante*); the Road Traffic Act, 1934 (see chapter V, *ante*).

(*q*) As to the cases in which they are likely to be affected, see *ante*, pp. 709 *et seq.*

(*r*) *Simpson v. Thomson* (1877), 3 App. Cas. 279; *King v. Victoria Insurance Co.*, [1890] A. C. 250.

(*s*) Law of Property Act, 1925, s. 136; 15 Halsbury's Statutes 313.

(*t*) *Mason v. Sainsbury* (1782), 3 Doug. K. B. 61; *London Assurance Co. v. Sainsbury* (1783), 3 Doug. K. B. 245; *Symons v. Mulhern* (1882), 46 L. T. 763.

indemnified, *aliunde*, in respect of the loss for which he is claiming (u). The defence that the insurers were not liable to indemnify their assured under the terms of the policy is also inadmissible, upon the general principle that the position as between assured and insurers, whether as to the terms of the policy or as to payment, does not concern his liability to the assured, which is distinct in character and quantum from the latter's right to indemnity against his insurers (v). On the other hand, when the insurers have indemnified their assured and proceedings are being brought for their benefit, the party sued is entitled to treat the insurers as the real plaintiffs and thus to rely upon the following defences (w) :

(i) that under a term in the policy the insurers have relinquished their rights against him (x) ;

(ii) that the policy of insurance was invalid (e.g. as amounting to a wager) (y) ;

(iii) that the insurers are not entitled in law to pursue their claim to benefit by subrogation (e.g. where they are alien enemies (z)).

But third parties, although in certain exceptional cases entitled to rely upon defences which can only arise as against the insurers and not against the assured (a), are always entitled to the benefit of any defences which they could validly rely upon against claims by the assured personally. Thus, where the assured in breach of his duty towards the insurers and without their consent enters into a compromise to release, compound or renounce his rights against such third party, the third party so benefited may validly set up such compromise by way of defence, and the insurers will be precluded from succeeding in the claim against him, although entitled to claim against the assured for an account or damages in respect of such breach of duty (b).

(ii) *Position of injured third parties.*—The question as to how far persons, to whom the assured has incurred liability against which the insurers are liable to indemnify him, that is, "third parties" in the common language of motor car insurance, may be affected by the rules of subrogation, is one which has only been rendered important by legislation whereunder rights and liabilities may arise directly between insurers and injured "third parties" in certain circumstances (c).

The insurers' obligations to such third parties, although statutory in origin and incidence, are nevertheless subject in the main to the conditions, control and limitations contained in the policy of insurance between the insurers and their assured (d). To a considerable extent, therefore, third parties stand in the shoes of the assured as far as rights against insurers

(u) *Darrell v. Tibbitts* (1880), 5 Q. B. D. 560.

(v) *King v. Victoria Insurance Co.* (*supra*), and see cases cited in notes (t) and (u) *ante*, p. 712, and generally pp. 709-11, *ante*.

(w) *Darrell v. Tibbitts* (1880), 5 Q. B. D. 560; *Castellain v. Preston* (1883), 11 Q. B. D. 380.

(x) *Thomas & Co. v. Brown* (1891), 4 Com. Cas. 180.

(y) *Edwards (John) & Co. v. Motor Union Insurance Co.*, [1922] 2 K. B. 249, and cases therein cited. See *ante*, pp. 702-3.

(z) *The Palm Branch*, [1916] P. 230.

(a) *Ante*, p. 709. See notes (x), (y) and (z), above.

(b) See *ante*, p. 709, and cases there cited. But the insurers would not be so entitled in the event of their having wrongly repudiated liability, as a rule. See chapter IX, *ante*, p. 676, and see *post*, p. 719.

(c) See chapter II, *ante*, p. 106, and chapter III, pp. 120 *et seq.*, and chapter V, pp. 271 *et seq.*

(d) *Loc. cit.*, at pp. 271 *et seq.*

are concerned (e). The question thus arises as to what, if any, extent the third party becomes obliged to assist the insurers in enforcing rights acquired by subrogation. It is submitted that subrogation can have no application as between insurers and third parties, since the doctrine is one of the consequences of the existence of a contract of indemnity, and that no contractual tie from which subrogation can flow subsists between assured and insurers (f). The third party and the insurers against whom he enjoys statutory rights in certain events are therefore at arm's length and no relationship other than that arising from the provisions of the relevant statutes themselves arises or exists between them (g). The M.I.B. Agreements, which were considered in chapter VI, make no difference to this principle. But in order to receive full satisfaction of their claims against the "assured" the third parties must comply with three simple conditions precedent, which have been set out in full in the chapter referred to.

5. Modification of subrogation by agreement (h).

(a) **By terms of policy.**—Allusion has been made in this chapter to the express obligation of assistance and prohibition of action prejudicial to the insurers imposed upon the assured by the conditions of the common form of motor insurance policy (i); these matters were discussed in an earlier chapter.

(i) **Rateable contribution clause.**—The only other condition of the policy which may affect the operation of subrogation which remains to be considered is the well-known "rateable contribution clause" (j). So in *Jenkins v. Deane* (k), GODDARD, J., pointed out that where the insurers have paid a loss in full under a policy containing a rateable contribution clause, they can by subrogation enforce any rights the assured has under another policy covering the same loss and thus enforce contribution against the other insurers.

(ii) **Contribution and subrogation.**—In such an event, however, the insurers are more likely to take advantage of the benefits of contribution which are applicable to double insurance (l), since in order to do so it will, as a rule (m), be unnecessary for the insurer to prove that he has paid his assured in respect of the loss before he can claim the benefits of contribution (n). Whilst the latter doctrine does have several features in common with subrogation, both of them flowing from the principle of indemnity, they are in truth separate and distinct, and it is not desirable in practice to confuse them (o).

(e) *E.g.* as to the terms, limitations, exclusions and conditions of the policy, subject to the provisions of the Road Traffic Acts, 1930 and 1934.

(f) This contractual tie between party entitled and party liable to indemnity is fundamental to subrogation. See *ante*, p. 702, and McCARDIE, J.'s judgment, in *Edwards (John) & Co. v. Motor Union Insurance Co.*, [1922] 2 K. B. 249.

(g) *Sed quære*: it is doubtful as to how far the principle indicated holds in relation to third parties succeeding to the assured's rights under the Third Parties Act, 1930. Such rights are merely those enjoyed by the assured, not special rights such as those created by the Road Traffic Acts, 1930-4, expressly or impliedly in favour of third parties injured. Thus, if the third party claims against two defendants and acquires the rights under his policy of one, is the third party bound to assist that one's insurers to prosecute whatever they have against the second defendant?

(h) See pp. 706, 712, *ante*. *Dane v. Mortgage Insurance Corporation*, (1894) 1 Q. B. 54.

(i) These conditions may to some extent increase the assured's obligations beyond the normal. See *ante*, p. 712.

(j) Chapter VIII, *ante*, pp. 604 *et seq.* (k) (1933), 103 L. J. K. B. 250.

(l) See *post*, pp. 719 *et seq.*, and as to the meaning of "double insurance," *post*, p. 721.

(m) As to when, see *post*, p. 723.

(n) See *post*, pp. 724 *et seq.* Payment is, however, a condition of subrogation, *ante*, p. 704.

(o) For a comparison, see *post*, p. 720.

(b) **By extraneous agreement.**—It frequently happens that the assured sustains loss or liability against which he is entitled to claim, and obtains indemnity from his own insurers, through the negligence or breach of duty of some third person who is also covered by insurance in respect of such occurrence. It is common in practice that insurers who to-day carry on large business in claims and counterclaims *inter se* shall subject their mutual relationships to the control of an agreement whereby their respective claims are balanced against one another and payment is made by one to the other only in respect of such balance as may at any agreed moment be outstanding between them. These are known as "knock for knock" agreements and "claims sharing" agreements (oo).

(1) **"Knock for knock" agreements.**—Where the assured and the third party who is liable to them are both insured, and such an agreement subsists between their respective insurers, no subrogation arises, but the insurers of either party bear the respective loss (p). This exclusion of subrogation by agreement applies only, however, to circumstances in which the insurance contracts are valid and subsisting upon both sides. If the third party's insurance is void, no case for the application of "knock for knock" arises, and the insurers are remitted to the benefits of subrogation.

The principles which govern the insurers' position in such cases are illustrated by the decision in the case of the *Bell Assurance Corporation v. Licenses and General Insurance Co.* (q), where there was a knock for knock agreement in the following terms:

"On the occurrence of a collision between a vehicle insured with one of the above-mentioned companies and a vehicle insured with the other above-mentioned company, each company shall bear the cost of making good the damage (if any) actually caused by such collision to the vehicle insured with itself."

The Bell Company had insured a Hupmobile car belonging to X. under a policy issued to him, and the Licenses & General Company a Ford car belonging to Y. under a policy issued to Z.

A collision occurred between the Ford and Hupmobile in respect of which the Bell Company paid X. £257, the sum recovered from him by Y. The Licenses & General Company were not liable to Y. in respect of the accident, because there was no policy with him, and not to Z. because he had no insurable interest in the Ford car.

It was held by the Court of Appeal (r) that as there was at the material time, viz. the time of the collision, no enforceable policy in respect of the Ford, that car and the claim did not come within the terms of the agreement (s):

"In each case what the agreement is referring to is a policy which is enforceable at the material time—that is, the moment of the collision. That that is so I think follows from what must have been the intention of the parties, namely, that each should bear its own loss, not that one should bear its real actual loss and the other should be treated as though it were bearing a loss although it bore no loss at all. The words in the first paragraph of the agreement bear that out because they provide that in the event of a collision taking place each company shall bear the cost of making good the damage (if any) actually caused by the vehicle insured by itself."

(oo) A "knock for knock" agreement is one under which insurers agree to share damage to vehicle claims irrespective of the liability or innocence of their respective assured, and a "claims sharing" agreement is one under which they agree to treat third party claims upon the same basis.

(p) For obvious reasons there is paucity of authority on the effect of knock for knock agreements.

(q) (1923), 17 Ll. L. R. 100.

(r) BANKES, SCRUTTON and ATKIN, L.JJ.

(s) Cf. *Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

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"That must, of course, refer to actual liability. It does not create a liability which does not exist under the policy. It refers to an actual liability created and existing under the policy" (t).

Assured's rights affected by knock for knock agreement.—It should be noted that the assured's rights may, or may seem to be, prejudiced by the existence of a knock for knock agreement between his insurers and the insurers of some third party. This occurs:

(i) *In regard to the assured's right to a "no claims bonus" under his policy.*—Where the assured makes a claim in respect or gives notice of an accident involving a third party with whose insurers the assured's insurers have a knock for knock agreement, he may lose his right to a "no-claims" bonus, although he attributes the fault entirely to the third party. Some policies contain an express exception in the "no claims bonus" clause (u), which prevents this hardship, and many insurers will waive their right to treat such a claim as a ground for refusing the rebate or bonus.

(ii) *In regard to the assured's right to sue the third party.*—When the assured is involved in an accident causing damage to his vehicle and personal injuries to himself, the damage to the vehicle may come within a knock for knock arrangement between his insurers and the insurers of the third party whose negligence caused the accident. In this case the assured may wish to take proceedings in respect of his injuries, whilst his insurers do not. The same position may arise under a policy which requires the assured to bear a specified amount of the loss in any one accident (v).

In practice, what generally happens is that the assured is left by his insurers to take his own action against the third party for the personal injuries only, or for the amount of the loss or damage which he has to bear, thus settling the other loss or damage under the knock for knock arrangement. The assured can, however, in these circumstances insist upon being allowed to claim for the whole of the loss or damage sustained by him in the accident. The clause which gives his insurers the right to take over or control and settle any third party claims would not apply in these circumstances, since the assured would be asserting that there was no liability on his part and therefore no liability of his insurers under the policy (w). The knock for knock agreement, being made behind his back and to which he is not a party, cannot affect his legal right to sue (wx).

On the other hand, if the assured adopts this attitude and insists on suing the third party for all the loss arising from the accident, he may find that if he loses the action and the third party succeeds in a counterclaim against him, he will have lost his right to an indemnity in respect of such counterclaim (x). But in such circumstances he will probably not also lose his right to indemnity in respect of damage to his vehicle (x).

(t) *Per BANKES, L. J.*, 17 Ll. L. R. 100, at pp. 101-2. It is submitted that the same reasoning is applicable to where there has been a repudiation of liability by one of the insurers in respect of their policy or the particular event concerned. But in the latter case contribution might be excluded *vis-à-vis* the other insurer by a breach of condition by his assured after the accrual of liability covered by the policy. See generally, chapter VIII, *ante*, p. 527, and contrast the insurer's position under a knock for knock agreement with his ordinary right of contribution, *post*, p. 720, and cf. *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.* [1945] K. B. 250; [1945] 1 All E. R. 316 (C. A.).

(u) As to which, see fully, *ante*, chapter VIII, p. 559.

(v) For this type of policy, see *ante*, chapter VIII, p. 649.

(w) *Morley v. Moore*, [1936] 2 K. B. 359; [1936] 2 All E. R. 79, discussed fully, *ante*, p. 598.

(wx) Having failed to perform a condition precedent to his insurers' liability under the policy.

(x) Since he is entitled to this regardless of any question of liability.

(2) **Subrogation for costs.**—The question as to how far the insurers are entitled to exercise the rights of subrogation in respect of the costs awarded to the assured in proceedings between him and a third party is considered later (y).

6. Effect of wrongful repudiation on subrogation.

(i) *Where the repudiation does not put an end to the policy.*—Where the insurers' wrongful repudiation is not treated by the assured as a renunciation of the policy (z) the insurers who are ultimately made to pay the indemnity which they have refused will, it is submitted, be entitled to the benefits of subrogation to the same extent as if there had been no repudiation (a).

(ii) *Where the repudiation terminates the policy.*—Where the assured treats the wrongful repudiation as terminating the policy and claims the amount of the indemnity due thereunder as damages (b), the insurers who are held liable to pay and do pay this sum will not apparently be entitled to any rights by subrogation (c). Therefore, if the assured has in the meantime compromised or abandoned his claim against a third party, they will have no right to complain. On the other hand, although they may have no right to enforce the assured's remedies against a third party by subrogation, the existence of such remedies may be taken into account in assessing damages (d), and if the assured, having compelled his insurers to discharge the indemnity which they repudiated (e), afterwards recovers compensation from a third party in respect of the same subject-matter, the insurers will, it is submitted, be entitled to claim reimbursement *pro tanto* (f).

PART 2.—CONTRIBUTION (g)

The principle of contribution, like that of subrogation, appears to have originated from the law of marine insurance, but it is now well settled to be applicable to all other types of insurance, including the insurance of motor vehicles.

"I am not aware that there have been any cases with reference to fire policies similar to those which have arisen on marine policies, but should any such arise I do not see why the principle enunciated by Lord Mansfield in the older case of *Godin v. London Assurance Co.* (h) should not be equally applicable to fire policies as to marine policies. One passage of his judgment has been referred to in the course of the argument, and there is another very concise statement by him to this effect: 'but a double insurance is where the same man is to receive two sums instead of one, or the same sum twice over for the same loss, by reason of his having made two insurances upon the same goods or the same ship' (i).

It appears, therefore, that contribution applies to cases of "double insurance." Insurance against loss of or damage to property, or against liability is, as has been previously stated, in the nature of indemnity (j).

(y) *Post*, p. 739.

(z) As to which see fully, *ante*, chapter IX, p. 673.

(a) Since the policy in this case is treated as still subsisting for all purposes.

(b) *I.e.* damages for wrongful repudiation or for breach of contract. See fully, *ante*, pp. 673 *et seq.*

(c) See *per* COLLINS, J., in *West of England Fire Insurance Co. v. Isaacs*, [1896] 2 Q. B. 377, at p. 384.

(d) *I.e.* as between insurers and assured.

(e) By an action for damages or otherwise.

(f) See *ante*, p. 712.

(h) (1758), 1 Burr. 489.

(g) See chapter II, *ante*, pp. 103 *et seq.*

(i) *Per* BAGGALLAY, J.A., in *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.* (1877), 5 Ch. D. 569, at p. 587.

(j) *Ante*, p. 699, and chapter II, pp. 71 *et seq.* See *Morgan v. Price* (1849), 4 Exch. 615.

Contribution, like subrogation, does not, therefore, apply to the personal accident or death benefits given by motor policies (*k*). At the same time there is no limit to the number of insurances which an assured may effect for the purpose of indemnifying him against the same risks to the same subject-matter. If, where an assured had effected double insurance, he were able to insist upon the fulfilment of his rights against every insurer, the result would be that he would recover more than was necessary to indemnify him against the loss or liability insured (*l*). Such a result would be contrary to the basic principles of indemnity which must control the position of assured and insurers, respectively, under such contracts (*m*). The principles of subrogation and contribution come into play in such circumstances to regulate the position of the several insurers who have separately agreed to indemnify the assured in respect of the same loss or liability, so as, on the one hand, to prevent the assured from recovering more than is necessary to indemnify him (*n*), and on the other, to regulate the reciprocal rights and liabilities of insurers in such a way that justice is done to all of them (*o*).

1. Contribution and subrogation.—In certain respects the principle of contribution bears a superficial resemblance to that of subrogation which has been last discussed (*p*). Their common features, however, are only such as proceed from the basis of indemnity upon which they both rest. Contribution differs fundamentally from subrogation in at least three respects. First, subrogation applies where there is only one policy of insurance, whereas contribution necessitates "double insurance," and consequently several insurers (*q*). Second, contribution only arises where the total amount of insurance is greater than the sum which is necessary to indemnify the assured against loss or liability (*r*). Third, whereas payment to the assured is an essential feature common to both (*s*), insurers who are taking advantage of the principle of contribution claim in their own right and in their own names (*t*).

Contribution, again, is sometimes confused with the situation which arises under the type of mutual arrangements between insurers known as "knock for knock" agreements, which have been discussed in connection with subrogation, of which subject they properly form a part (*u*). Examination

(*k*) See *ante*, p. 701.

(*l*) See *ante*, p. 701; *Newby v. Read* (1763), 1 Wm. Bl. 416; *Morgan v. Price* (*supra*); *Williams v. North China Insurance Co.* (1876), 1 C. P. D. 757.

(*m*) See *ante*, p. 699, and chapter II, *ante*, pp. 71 *et seq.* But contribution, like subrogation, is only applicable to such insurance as is in the nature of indemnity. It is not, e.g., applicable to personal injury insurance. See *ante*, p. 701.

(*n*) *Goslin v. London Assurance Co.* (1758), 1 Burr. 489; *Williams v. North China Insurance Co.* (*supra*); *North British and Mercantile Insurance Co. v. London, &c. Insurance Co.* (1877), 5 Ch. D. 569.

(*o*) *Ibid.*, and see JESSEL, M.R., in *Williams v. North China Insurance Co.* (1876), 1 C. P. D. 757, at p. 768.

(*p*) Cf. *ante*, pp. 699 *et seq.*

(*q*) Cf. *Jenkins v. Deane* (1933), 103 L. J. K. B. 250, where GODDARD, J., intimated that insurers who had paid a claim or loss might be subrogated to their assured's rights against co-insurers of the same loss, and this occurred in *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250; [1945] 1 All E. R. 316 (C. A.). In such a case it is really unnecessary to resort to the application of the doctrine of subrogation since contribution exists independently of and apart from it.

(*r*) *North British, &c., Insurance Co. v. London, Liverpool and Globe Insurance Co.* (1877), 5 Ch. D. 569, at p. 581. *American Surety Co. of New York v. Wrightson* (1910), 103 L. T. 663.

(*s*) *Ante*, p. 704.

(*t*) See *post*, p. 724, and the comments of MACKINNON, L.J., in *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250; [1945] 1 All E. R. 316.

(*u*) *Ante*, p. 717.

of the circumstances in which a knock for knock agreement arises clearly indicates that there is no resemblance between the cases to which they apply, which could only be called "double insurance" in the sense that there are two separate people separately insured against separate risks (v), and cases where contribution is applicable which involve "double insurance" in its true meaning as defined below.

The subject of contribution is best treated under three heads: (1) the conditions which are necessary in order that it should arise; (2) the effects of the principle when it does come into play; and (3) the effect on contribution of certain terms commonly to be found in motor insurance policies.

2. Conditions precedent to contribution.

(a) **Double insurance.**—The first and most important condition for the operation of the principles of contribution is that there should be a case of "double insurance." "Double insurance" is defined most appropriately by Lord MANSFIELD as "Where the same man is to receive two sums instead of one or the same sum twice over for the same loss by reason of his having made two insurances upon the same goods or the same ship." (x) True double insurance involves, therefore, the following features:

- (a) the same peril is insured against;
- (b) the same interest in the same subject-matter is insured;
- (c) both insurances shall be effected by the same assured.

Each of these needs some separate discussion.

(i) *The same peril.*—All the insurances must contain obligations, *inter alia*, by the different insurers to indemnify the assured against the same loss or liability (y). The loss or liability in this sense must, of course, be interpreted in accordance with the conditions in which it eventuates (z). Some difficulty arises, particularly in motor insurance cases, where policies commonly contain clauses excluding liability for risks which are covered by other subsisting insurance (a). The effect of these clauses has been discussed in a preceding chapter, particularly in relation to *Gale's* and *Loyst's* Cases (b) and *Weddell's Case* (c). Whilst reserving this question for later discussion (d) it may at this juncture be said that a peril insurance against which is expressly excluded by the terms of any particular policy can hardly be said to be one in respect of which liability arises under that policy so as to impose an obligation upon the insurers to pay under it (e).

(ii) *The same subject-matter insured.*—The same interest in the same subject-matter must be covered by the double insurance (f). It is not necessary that the amount of the insurance should be the same in each

(v) Although in the circumstances it may be that the separate insurances become mutually applicable. As, e.g., where A and B are separately insured and become involved in two successive collisions, for one of which each assured was liable to the other in negligence.

(x) In *Godin v. London Assurance Co* (1758), 1 Burr 489, at p. 492. Quoted at p. 720, *ante*.

(y) *Williams v. North China Insurance Co.* (1876), 1 C. P. D. 757. See also *ante*, p. 720, and *per* GODDARD, J., in *Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

(z) *North British and Mercantile Insurance Co. v. London and Globe Insurance Co.* (1877), 5 Ch. D. 569, at p. 581.

(a) See chapter VIII, *ante*, pp. 529, 604.

(b) [1928] 1 K. B. 359.

(c) [1932] 2 K. B. 563.

(d) *Post*, p. 727.

(e) *Australian Agricultural Co. v. Saunders* (1875), L. R. 10 C. P. 668. See cases cited in notes (b) and (c), *supra*, discussed in chapter VIII, *ante*, at p. 529.

(f) *Williams v. North China Insurance Co.* (1876), 1 C. P. D. 757; *North British and Mercantile Insurance Co. v. London, &c., Globe Insurance Co.* (1877), 5 Ch. D. 569; *American Surety Co. of New York v. Wrightson* (1910), 103 L. T. 663.

policy (g), nor is it necessary that each policy should be restricted to the same subject-matter (h). The essential condition is that the policies should all cover the same subject-matter to some extent and whether or not they cover anything in addition to the common subject-matter.

(iii) *The same assured*.—The third feature of double insurance, that the policies shall have been effected by the same assured, has become blurred in modern motor insurance law (i) owing to the effect of section 36 (4) of the Road Traffic Act, 1934. By that section, as was decided in *Tattersall v. Drysdale* (h), the "authorised driver" is given a right to sue insurers for an indemnity under the policy, although in fact he never signed the policy himself. In *Digby's Case* (l) it was decided that under the normal extension clause granting cover to an authorised driver, such a person while driving becomes *pro hac vice* the assured. To this extent, therefore, motor insurance policy is unique in that persons not signatories to an agreement are deemed to be parties thereto. The following dictum of JAMES, L.J., taken from his judgment in the *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.* (m), indicates how essential and fundamental this condition is to the whole principle of contribution:

"The case is this: B. being liable to make good any loss by fire of the
"goods to R., insured the goods in one office, and R., for his own protection,
"insured the goods in another office. There was no communication between
"the two offices or between the two persons insured. Under these circum-
"stances it seems to me utterly impossible to say there might have been
"any contribution. Contribution exists where the thing is done by the
"same person against the same loss and to prevent a man first of all from
"recovering more than the whole loss or, if he recovers the whole loss from
"one which he could have recovered from the other, then to make the
"parties contribute rateably (n). But that only applies where there is the
"same person insuring the same interest with more than one office."

In *Gale's* and *Loyst's Cases* (o) and *Weddell's Case* (p) the point that the policies must both have been effected by the same assured in order to render the principle of contribution operative was not taken, a fact which was probably due to the parties having sued as trustees on behalf of persons alleged to be indirectly entitled to indemnity under a policy effected by the "trustee" (q) in his name (r). While in *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.* (s), which was decided after *Digby's Case* and *Tattersall v. Drysdale*, this special characteristic of motor insurance law was recognised. As regards motor insurance policies, therefore, this third feature

(g) *American Surety Co. of New York v. Wrightson* (*supra*).

(h) *North British and Mercantile Insurance Co. v. London, &c., Globe Insurance Co.* (*supra*).

(i) Although GODDARD, J. (as he then was), in *Jenkins v. Deane* (1933), 103 L. J. K. B. 250, is explicit on the point.

(h) [1935] 2 K. B. 174. In *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250; [1945] 1 All E. R. 316, this right to sue was extended to cover claims under the policy not only in respect of Road Traffic Act liabilities but also claims in respect of any risks covered by the policy. *Ante*, p. 213.

(l) [1943] A. C. 121, at p. 139; [1942] 2 All E. R. 319, at p. 328, *per* Lord WRIGHT, *ante*, p. 213.

(m) (1877), 5 Ch. D. 369, at p. 581.

(n) As to this, see chapter VIII, *ante*, p. 604, and p. 747, *post*.

(o) [1928] 1 K. B. 359.

(p) [1932] 2 K. B. 363. See this and *Gale's Case* discussed at length, chapter VIII, *ante*, p. 529.

(q) As to this method of procedure, see chapter II, *ante*, and chapter VIII, *ante*, p. 529.

(r) As to double insurance by different persons, see *post*, p. 726.

(s) [1945] K. B. 250; [1945] 1 All E. R. 316 (C. A.).

of double insurance may be expressed as requiring that *both insurances shall indemnify the same assured*.

(b) **Subsisting policies.**—The second condition of contribution is that all the policies to which it is said to apply in any particular case must be policies in force and legally binding at the time when the loss occurs (t). If for some reason or other one of the policies is void or unenforceable no question of contribution can arise with respect to it (u). Similarly, if at the time of the loss one of the policies has lapsed (v), is void (w) or has not yet become effective (x) the doctrine does not apply (y). Although it is clear that the policies must all be valid and subsisting at the time when the loss insured against under them occurs, yet where something has occurred after the loss which disentitles the assured to his indemnity under one policy the insurers of the other may be prejudiced from obtaining the benefits of contribution. Thus in *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.* (a), the facts of which have already been discussed, a motorist, who had already been paid in full by insurers under his own policy in respect of an accident and claimed an indemnity, or alternatively contribution under a friend's driving clause from the insurers who had issued a policy covering the driving of the car concerned in the accident, failed to give notice to the insurers of his friend's car of impending prosecutions for dangerous and careless driving of that car. Although he had never seen his friend's motor insurance policy, he was held to have been in breach of a clause therein requiring persons insured thereby to give notice in writing to the company of any impending prosecution, and he was therefore unable to recover any sum in respect of the accident from his friend's insurers (b). To have held that he was entitled to ignore the condition as to notice (although he was bound by the terms of his friend's policy in so far as they could apply) would have resulted in the benefits conferred on the "authorised driver" being far greater than the benefits conferred on the policy holder himself.

(c) **Payment by insurers.**—The third condition for the operation of the principles of contribution is that the insurer who is seeking to obtain the benefits of it against other insurers must have paid to the assured the amount of the loss or liability under the insured risk with respect to which he is seeking to obtain relief against his co-insurers. This principle is categorically expressed in *JESSEL, M.R.*'s judgment in *Williams v. North China Insurance Co.* (c), in which he says :

"No question of contribution can be raised. They (the insurers seeking contribution) could have no right of contribution till they had paid the shipowners the amounts they had respectively insured. But this argument is that they have paid nothing. It is clear that this argument puts them in the position not of underwriters entitled to contribution but of mere purchasers of the policy who might have been outside strangers."

(t) *Equitable Fire and Accident Office, Ltd. v. Ching Wo Hong*, [1907] A. C. 96; *Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

(u) *Thames and Mersey Marine Insurance Co. v. Gunford Ship Co.*, [1911] A. C. 529; *Edwards (John) & Co. v. Motor Union Insurance Co.*, [1922] 2 K. B. 249.

(v) *Equitable Fire and Accident Office, Ltd. v. Ching Wo Hong* (supra).

(w) *E.g.* on the ground that it was obtained by non-disclosure.

(x) *E.g.* because the premium has not been paid.

(y) *Lishman v. Northern Maritime Insurance Co.* (1875), L. R. 10 C. P. 179, and case cited in note (v), supra.

(a) [1945] K. B. 250; [1945] 1 All E. R. 316 (C. A.), ante, p. 213.

(b) *Distinguishing Re Coleman's Depositories, Ltd., and Life and Health Assurance Association*, [1907] 2 K. B. 798, where the condition as to notice was held not to have been in the circumstances part of the insurance contract.

(c) (1876), 1 C. P. D. 757, at p. 763.

That this is an essential condition of contribution is further borne out by the judgment of BAGGALLAY, J., in *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.* (d), in which he says, in dealing with a clause similar to the rateable contribution clause found in motor policies (e) :

" But I am bound to say that in my opinion it in effect, although it may not be very clearly expressed, really amounts to this, that where there are several policies, and where there, in point of fact, is a double insurance, then in order to do away with the old practice of the assured recovering the whole from one of the several insurance offices, and then the one from whom it was recovered being put to obtain contribution from the others, this clause was put in to say that the assured should, in the first instance, proceed against the several insurance companies for the aliquot part for which they are liable in consequence of that condition."

The dictum cited above is concisely expressive of the modern practice which has modified the effect of the third condition upon which the doctrine of contribution is operative (f). Formerly, as is still the case with subrogation, it was essential that the insurer seeking the benefits of the principle should have paid the amount of the loss or liability to the assured and so have fulfilled the indemnity from the basis of which the right to contribution which he was seeking to exercise was founded (g). As BAGGALLAY, J., in the last cited passage, indicates, insurers found it to be inconvenient in practice that the assured should have been paid the whole amount of his loss or liability by one insurer as a condition for the operation of the principle of contribution and therefore introduced terms into the policy which modified this condition (h). The most common of such terms is the so-called rateable contribution condition, the effect of which has been discussed in a preceding chapter (i) and concerning which some further consideration will be necessary later (j).

(d) **Excess by double insurance.**—The fourth and last condition precedent to the application of contribution is that the amount of the " double insurance " shall exceed the loss or liability which the assured has sustained (k). This is a condition which differentiates contribution at the outset from subrogation (l), since subrogation will arise even though the insurer who is seeking to take advantage of it is only partially liable to the assured in respect of his loss or liability and where, therefore, the insurers' indemnity is a mere partial one (m).

3. The effects of contribution.—It is necessary briefly to consider the effects of contribution from the viewpoint of the insurers, of the assured and of third parties before proceeding to discuss the modifications of the principle which commonly arise through the insertion in motor insurance policies of certain peculiar terms and conditions (n).

(a) **Position of insurers.**—Subject to the terms of a policy, the insurers' position is that they must have satisfied all the conditions which have been

(d) (1877), 5 Ch. D. 569, at p. 588.

(e) See further as to this clause, *ante*, chapter VIII, p. 604.

(f) See also *ante*, p. 720.

(g) *Ante*, p. 723.

(h) See also *per* Lords MONCRIEFF and McLAREN in *Scottish Amicable Heritable Securities Association v. Northern Assurance Co.* (1883), 11 R. (Ct. of Sess.) 287, at pp. 290, 291, 303; also *per* CAVE, J., in *Nichols & Co. v. Scottish Union, &c., Co.* (1885), 2 T. L. R. 190.

(i) Chapter VIII, *ante*, pp. 604 *et seq.*

(j) *Post*, p. 727.

(k) See cases cited in note (f), *ante*, p. 721.

(l) See *ante*, p. 722.

(m) *Ante*, p. 713.

(n) *Post*, pp. 727 *et seq.*

indicated above in order to obtain the benefit of contribution (o). They can, of course, only exercise the rights flowing from contribution in cases to which it is applicable—that is, to cases of true “double insurance” in the sense defined (p). Where the right of contribution arises, it is enforceable by insurers in their own names.

(b) **Position of the assured.**—The assured's position is fundamentally determined by the fact that he is entitled as a general rule to an unconditional indemnity as against each of the insurers with whom he may have entered into a contract of insurance (q). In principle, therefore, while he is confined to recovering the amount of the loss or liability which he has incurred he is not restricted from proceeding against one of his several insurers for the whole amount of such loss or liability (r). As has been previously indicated, although in principle the assured is not affected by the insurers' right to contribution and may exercise his rights under a policy against any one of them to the full extent, in motor insurance practice the assured is invariably subjected to conditions which prevent him from claiming against his insurers more than that proportion of the loss for which they would ultimately be out of pocket after enforcing their right of contribution from other insurers (s). Thus an assured covered by “double insurance” is at the outset by such terms prevented from enforcing the whole amount of his loss or liability against any one insurer (t). He cannot, as he could in the absence of such a term, select one of his insurers to bear the whole amount of his loss or liability as far as he was concerned (s). From the modifications which the insertion of such clauses have made in policies of insurance, it follows that not only is the assured affected at the outset by the existence of the right of contribution (since he is usually only able to proceed against insurers for the amount representing their proportion of the liability (u)), but the third fundamental condition of contribution, i.e. payment to the assured, has been in practice modified almost out of existence (v). The consequence of these terms has then been to worsen the position of the assured because he is not able to claim indemnity against one of his insurers, but is necessarily bound to claim a proportionate amount against all of them, and in the event of one insurer disputing his liability the assured may be put to the burden of taking proceedings against both insurers (w). To such proceedings his other insurers may also be made parties (x).

(o) *Williams v. North China Insurance Co* (1876), 1 C. P. D. 757; *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.* (1877), 5 Ch. D. 569; *Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

(p) *Ante*, pp. 721, 722, and see dictum of Lord MANSFIELD, cited at p. 721. Cases of mere “accidental overlapping” do not, *semble*, give rise to contribution. *Australian Agricultural Co. v. Saunders* (1875), L. R. 10 C. P. 608; *American Surety Co. of New York v. Wrightson* (1910), 103 L. T. 663.

(q) *Ante*, p. 628.

(r) See cases cited in note (o), *supra*.

(s) See chapter VIII, *ante*, p. 604, and *post*, pp. 727, 728. In *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250, [1945] 1 All E. R. 316, *ante*, p. 213, one insurer had paid the full amount of the indemnity “without prejudice to the contention that the assured was entitled to be indemnified by the other insurers.” The assured then agreed to allow the first insurers to sue the second by way of subrogation or of contribution.

(t) *Loc. cit.* See also *Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

(u) *Jenkins v. Deane* (*supra*), *post*, p. 728.

(v) See chapter VIII, *ante*, p. 604.

(w) It should be noticed, however, that where one insurer relies upon a rateable contribution clause the onus of proof lies upon him to show that the assured is entitled to enforce an indemnity under another policy. See *Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

(x) See, e.g., *Gale's and Loyal's Cases*, [1028] 1 K. B. 359, *Weddell's Case*, [1932] 2 K. B. 563, and *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.* (*supra*). But cf. *Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

(c) **Effect on other insurers.**—It follows from the conditions and effect of contribution which have been discussed that other insurers are always affected by the principle of contribution where a case arises for its application. Where in fact there is true "double insurance" insurers against whom the right to obtain contribution is being exercised are entitled as against the claimants to such right to rely

either upon the terms of their own policy which would exclude the right to contribution in any particular case,

or upon the terms of the policy issued by the insurers seeking to enforce the principle of contribution (y).

The former can be illustrated by a case where insurers whose policy excludes contribution in certain circumstances are seeking to enforce contribution against other insurers (z). The latter may be illustrated by a case in which the respective liabilities of the double insurers vary in quantum, it being well settled in such case that the total liability is to be shared by the double insurers in proportion to the relation between the total amounts of their insurances respectively (a).

(d) **Third parties.**—Apart from other insurers, third parties, those persons to whom the assured has incurred liability covered by the terms of his several policies, may possibly be affected by the principle of contribution. This question has been elsewhere discussed (b), and it is therefore unnecessary to add to the previous conclusions which were :

First, that as far as third parties acquiring rights under the Third Parties (Rights against Insurers) Act, 1930 (c), are concerned, such persons would be affected by the principle of contribution in so far as the assured would have been affected by it under the terms and conditions of his policy in the particular case (d) ;

Secondly, that as far as third parties obtaining rights under the Road Traffic Act, 1934 (e), are concerned such third parties are not affected by contribution, although the assured by whom liability to them was incurred would have been affected by it under the terms of the policy with the insurers against whom the third party is seeking to enforce his judgment, since in such case contribution if it were applied would have the effect of diminishing the amount which the third party would be entitled otherwise to claim against such insurers (f).

It may therefore be said, in general, that the question of contribution cannot be fought out at the expense of a third party who has rights against the assured (g). Save in the cases noted above the third party has no rights against the insurers, and consequently falls under no obligations towards them (h). He is not concerned with either the fact or the extent of their liability. He will look in law primarily to the assured for payment to him

(y) *American Surety Co. of New York v. Wrightson* (1910), 103 L. T. 663, *Gale's and Loyd's Cases*, [1928] 1 K. B. 350; *Widdell v. Road Transport, &c. Insurance Co.*, [1932] 2 K. B. 363. But see, as to these cases, chapter VIII, *ante*, pp. 529 *et seq.*

(z) *Australian Agricultural Co. v. Saunders* (1875), L. R. 10 C. P. 668, and cases cited in note (y) above.

(a) *American Surety Co., &c. v. Wrightson* (*supra*), chapter VIII, *ante*, p. 604.

(b) Chapter VIII, *ante*, p. 525.

(c) Chapter III, *ante*, p. 120.

(d) See generally chapter III, *passim*, and chapter VIII, *ante*, pp. 529, 604.

(e) Chapter V, *ante*, p. 278, and see chapter VIII, *ante*, pp. 529, 604; or being granted the benefits of the M.I.B. Agreements, *ante*, chapter VI.

(f) Chapter V, *ante*, *passim*, and see particularly p. 278.

(g) In the first place, he is not concerned with the rights of the assured and insurers, *inter se*.

(h) Chapter II, *ante*, p. 93.

of the liability which the assured has incurred. In so far as third party liability under the Road Traffic Acts is concerned (i) third parties deriving rights against the insurers will not be affected by the operation of contribution between co-insurers or its possible effect upon the assured.

4. Effect of terms in policies upon contribution.—Under this last head it remains briefly to consider the effects of two clauses commonly found in motor insurance policies both of which have already been considered in some detail in an earlier chapter (j).

(i) *Exclusion of risks.*—Motor insurance policies frequently contain clauses excluding the rights of the assured against his insurers in respect of losses or liabilities concerning which he is entitled to make a claim upon other insurers (k). Where such a clause appears, it is submitted that it is very doubtful indeed whether any question of contribution can be raised by insurers who have paid the assured against other insurers who might be said, but for such a clause excluding liability, to be liable. The operation of contribution must necessarily be affected by the terms of any particular policy under which an insurer's liability arises, and there seems to be no valid reason for discounting one particular term of such policies—viz. the term excluding liability.

Terms excluding liability, however, may give rise in practice to considerable difficulty, as appeared in *Loyst's* and *Gale's Cases* (l), in *Weddell's Case* (m) and in *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.* (n), which have been previously discussed (o). In the last two of these cases questions as to contribution arose between insurers both of whose policies contained clauses excluding liability in the event of a particular loss being covered by another policy of insurance, and it was held that such clauses excluding liability in the event of there being co-existing cover cancelled themselves out and became mutually inoperative (p).

(ii) *Rateable contribution clause.*—As has been previously indicated, the effect of the rateable contribution clause is considerably to modify the conditions which, apart from such a term, govern the application of the doctrine of contribution (q). Such modifications arise in two ways:

First, the insurer by such clause is relieved from the obligation of paying the whole or any amount of the indemnity to the assured before seeking to exercise the benefits of contribution against his co-insurers; and

Secondly, the assured loses his right to select one of his several insurers to bear the whole of the loss and can only call upon him to bear his proportionate share (r).

In *Gale's* and *Loyst's Cases* (s) it was decided that the rateable contribution clause when included in a policy which contained a clause excluding liability in the event of a risk being covered by other insurance, took effect by way of qualifying the exclusion of liability in such event.

(i) See chapter V, *ante*, p. 278, and chapter VIII, *ante*, p. 604.

(j) Chapter VIII, *ante*, pp. 527, 604.

(k) *Loc. cit.*, p. 527. See *Gale's* and *Loyst's Cases*, [1928] 1 K. B. 359; *Weddell's Case*, [1932] 2 K. B. 563; *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.*, [1945] K. B. 250; [1945] 1 All E. R. 310.

(l) [1928] 1 K. B. 359.

(m) [1932] 2 K. B. 563.

(n) [1945] K. B. 250; [1945] 1 All E. R. 310.

(o) Chapter VIII, *ante*, pp. 527 *et seq.*, and pp. 604–606.

(p) *Per KOWLATZ, J.*, at p. 507, and see note (o), *supra*.

(q) *Ante*, pp. 721–724, and chapter VIII, *ante*, p. 604.

(r) Chapter VIII, *ante*, p. 604, as to effect of rateable contribution condition.

(s) [1928] 1 K. B. 359, see chapter VIII, *ante*, pp. 527 *et seq.*

In *Austin v. Zurich General Accident and Liability Insurance Co., Ltd.* (f), TUCKER, J., held that the decision of ROWLATT, J., in *Weddell's Case* was good law and should be followed; and his judgment was confirmed *in toto* by the Court of Appeal.

5. Double insurance by different persons.—As has been seen (u), contribution only arises where the other insurance in respect of which it is claimed was effected by the same assured subject to the modification introduced into motor insurance law by the operation of the extension clause which allows the authorised driver to become, for the purpose of this principle, the assured. Where different policies are taken out by different persons in respect of the same subject-matter, as may happen where a car is being acquired by hire purchase (v), and the car owner insures with one insurer, and the purchaser with another, subrogation and not contribution may arise (w). The position in such cases is concisely stated in the following words :

"Where different persons insure the same property in respect of their different rights they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainderman. Then if each insures, although they may use words apparently insuring the whole property, yet they would recover from their respective insurance companies the value of their own interests, and of course those values added together would make up the value of the whole property. Therefore it would not be a case of either subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the respective persons assured had in the property. But then there may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of a mortgagor and mortgagee. But wherever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure for the full value, because in certain events, for instance, if the other person become insolvent, it may be he would lose the full value of the property, and therefore would have in law an insurable interest; but yet it must be that if each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other. I think whenever that is the case the company which has insured the person who has the remedy over succeeds to his right of remedy over, and then it is a case of "subrogation" (a).

PART 3.—LIABILITY FOR ASSURED'S COSTS IN LITIGATION BETWEEN ASSURED AND THIRD PARTIES

Where in the exercise of their option under a clause giving them that right (b), the insurers take over the conduct of legal proceedings brought against the assured, the question arises as to who is directly responsible for the legal costs of the assured's defence. It is noticeable that under the condition set out in a preceding chapter (b) the insurers are entitled to

(f) [1944] 2 All E. R. 243, *per* TUCKER, J.; affirmed, [1945] K. B. 250; [1945] 1 All E. R. 316 (C. A.).

(u) *Ante*, p. 721.

(v) Usually in this case both parties are covered by the same policy by means of a hire-purchase endorsement, as to which see *ante*, chapter IX, p. 633.

(w) See *per* GODDARD, J., in *Jenkins v. Deane* (1933), 103 L. J. K. B. 250.

(a) *Per* MELLISH, L. J., in *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.* (1877), 5 Ch. D. 569, at p. 583.

(b) See *ante*, chapter VIII, p. 596.

conduct the proceedings "in the name of the assured." It is submitted that these words do not give insurers the right to incur any costs on his behalf without his consent (c), any more than the same words would entitle them to make the assured liable for costs incurred by them in exercising their right of subrogation (d) under the succeeding part of the condition.

It would seem that this question is one of fact in each case. Its two aspects must be clearly distinguished. These are :

1. To whom is the solicitor entitled to look for payment of his bill ?
2. As between insurers and assured, who is liable ?

1. As between solicitor and client.—In practice the solicitor is usually instructed by the insurers. Occasionally, however, the insurers allow the case to be dealt with by solicitors nominated by the assured. Often the solicitor requires the assured to give him a written retainer. It is submitted that in any case the solicitor may as a rule look to the assured for his costs. The assured is his client (e), and it was laid down in *McCormick's Case* that neither solicitor nor counsel can withdraw from a case upon the instructions of the insurers once they have appeared on the assured's behalf in court (f).

On the other hand, since the solicitor in fact receives his instructions from the insurers (save in the instance noted) (g), it may well be that the solicitor is entitled to look to them as well for payment of his costs, whether they be regarded as *del credere* agents (h) or as guarantors of the assured or as co-principals (i) with him. There may, of course, be special circumstances (j) which make the above considerations inapplicable, and each case must be considered having regard to the actual facts. Thus many insurers employ a standing solicitor who in such circumstances could not look to the assured for his costs (k). It must be observed that, unlike the position between insurers and assured, the position between solicitor and client is unaffected by the fact that the insurers seek to repudiate the policy or liability under it, save in cases where they make it clear to the solicitor that they will not be responsible for his costs if it turns out that the policy is not binding upon them.

The relationship between the assured, the insurers and a solicitor instructed by insurers to conduct the defence of the assured in a running-down action as a result of a condition in the policy providing that "... the Insurers shall have absolute conduct and control of all or any proceedings against the insured, if and so long as they so desire" was considered at length in the case of *Groom v. Crocker* (l), in which a conflict arose between the interests of the insurers and those of the assured.

(c) See *Allen v. London Guarantor and Accident Co., Ltd.* (1912), 28 T. L. R. 254.

(d) As to subrogation, *ante*, pp. 699 *et seq.*

(e) *Groom v. Crocker*, [1937] 3 All E. R. 844; on appeal, [1939] 1 K. B. 194; [1938] 2 All E. R. 394 (C. A.). *Vide infra*.

(f) *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361.

(g) *I.e.* where the insurers allow the assured's own solicitor to act in the case; where this occurs as a rule such solicitor will not be able to look to the insurers for his costs.

(h) *I.e.* agents who guarantee the solvency of or payment by their principals.

(i) "The action was being fought on behalf of the assured as well as the insurance company," *per* SLESSER, L. J., in *McCormick v. National Motor and Accident Insurance Union, Ltd.* (1934), 49 Ll. L. R. 361, at p. 371.

(j) Such as where the insurers (or the assured, as the case may be) make it clear to the solicitor that they do not undertake to pay his costs.

(k) Unless, of course, he has obtained a retainer from him, as is not unusual.

(l) [1937] 3 All E. R. 844; on appeal, [1939] 1 K. B. 194; [1938] 2 All E. R. 394.

MACKINNON, L.J., in the Court of Appeal (m), dealing generally with the problem, pointed out that where the assured requires a course to be followed in the legal proceedings which is unreasonable, or in the case of any other conflict of interest or tactics between the assured and the insurers, as a result of this clause in the policy

"the insurers can say: Very well; if that is the way in which you insist on your action being conducted, our solicitor shall no longer act for us. You can instruct him, or any other, as your own solicitor. And, thereafter, the litigation being ended, the assured will have to put forward his claim under Part II of the operative part of the policy for 'All sums including claimant's costs and expenses which the insured shall become legally liable to pay in the event of injury or damage caused by' the insured car. That part of the policy must also be subject to an implied term—namely, that the costs and expenses shall have been reasonably incurred by the assured. And if, in the case I supposed, the assured had insisted on suing . . . and had lost his case and incurred costs, the Society could refuse to indemnify him for them, on the ground that such costs had been unnecessarily incurred by his own foolish conduct."

"This means that the solicitor, nominated by the Society, is the solicitor for the assured, who is his client. But he is also appointed by the Society to protect its interests. If in regard to any question of tactics in conducting the litigation the solicitor has reason to discern a conflict, or possible conflict, of interest between the Society and the assured, it is the duty of the solicitor to inform the assured of the matter. If the assured then insists on a course that the Society disapproves, it can refuse to conduct or control the proceedings any longer and leave the assured to do so at his own cost, and at the risk, if the Society are right in their view, of not being able to recover that cost under his policy."

In the case under review (n), it was alleged that in order to enable insurers to obtain for themselves a pecuniary advantage under an agreement with which the assured had no concern (o), the solicitors appointed by insurers to conduct the defence of the assured, acting as the assured's solicitors, without obtaining or seeking his consent, committed him to an admission of negligence in the defence entered on his behalf which led to the result of a judgment being given against him. The assured did not consent to or believe in that admission of negligence, and thereafter sued both his solicitor and the insurers for libel and breach of duty.

LORD GREENE, M.R., pointed out that the clause giving insurers absolute control of the legal proceedings did not entitle the solicitors to make such an admission.

"A solicitor who, acting upon instructions, express or implied, from the insurers, does something to which the insurers, as between the insurers and the assured, are not entitled to require the assured to submit, would in my view be acting beyond his competence: and if what he does is something which in the ordinary way would be a breach of duty (p) to his client, he will be liable to the client accordingly."

(m) [1939] 1 K. B. 194, at p. 227; [1938] 2 All E. R. 394, at p. 417.

(n) *Groom v. Crocher*, *supra*.

(o) *Cf.* the facts of *Morley v. Moore*, [1936] 2 K. B. 359; [1936] 2 All E. R. 79.

(p) The duty is contractual (*cf. Bean v. Wade* (1883), 2 T. L. R. 157), and the damages flowing from such a breach are to be assessed on the rules applicable to the law of contract, and not the law of tort. The damages awarded by the Court of Appeal in this case for the breach of duty were 40s. It was also held that the solicitors had libelled their client by repeating the admission of negligence in a letter written to the solicitors acting for the injured third party.

The Master of the Rolls continued (q) :

" The effect of the provisions in question (r) is, I think, to give to the insurers the right to decide upon the proper tactics to pursue in the conduct of the action, provided that they do so in what they *bona fide* consider to be the common interest of themselves and their assured."

The assured's claim against the insurers was dismissed, the insurers being shown not to have defamed him, and, secondly, in the matter of breach of duty, the Court held (s) that the question was one which would properly have arisen in arbitration proceedings between the parties, and as the policy contained an arbitration clause in the *Scott v. Avery* form (t), the assured could not succeed in his action at law.

An instance both of the wide powers given by the "conduct of litigation clause" and of the effect of the words of the Master of the Rolls last quoted is shown in *Beacon Insurance Co., Ltd. v. Langdale* (u). The insurers settled, without the express sanction of the assured, a claim by a third party, being careful to state in the settlement that liability was not admitted. The policy was subject to a £5 excess, and the assured contended, when the £5 was claimed from him by insurers, that the insurers were not entitled to settle the claim without notice to him, and that they had acted unreasonably in the conduct of the negotiations (v). The Court of Appeal held (1) that no notice was necessary, (2) the settlement was advantageous and made *bona fide*, (3) the £5 excess was to be paid by the assured to insurers.

2. Liability for costs as between insurers and assured.—In approaching consideration of the questions as to the rights and liabilities in respect of the costs of defending a third party claim against the assured, the following points must be kept clearly in mind.

(i) The ordinary motor policy does not insure against *claims* by, but against liabilities to third parties (a).

(ii) Most motor policies do not expressly give any indemnity against the costs of defending civil proceedings (a), but on the contrary impliedly exclude such an indemnity by expressly providing

(i) That the indemnity extends to the third parties' costs (b) ;

(ii) That the insurers will pay such costs incurred with their written consent (c) ;

(iii) That they expressly undertake to pay the costs of certain criminal proceedings (d).

(iii) Most motor policies contain a condition giving the insurers the right, expressly exercisable at their option, to take over the conduct of proceedings brought against the assured, but do not contain any undertaking to defend such proceedings.

(iv) In several cases an assured has been held entitled to his own costs although incurred without insurers' consent.—In *James v. British General Insurance Co.* (e) it appears to have been held that insurers who wrongfully repudiated,

(q) [1939] 1 K. B. 194, at p. 203 ; [1938] 2 All E. R. 394, at p. 400.

(r) I.e. the right given to insurers to conduct the proceedings if they so desire.

(s) *Hawkes, J.*, [1937] 3 All E. R. 844.

(t) [1856], 5 H. L. Cas. 811. See pp. 611 *et seq.*, *ante*.

(u) [1939] 4 All E. R. 204.

(v) The assured desired to make a claim against the third party

(a) It should thus be contrasted with the ordinary newspaper libel policy which does. See *Hulton (E.) & Co., Ltd. v. Mountain* (1921), 37 T. L. R. 869 ; *Daily Express* (1908), *Ltd. v. Mountain* (1916), 32 T. L. R. 592.

(b) See *ante*, chapter VIII, p. 518.

(c) *Ante*, chapter VIII, p. 526.

(e) See *ante*, chapter VIII, p. 524.

(f) [1927] 2 K. B. 311.

leaving the assured to look after his own defence of third party proceedings, were liable for his costs where it was reasonable on his part to incur them. The reports of this decision do not show what were the exact terms of the policy relied upon, nor do they show whether it was actually argued that the insurers could not be liable for these costs unless they had consented to their being incurred. The point was however, raised upon the pleadings, that these costs were not recoverable since the insurers' written consent thereto had not been given. But it may be that the relevant clause in the policy in this case contained the qualification "such consent not to be unreasonably withheld" (f).

In *Re Morgan and Provincial Insurance Co., Ltd.* (g), a motor policy insured against all sums which the assured might become legally liable to pay to third parties (including claimants' costs) and undertook that the insurers would pay law costs incurred with the written consent of the Company in the defence of any third party claim. The insurers wrongfully repudiated liability in respect of a third party claim, refusing their consent to the incurring of any costs, and leaving the assured to look after himself. He claimed a declaration that the insurers were liable to indemnify him *inter alia* in respect of all law costs incurred by him in the investigation, defence, or settlement of any claim. The arbitrator awarded a declaration to that effect, and the award was ultimately upheld by the House of Lords. In this case again the reports do not show whether it was contended on the part of the insurers that there was no liability under the policy to pay costs incurred without their consent, and no obligation to give such consent.

In *Piddington v. Co-operative Insurance Society Ltd.* (h), the insurers had wrongfully repudiated, leaving the assured to conduct his own defence of a third party claim. The assured failed in his defence, and in arbitration proceedings was awarded £200 for his own costs of the third party's action. The report does not show what the clause in the policy was which entitled the assured to these costs, nor whether the point was taken, but the arbitrator's order was held correct by ROCHE, J.

In *Pictorial Machinery, Ltd. v. Nicolls* (i) insurers also repudiated wrongly a third party claim against the assured. The third party claim was settled out of court, but the assured incurred costs and expenses in preventing judgment being given against them. The policy provided that insurers would pay all costs and expenses in connection with any claim which they required to be contested, and, secondly, subject to this first provision, they would pay all legal and other costs incurred with their consent. In proceedings to recover under the policy the assured's expenses referred to, HUMPHREYS, J., held that although the costs incurred by the assured in defending the third party claim were not within the cover expressly provided by the policy, the right of recovery was not excluded by the terms of the policy and these costs and expenses were recoverable (h) in so far as they had been reasonably incurred, as damages flowing from the insurers' breach of contract.

(f) Cf. *Hulton (E.) & Co., Ltd. v. Mountain* (1921), 37 T. L. R. 869.

(g) [1932] 2 K. B. 70 (C. A.), affirmed, *sub nom. Provincial Insurance Co. v. Morgan and Foxon*, [1933] A. C. 240.

(h) [1934] 2 K. B. 236.

(i) [1940], 67 Ll. L. R. 524.

(h) Cf. *London Assurance v. Clars* (1937), 57 Ll. L. R. 254, where insurers' expenses incurred in investigating a fraudulent claim by the assured were held not recoverable as damages by GODDARD, J., (as he then was). The two decisions may be reconciled by the proviso in the judgment of GODDARD, J., that any part of the said expenses which could properly be regarded as costs would no doubt be taken into account by the Taxing Master on taxation.

(v) It is difficult to see how it could be said of a clause that merely states that the insurers will pay costs incurred with their consent, that this qualification must be implied. If there is no such implied proviso, where the policy gives no undertaking to defend proceedings brought against the assured, insurers who have wrongfully repudiated will be in no worse position than those who do not repudiate and merely refuse their consent to the incurring of costs. It may be, however, that the assured would be held entitled to his own costs under some policies (l) where he reasonably defends proceedings as sums which he becomes liable to pay "in respect of" a third party liability.

(vi) *Implied indemnity against own costs.*—It is sometimes thought that the costs of defending a third party suit are part of the loss insured against as being consequent upon the third party liability (m). There is, however, no authority for this proposition (n).

It may be that a distinction can be drawn between the costs of defending the issue of liability and those incurred in establishing the amount thereof. The former might not be said to be consequential upon the loss (o) but the latter, as has been seen (p), must in many cases be incurred in order to ascertain the sum to which the third party is entitled, and therefore are directly caused by, or constitute part of, the loss insured against. It is submitted that :

(vii) *A motor policy may be held to cover law costs incidental to the ascertainment of the amount of third party liability where necessarily incurred (q).*

The summary which follows applies only to policies which do not contain an express or implied term imposing any obligation upon the insurers either to give their consent to the incurring of, or to pay for the legal costs of the assured's defence of third party proceedings. Where a policy does contain such an express term, the position as to costs must be governed in each case according to the meaning and effect of that relevant clause. Whether or not such a term is to be implied will depend upon the meaning and effect of the express terms of the policy, which will also determine the extent and effect of the term to be implied (r).

(viii) *Damages for breach of contract.*—It may be that in some cases the assured will be entitled to recover his own costs as part of damages for wrongful repudiation (s).

(a) *Where insurers take over the conduct of proceedings.*—When the insurers take over the conduct of the proceedings, their express written consent to the assured, although strictly necessary according to the terms of most specimen policies (a), is, it is submitted, dispensed with if they give instruc-

(l) Like so many questions in motor insurance law, this must depend on the exact words of the policy in each case.

(m) Cf. Wellford on Accident Insurance, 2nd Edn., p. 449.

(n) See, however, *Xenos v. Fox* (1899), 1. R. 4 C. P. 665.

(o) They are apparently a consequence of the assured's perversity in not admitting the claim. "In practically every case a judgment against the defendant means that he should have admitted the claim when made and paid the appropriate sum in damages." Per Lord HAWORTH, M. R., Lord WRIGHT, ROMER, L. J., SWIFT, J., and GODDARD, J. (as he then was), in 2nd Interim Report of the Law Revision Committee, 1934.

(p) *Ante*, p. 674.

(q) *I.e.*, when this amount cannot properly be computed by agreement, as in most cases of personal injury. See fully, *ante*, chapter VIII, and *Groom v. Crocher* (*supra*).

(r) *As*, for example, whether the implied term extends to the costs of defending proceedings in which the third party fails to prove any liability.

(s) See *ante*, p. 682, and *Pictorial Machinery, Ltd. v. Nicolls* (1940), 67 Ll. L. R. 524.

(a) See the usual clause, *ante*, chapter VIII, p. 524.

tions to a solicitor (b) to act on his behalf without *making it clear that they do not undertake to pay the costs*, or *give him their oral consent* (c).

It is submitted that where the insurers are not ultimately liable under the policy and have paid, or are obliged to pay, the assured's costs, they can recover these from him as damages for breach of contract (d) wherever the claim defended is

(1) one which by virtue of the provisions of section 10 (e) of the Road Traffic Act, 1934 (f), the insurers will be obliged to satisfy when judgment for it is obtained by the third party (g); and

(2) one which in the circumstances it was reasonable to defend (h).

They may, however, if they have *not* undertaken the defence "without prejudice," in some cases be estopped from recovering these costs (i).

Where insurers take over the conduct of proceedings, the greatest difficulty which may arise is where the assured insists, which, as has been seen (j), he is entitled to do (j), upon prosecuting a counterclaim against the third party, whilst the insurers desire to settle (k). Under these circumstances it is submitted that if the insurers refuse to go on with the conduct of the case, the position will, as from the time of such refusal, be precisely the same as where they have not taken any part in the proceedings and have refused their consent to the incurring of any costs (l). If they consent to go on, no question arises. If they consent to go on only "without prejudice," although each case must depend upon the terms of such consent, it is submitted that in general if the action terminates against the assured, they will not be liable to any sum in excess of that for which they were willing to settle with the third party, plus the costs up to the date of the assured's refusal to settle. This, however, is extremely doubtful in the case of policies which insure against "all sums which the assured shall become legally liable to pay" (m), unless the assured's insistence upon going on with the case constituted a breach of contract. If, for example, it was so unreasonable as to be a breach of the condition requiring all reasonable assistance (n) in the defence of third party proceedings, the assured would be unable to make any claim under the policy, having failed to fulfil a condition precedent to the insurers' liability. But if in these circumstances the assured is successful, or partially successful so that in the result the insurers benefit, it is suggested

(b) As to the position where insurers take over conduct of proceedings "without prejudice" see next paragraph in text. And as to that where they later discover that there was no liability on the policy, *ante*, chapter IX, p. 674.

(c) See *Eclipse Policies v. Marchbank*, *post*, p. 737, and cf. *McConnell v. Poland* (1926), 23 Ll. L. R. 77, and *Knight v. Hosken* (1943), 75 Ll. L. R. 74.

(d) If reasonably incurred, see fully, *ante*, chapter IX, p. 673.

(e) *Ante*, chapter V, p. 278.

(f) *Ante*, chapter V.

(g) *Ante*, chapter V, p. 294.

(h) See further, *ante*, chapter IX, p. 674.

(i) This could only occur where they knew of the ground of repudiation when undertaking the defence, and would generally only arise in cases where estoppel also prevented their repudiating. As to which, see *ante*, chapter IX, p. 691, and, as to estoppel generally, *ante*, chapter II, p. 68.

(j) *Ante*, chapter VIII, p. 525, *Morley v. Moore*, [1936] 2 K. B. 359; [1936] 2 All E. R. 79, *ante* p. 598.

(k) E.g. a counterclaim for personal injuries.

(l) The position in those circumstances is summarised below.

(m) Since in this case he would have become legally liable to pay a certain sum, and his policy would cover it. Cf. *Knight v. Hosken* (1943), 75 Ll. L. R. 74, a limited indemnity case.

(n) As to the usual clause requiring this, see *ante*, chapter VIII, p. 606.

they will not be liable even to the extent of that benefit (o) either for any costs which the assured is unable to recover from the third party (p) or for his own costs (q). The foregoing suggested rules must, however, be understood as being only of the most general application. Thus where, for example, the assured insists on prosecuting a counterclaim for personal injuries in spite of the insurers' desire to settle (r), and in the result is awarded (but fails to recover) (p) heavy damages and costs, the insurers who had conducted the proceedings "without prejudice" might say that they were liable for no costs after the assured's refusal to settle because :

- (i) There was never any liability under the policy (s) ;
- (ii) They were never interested in the assured's counterclaim for personal injuries (t) ;
- (iii) They never consented to the incurring of the costs.

Moreover, the insurers would in no circumstances be liable for either the assured's or the third party's costs attributable to the counterclaim (u) prosecuted without their consent.

(b) *Where insurers take over conduct of proceedings "without prejudice."*—Where this occurs, each case must depend upon the precise terms of the "without prejudice" arrangement. But in general, if the insurers take over the conduct of proceedings, but make it clear to the assured that they will not be liable for his costs, *either* because they have repudiated liability or for any other reason, the position depends upon whether or not the assured consents to this course. If he does it is clear the insurers will be liable to indemnify the assured—if they are liable on the policy at all—for the third party's costs (v) but not for the assured's.

But if the assured refuses to assent to this course (w), the insurers will, if they go on (x), be liable for his costs whether or not the proceedings result in favour of the assured provided that they are ultimately liable on the policy (y). If they are not liable, they can in the circumstances suggested above, recover the sums paid or payable by them in respect of the assured's costs as damages for breach of contract.

(c) *Where the insurers refuse to take over conduct of proceedings but are willing to give their consent to the incurring of costs.*—In this case, although written consent may be required by the terms of the policy, oral consent

(o) I.e. to the difference between (a) the gross sum which they were willing to pay the third party and (b) the gross amount (if any) which the assured recovers in the action.

(p) As to whether insurers are ever subrogated to his rights in respect of costs, etc., against the third party, see *ante*, chapter IX, p. 649.

(q) Since there is no liability; see *Xenos v. Fox* (1869), L. R. 4 C. P. 665.

(r) As to whether the insurers have the right to settle in these circumstances, see *post*, pp. 743 *et seq.*

(s) And therefore never any right to indemnity. See *Xenos v. Fox* (*supra*). See, however, *Eclipse Policies v. Marchbank*, *post*, p. 737.

(t) See further, *post*, p. 737.

(u) I.e. as distinct from the costs attributable to the defence.

(v) See *Allen v. London Guarantee and Accident Co., Ltd.* (1912), 28 T. L. R. 254.

(w) As he may do. He may also refuse, in some cases, to allow insurers who have repudiated to take over conduct of his case at all (i.e., even if they undertake to pay the costs). See further, *ante*, chapter IX, p. 673.

(x) Which, as a rule, they would not do.

(y) Since here their position would be exactly the same as when they take over conduct of proceedings in the ordinary way, unless, of course, they only discover the ground of non-liability afterwards. As to which, see *Eichells, Congdon and Muir, Ltd. v. Eagle Star and British Dominions Insurance Co. Ltd.* (1928), 72 Sol. Jo. 242, and *ante*, chapter IX, p. 696. In the event of their refusing to go on, the position will be as indicated in the next paragraph.

will as a rule be sufficient (s). Consent must be obtained at each step of importance in the proceedings (a).²

(d) *Where the insurers refuse to take over conduct of proceedings and refuse their consent to the incurring of any costs.*—Where the insurers adopt this attitude, either because they repudiate the policy or liability under it, or for any other reason, the assured's duties in regard to the defence of third party proceedings are as explained in the last chapter. It is submitted that where he properly admits (b) or does not contest (c) or is defeated on the issue of liability he may always recover any costs necessarily incurred (d) in the *ascertainment of the amount* (e) of the third party liability. The circumstances (f) in which, it is submitted, the assured ought to defend the claim as to *amount* were described in the last chapter (g). The costs thus incurred may be in respect of defending the case in court (h), attending and contesting a claim before a sheriff's jury (i), a master (k) or referee (k), or in the employment of legal and medical (l) or other expert (m) advisers to assist in checking the claim and ascertaining the amount which is properly due as compensation to the third party (n).

3. Liability for costs incurred in respect of a claim not covered by the policies (o).—Difficulties may arise under the "Road Traffic cover" form of policy (p), where insurers take over the defence of third party proceedings in which there is joined a claim in respect of a liability not covered by the policy—as, for example, a claim by a voluntary passenger or in respect of damage to property. In such cases the insurers are clearly not liable under the policy to pay the costs attributable to the claim, or to that part of a claim which is excluded from the indemnity given by the policy. On the other hand, insurers who incurred costs on behalf of their assured in respect of such claims without warning him that he was liable to reimburse them therefor might find that they were estopped (q) from saying that these had not been incurred for their own benefit (r).

(s) The insurers in such case being estopped from insisting upon, or deemed to have waived the necessity for writing. See *McConnell v. Poland* (1926), 23 Ll. L. R. 77.

(a) See *ante*, p. 731, and *Hulton (L. & Co., Ltd. v. Mountain* (1921), 37 T. L. R. 809). *Daily Express* (1908, *Ltd. v. Mountain* (1916), 32 T. L. R. 592. And see, as to the position when, after having consented to the incurring of costs, they discover a ground upon which they can avoid or repudiate liability under the policy, *ante*, chapter IX, p. 696, and *Eichells, Congdon and Muir, Ltd. v. Eagle, Star and British Dominions Insurance Co., Ltd.* (1928), 72 Sol. Jo. 242.

(b) As to when he can properly admit, see *ante*, chapter IX, p. 677.

(c) As to when he can properly allow judgment to go by default, see *ante*, chapter IX, p. 677.

(d) *E.g.* the employment of legal and other expert advisers.

(e) Since this *must* be ascertained in some cases, and must be done competently in the interests of all parties concerned.

(f) Where the claim is for personal injuries, almost invariably.

(g) *Ante*, chapter IX, p. 678.

(h) *I.e.* where the case is fought out, or, if liability is admitted, where the amount thereof is contested.

(i) Where judgment is allowed to go by default, or interlocutory judgment obtained, the damages must in certain cases be assessed by a Sheriff's jury. See O. 14, r. 7A, and notes thereto in current Annual Practice.

(k) See O. 13, r. 5, and O. 14, r. 7A, and notes thereto in current Annual Practice.

(l) *I.e.* for the purpose of examining the third party's injuries.

(m) *E.g.* a motor repairer for the purpose of checking the third party's estimate of the cost of repairing his car.

(n) In most cases it is impossible for the assured to ascertain this without such assistance.

(o) *Cf.* the position as to liability for the third party's costs in such cases, *post*, p. 744.

(p) As to this form of policy, see *ante*, chapter VIII, p. 491.

(q) As to estoppel, see fully, *ante*, chapter IX.

(r) Since they would as a rule have no right to take over his defence of a claim not covered by the policy. See also *Eclipse Policies v. Marchbank* (1921), 1 L.J., C.C.R. 365.

4. Liability for assured's costs under limited liability policies.—The position where the third party claims in respect of a liability which is covered by the policy (s), and partly in respect of one which is not (t) has been explained (u).

It remains to examine the position where the policy gives only a limited indemnity (v), either by requiring the assured to bear the first £x of any claim (a), or by specifying a maximum sum beyond which the insurers will not be liable in respect of any one accident (b), or during the currency of the policy (c) or both (d). The position must be regarded as in general governed by the same considerations which, it is submitted, apply to the unlimited policy (e).

The following differences should, however, be noted (d).

(a) Where insurers take over conduct of proceedings.—Here great difficulty arises where the costs incurred do not exceed the minimum which the assured has to bear, or where the third party liability is not greater than that sum, or some combination of these circumstances occurs. Thus in *Eclipse Policies v. Marchbank* (f) the policy contained the following clauses:

" Clause 1.—The insurers undertake to pay all expenses and legal costs incurred with their express consent in writing in settling or defending any claim.

" Condition 2.—Shall be entitled, if they so desire, to take over and conduct in the name of the assured the defence or settlement of any claim, or to prosecute in his name for their own benefit any claim for indemnity or damages or otherwise (g), and shall have full discretion in the conduct of any proceedings, or in the settlement of any claim.

" Endorsement No. 1.—The underwriters shall not be liable to pay the first £50 of any claim in respect of which indemnity is provided by this policy. The assured shall indemnify the underwriters in respect of any amount not exceeding the aforementioned sum for which the underwriters make payment in respect of any such claim which may be the subject of indemnity under the policy. The expression 'claim' shall mean a claim or series of claims arising out of one cause."

The assured was involved in an accident with two other vehicles besides his own. One of the third parties sued and recovered judgment jointly against the assured and the other third party in the County Court. The insurers contributed the sum of £5 gs. 2d. in respect of the County Court third party's damages and costs, being the sum due from them (h) under the policy. Subsequently the third party who had been held in the County Court jointly liable with the assured brought an action against the assured, claiming £150 damages in respect of the same accident. The insurers, who had instructed a solicitor to act on behalf of the assured in the County Court action, also took over and instructed the same solicitor to conduct his defence in the High Court, and in this action a counterclaim was made on his behalf.

(s) *E.g.* personal injuries.

(t) *E.g.* damage to property.

(u) *Ante*, p. 736.

(v) For this type of policy see *ante*, chapter IX, p. 649.

(a) *Ibid.*

(b) *Ibid.*

(c) This is less common in modern motor insurance.

(d) *Cf.* the position under policies giving limited cover, *ante*, p. 649.

(e) And which are fully set forth above, *ante*, pp. 731 *et seq.* *E.g.* taking over "without prejudice," unreasonable insistence by assured, or prosecuting a counterclaim, etc.; see *ante*, pp. 732 *et seq.*

(f) (1934), 1 L. J., C. C. R. 365.

(g) See, as to the validity and effect of this part of this type of clause, *ante*, chapter VIII, pp. 596 *et seq.*

(h) *I.e.* presumably the assured's total liability was £55 gs. 2d., *sed quaere*.

738 Chapter X—Parties' Position in Legal Proceedings

The High Court action was settled on the terms that claim and counterclaim be withdrawn, each party paying his own costs.

The insurers paid the solicitor instructed by them the costs of the assured's defences in the County Court and in the High Court, a sum amounting to £41 10s. 6d.

They then claimed this sum as being due to them from the assured.

The County Court judge who tried the case (i) stated his views of the construction of the policy, *inter alia*, as follows :

(1) If the insurers do not take (k) over the conduct of the assured's case, they cannot be liable for any costs incurred on his behalf for which they have not given their written consent (l).

(2) The costs were incurred under Condition 1, and, at any rate in respect of the counterclaim, for the insurers' own benefit.

(3) The clause undertaking to pay costs incurred with the insurers' written consent is applicable only when he conducts his own case (m).

In the result the learned judge held that, upon his construction of the policy the insurers were entitled to nothing (n).

The learned judge appears not expressly to have dealt with the point upon which the insurers no doubt chiefly relied—namely, that the assured had agreed to indemnify them "in respect of any amount up to £50 for which they make payment in respect of any claim the subject of indemnity under the policy." It is, however, submitted that the learned judge's decision should be upheld or followed in similar cases on the grounds that :

(a) The costs were incurred with their consent (o), and the necessity for express written consent is therefore waived (p).

(b) The endorsement does not cut down or apply to the clause under which they undertake to pay costs incurred with their consent, since "claim" refers to a third party claim.

In general, therefore, where insurers instruct their own solicitor to conduct the assured's case against the third party, they will be responsible for his bill of costs, in the absence of an agreement with the assured to the contrary. Any agreement, moreover, as to sharing of costs must be supported by proper consideration. Thus, in *Knight v. Hosken* (q), an action on an estate agent's indemnity policy, insurers had contracted to indemnify the assured against certain third party claims up to £2,000. A clause in the policy provided that in the event of insurers requiring any claim to be contested by the assured they would pay all costs and expenses in connection therewith. A claim amounting to about £5,000 was made against the assured. Insurers undertook the defence in the High Court and instructed their own solicitor. The defence was successful, but, on appeal, the amount claimed but refused in the Court below was awarded to the third party,

(i) His Hon. Judge WHITMORE RICHARDS.

(k) *Seem* whether because repudiating or for any other reason.

(l) *Cf.* the author's views as to costs necessarily incurred in computing the proper amount of the third party liability, *ante*, p. 736.

(m) *Cf.* *ante*, pp. 736-7.

(n) This case should be carefully compared with that of *Allen v. London Guarantee and Accident Co. Ltd.* (1912), 28 T. L. R. 234, of which a full account was given *ante*, chapter IX, p. 650. In the latter case the insurers did not apparently contend that the assured was responsible for any of his costs.

(o) They may have been incurred with their *express* written consent; the clause does not say that the consent must be given to the assured, and express written instructions to the solicitor would, it is submitted, satisfy it.

(p) See *McConnell v. Poland* (1926), 23 Ll. L. R. 77, and see generally as to waiver and estoppel *ante*, chapter IX, p. 691.

(q) (1947), 72 Ll. L. R. 206, *per* ATKINSON, J.; (1943), 75 Ll. L. R. 74 (C. A.).

subject to assessment by the Official Referee. Insurers also instructed their own solicitor to appear on behalf of the assured in the Court of Appeal, but when the appeal was decided against them, insurers withdrew their support from the assured, who, owing to lack of funds, did not himself appear before the Referee (r).

Finally, the damages awarded against the assured were something over £5,000, the third party's costs were £1,141 13s. 10d., and the bill of costs of the solicitor conducting the assured's defence amounted to £777. The assured claimed against insurers £2,000 of the damages awarded and both bills of costs. The insurers admitted they were liable for all three sums under the policy, subject to a set-off as to a proportion of the sum representing the third party's costs as the result of an alleged agreement between the insurers and the assured to share that sum roughly in proportion to the respective liability of the two parties for the damages awarded.

It would appear therefore that where insurers instruct a solicitor to conduct the assured's defence, and there is a clause in the policy requiring insurers to pay all costs, charges and expenses in connection with any claim, the insurers are liable in full for that solicitor's bill of costs, whether the policy is one of limited indemnity or no. As to the agreement to share the third party's costs, the arrangement was come to in a series of letters exchanged between insurers and the assured after the insurers' solicitor had been instructed to conduct the assured's defence. Since the insurers were not bound by the policy to undertake the assured's defence, and since they had decided to fight the action primarily for their own benefit the Court of Appeal held that there was no consideration for the assured's promise to share the costs, and that therefore the sharing agreement was unenforceable.

(b) **Where the assured deals with his own case.**—It is submitted that where the assured deals with his own case for any reason (s) he is not in law entitled to recover (t) his costs from them :

(1) In respect of a case in which the sum recovered by or settled with the third party does not exceed the amount which the assured under his policy has to bear.

(2) In respect of that part of the claim which is attributable to the amount the assured has to bear or to the excess over that to which the insurers' liability is limited, as the case may be.

In other cases the position will be governed by the principles applicable to an unlimited policy (a).

PART 4.—LIABILITY FOR THIRD PARTY'S COSTS

1. Generally.—The usual form of third party liability indemnity is "against all sums, including claimant's costs, which the assured shall become legally liable to pay" (b). As has been seen (c), the inclusion of "claimant's costs" adds nothing to the extent of the cover (d). Nevertheless, the assured will not always be entitled to an indemnity in respect of the third party's costs. The position may be summarised as follows :

(r) No harm was done, apparently, by his non-appearance, for the basis of assessment of damages had already been laid down by the Court of Appeal.

(s) *I.e.* either because the insurers repudiate or because for some reason (*e.g.* the assured insisting on going on with a bad counterclaim).

(t) Either under the policy or as damages.

(a) The liability as between solicitor and client is explained *ante*, pp. 733-4.

(b) See *ante*, chapter VIII, p. 518.

(c) *Ante*, chapter VIII, p. 518.

(d) See *Xenos v. Fox* (1869), L. R. 4 C. P. 665.

(a) Where assured is entitled to indemnity for third party's costs.

1. Whenever the insurers take over the management (e) or control (f) of the proceedings (g), or persist or acquiesce in the manner of their conduct (h).

2. Where, the assured being left to look after his own defence (i), the third party's costs are not caused or increased by the assured's unreasonable conduct (j).

(b) Assured not entitled to indemnity for third party's costs.

1. *Costs referable to a liability not covered by the policy.*—Where the policy gives "Road Traffic Act" cover (k) only (l) the assured will never, unless perhaps the insurers expressly undertake to pay it (m), be entitled to an indemnity in respect of costs referable to a third party claim not covered by the policy—for example, a claim by a voluntary passenger (n). Difficulties may arise here where the third party claims partly in respect of a liability covered by the policy—personal injuries (o)—and partly in respect of one not covered—damage to property (p). As has been seen, endeavour should always be made to ascertain the proportion of the total costs of the third party attributable to these separate liabilities having regard to the provisions of section 10 (q) of the Road Traffic Act, 1934 (r).

2. *Costs caused or increased by assured's misconduct.*—Where, whether the proceedings are conducted by the insurers (s) or by the assured left to look after himself (t), the assured by his unreasonable conduct causes or increases the costs due to the third party, these will not (u), or will not *pro tanto*, as the case may be, come within the indemnity given by the policy, nor in cases of repudiation (v) will he be able to recover them, or all of them, as damages (w).

This is so either because the assured will be in breach of the express (w)

(e) *E.g.* under the usual clause giving them power so to do. Cf. *Knight v. Hoshen* (1943), 75 Ll. L. R. 74 (C. A.).

(f) *E.g.* where they allow the assured to instruct his own solicitor subject to their supervision. See *Hulton (F.) & Co., Ltd. v. Mountain* (1921), 37 T. L. R. 869.

(g) *Allen v. London Guarantee and Accident Co., Ltd.* (1912), 28 T. L. R. 254.

(h) *E.g.* where the assured informs repudiating insurers of his procedure at every important stage of the proceedings.

(i) Whether because the insurers repudiate or for any other reason. See further, *ante*, chapter IX, pp. 673 *et seq.*

(j) As to what is unreasonable conduct in these circumstances see *ante*, chapter VIII, p. 525.

(k) *I.e.* only the cover required by s. 36 (1) (b) of the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), *ante*, chapter IV, p. 188.

(l) Cf. the position under a limited liability policy, *ante*, p. 737.

(m) Cf. *Allen v. London Guarantee and Accident Co., Ltd.* (*supra*), and *Eclipse Policies v. Marchbank* (*supra*).

(n) Against liability to whom insurance is not required by s. 36 (1) (b), *supra*, or given by this form of policy.

(o) *E.g.* by a pedestrian.

(p) Or for personal injuries by a voluntary passenger.

(q) Which require the insurers to pay the costs referable to the personal injuries claim direct to the third party, whatever may be the position between them and their assured. See *ante*, chapter V, p. 278, and also the effect of the M.I.B. Agreements, chapter VI, *ante*.

(r) *Ante*, chapter V.

(s) Under the clause in the policy giving them that right or otherwise with the assured's consent.

(t) Either on repudiation or simply because the insurers refuse to take over his defence.

(u) See *James v. British General Insurance Co.*, [1927] 2 K. B. 311, and see further, *ante*, chapter IX, pp. 641 *et seq.*

(v) *I.e.* where he accepts the repudiation and does not treat the policy as remaining in force. See chapter IX, *ante*, p. 673.

(w) There is usually an express term to this effect. See *ante*, chapter VIII, p. 597.

or implied (x) term of his policy requiring him to take all reasonable steps to minimise the loss (x), or because such costs are not directly (y) attributable to the liability insured against, but are caused (a) by the assured's own misconduct (b) in the matter (c).

The circumstances in which the assured may be regarded as having acted unreasonably in the conduct of his case have been fully explained in a previous chapter (d).

2. Third party's costs under limited liability policies.

1. *Where the insurers take over his case.*—As the cases of *Allen v. London Guarantee and Accident Co., Ltd.* (e), and *Knight v. Hosken* (f) show, the insurers who take over and conduct a defence, whether with or without the consent of the assured, are liable to indemnify the assured for any costs which the third party is awarded, in so far as the insurers undertake that defence primarily for their own benefit, and are not bound to do so by the terms of the policy (g).

If insurers, in consideration of their undertaking the defence, make some agreement with the assured to share the third parties' costs, that agreement will determine the liability of insurers for those costs. But such an agreement must be supported by good consideration (h).

2. *Where the assured conducts his own case.*—(i) Where the assured is left to deal with his own case under a limited liability policy it is clear that he can recover nothing if the total of the damages and costs does not exceed the minimum.

(ii) Where the damages alone are less, but with the third party's costs more than the minimum and where the damages alone exceed the minimum, the position must depend upon the wording of the policy (k) in each case.

3. *Liability for third party's costs under limited cover policies (l).*—It is submitted that the same considerations apply to these as to the form of policy last considered (m).

4. *Insurers' rights in regard to costs awarded to assured.*—Where the insurers take over and incur liability (n) to a solicitor for the costs of the assured's defence (o) and in the result of the litigation the third party is ordered by the court to pay the assured's costs, the question arises as to whether the insurers can directly enforce this order for their own benefit. The answer is not free from doubt, but the following propositions may be made :

1. The insurers can only acquire this right by subrogation or assignment.

(x) In the absence of an express term, an obligation to the same effect must be implied. See *ante*, chapter VIII.

(y) Or wholly, as the case may be. (a) Or increased, as the case may be.

(b) Which is not the class of misconduct covered by the policy, i.e. not negligence in the use of the insured vehicle.

(c) See *per SCRUTTON, L.J.*, in *City Tailors, Ltd. v. Evans* (1921), 91 L. J. K. B. 379.

(d) *Ante*, chapter IX, pp. 676 *et seq.*, and see *James v. British General Insurance Co.*, [1927] 2 K. B. 311.

(e) (1912), 28 T. L. R. 254; *ante*, chapter IX, p. 650.

(f) (1943), 75 Ll. L. R. 74 (C. A.); *ante*, p. 739.

(g) *Allen v. London Guarantee and Accident Co., Ltd.* (1912), 28 T. L. R. 254, and *Knight v. Hosken* (1943), 75 Ll. L. R. 74, are decisions on policies which limited the maximum of the insurers' liability, and are not, therefore, reliable guides on some questions under the kind of policy which requires the assured to bear a minimum.

(h) The type of clause or endorsement requiring the assured to bear a minimum varies radically in different policies in this respect.

(i) E.g. "Road Traffic cover only" policies.

(m) As to liability for assured's costs under this form of policy see *ante*, p. 737.

(n) As to when they incur that liability see *ante*, pp. 733-4.

(o) Or settlement or counterclaim.

2. Most policies confer this right by assignment under a clause expressly giving it (p).

3. If there is no right by assignment, subrogation will only arise if

(i) The assured is given an indemnity for his own costs by the policy (q) and

(ii) Such costs have been paid by the insurers (r).

4. If the insurers have no right directly to enforce the order against the third party, they can always recover from the assured any money which he recovers in respect of any indemnity which they have discharged to him (s).

PART 5.—INSURERS' LIABILITY FOR INTEREST

The provisions of the Law Reform (Miscellaneous Provisions) Act, 1934 (t), making possible the award of interest to the successful plaintiff in running down actions (u), raise the interesting question as to whether the ordinary motor policy covers the award of interest. The indemnity usually given is "against all sums which the assured shall become legally liable to pay, including claimant's costs" (v).

It is submitted that wherever the assured is entitled to recover in respect of his liability for the third party's costs he will also be entitled under his policy to recover an indemnity for whatever sum is awarded to the third party in interest (w), and that, conversely, wherever the assured by his unreasonable conduct (x) has increased (y) or caused the incurrence of the third party's costs and is therefore not entitled to be indemnified for them he will be unable to recover from his insurers all or part of the interest awarded to the third party.

Thus if the assured, left by repudiating insurers to deal by himself with a third party claim, delays unreasonably (z) in admitting liability (a), or unreasonably (z) contests the case, and in the result the third party is awarded interest, the assured will not be entitled to an indemnity (b) or an equivalent sum in damages (c) for the interest if but for his delay it would not have been awarded (d), or if but for his delay the sum payable for interest would have been less (d), he will be entitled to recover from his insurers only *pro tanto* (e).

(p) For this clause see *ante*, chapter VIII, p. 598.

(q) This would usually be the case when the policy provides for the payment of costs incurred with the insurers' consent.

(r) See *Page v. Scottish Insurance Corporation* (1920), 98 L. J. K. B. 308, and *ante*, pp. 704 *et seq.*

(s) See fully, *ante*, pp. 709 *et seq.*

(t) 27 Halsbury's Statutes, 220, and as to interest, chapter V, p. 293.

(u) See *ante*, chapter V, p. 293. (v) *Id.* under the Road Traffic Act, 1934.

(w) Cf. *Re Waterhouse's Policy*, [1937, Ch. 415, [1937, 2 All E. R. 91, where insurers who wrongfully refused to pay policy monies to the assured were held liable to pay interest thereon from the date of maturity of the policy to the date of payment into Court.

(x) E.g. by not admitting liability soon enough.

(y) E.g. by not admitting a hopeless case at the outset.

(z) As to what is reasonable conduct in such circumstances see generally *ante*, chapter IX, pp. 674 *et seq.*

(a) With the consequence that the time between the accident and payment to the third party is unduly prolonged.

(b) Under his policy.

(c) *Id.* for wrongful repudiation.

(d) It is clear from the Report of the Statute Law Revision Committee (2nd Interim Report 1934), upon which the interest section of the Law Reform (M. P.) Act, 1934, was passed, that one of the determining factors in the award of interest will be the reasonableness of the delay in settling and paying a claim.

(e) Cf. the consequence of his settling a claim against a third party so as to prejudice his insurers' rights of subrogation, *ante*, p. 711.

PART 6.—SETTLEMENT OF THIRD PARTY CLAIMS

1. **By insurers.**—When the policy gives insurers the right to settle claims against their assured, or they otherwise acquire authority so to do, any settlement will generally be binding both upon the assured and upon the third party. The settlement will not be binding upon the assured as between him and his insurers when it exceeds the authority which has in fact been given, as where, for example, the insurers settle a counterclaim which he wishes to prosecute without his consent (*f*). On the other hand, it is apprehended that as a rule any settlement made by insurers will be binding as between the assured and the third party if he has in any way represented his insurers as having authority to settle claims on his behalf.

The settlement will generally be binding upon the third party, who cannot afterwards take action against the assured. That there may be exceptions to this rule is shown by the case of *Martin v. Bannister* (*g*), where a third party, who had been injured in a motor accident, whilst lying in hospital instructed a solicitor whom he had not met before to make a claim on his behalf against the assured. The insurers took over the conduct of the case from their assured under the terms of the policy. Before any writ was issued, the solicitor ultimately agreed to settle his client's claim for the sum of £100 as compensation, and the sum of £35 15s. for his costs after having at the last moment (on behalf of his client) increased the demand in respect of his costs from £31 10s. to £42, although, as the Master of the Rolls (*h*) pointed out, if a writ had been issued, and the insurers had allowed judgment to go by default in Order XIV proceedings, the most that they would have been obliged to pay in respect of costs was between £10 and £12.

In these circumstances the third party was paid £100 and signed the following document :

" Received from Harry Bannister *per* the Prudential Assurance Company, Limited, the sum of £100 in full satisfaction and discharge of all claims made or to be made in respect to injuries and/or damage or injurious results accrued or likely to accrue in consequence of an accident which happened to me on the 25th day of September, 1932. . . . "

The £35 15s. costs were paid to the solicitor. Later, when the third party had partly recovered from his injuries, he instructed another solicitor to commence proceedings on his behalf against the assured. The insurers, acting in the name of their assured, applied for an order to stay these proceedings on the ground that the claim had been settled. The Court of Appeal refused to exercise their discretion (*i*) to stay the proceedings on the ground that there were peculiar and unusual circumstances (*k*) in the case which required further investigation.

(*f*) As to how far the insurers may have, under the terms of the policy, the right to do this see *ante*, chapter VIII, p. 597. Cf. dicta in *Morley v. Moore*, [1936] 2 K. B. 359; [1936] 2 All E. R. 79, p. 598, *ante*, and the general duty of the Solicitor instructed by insurers towards the assured as laid down in *Groom v. Crocker*, [1939] 1 K. B. 194; [1938] 2 All E. R. 394. The settlement will only exceed the authority given when it is not *bona fide*, and the counterclaim might reasonably have succeeded. *Beacon Insurance Co., Ltd. v. Langdale*, [1939] 4 All E. R. 204, *ante*, pp. 597, 731.

(*g*) (1933), 47 Ll. L. R. 270.

(*h*) Lord HANWORTH.

(*i*) Under s. 41 of the Supreme Court of Judicature (Consolidation) Act, 1925.

(*k*) The circumstance which the Master of the Rolls regarded as unusual was that the sum which was agreed to be paid in respect of the solicitor's costs was relatively very large for what was apparently the work that had to be done by him.

2. By assured.—If it is made without fraud or collusion (*l*) a settlement (*m*) made by the assured of a liability to or claim against a third party may be binding as much upon the insurers as upon the parties to the settlement.

When not conclusive between insurers and third party.—In two cases only can a settlement made without collusion or fraud be re-opened or questioned as between insurers and a third party. These arise where the third party seeks to enforce the rights of the assured which have been transferred to him under the Third Parties (Rights against Insurers) Act, 1930 (*n*), or by assignment (*o*).

(1) In these cases the insurers will be entitled to say that the amount settled between their assured and the third party is not the amount really due.

(2) The insurers may be able to evade liability to the third party on the ground that the settlement made by their assured was a breach of the terms of his policy. This, however, would only be possible in so far as the liability settled was one required to be covered by the Road Traffic Act, 1930 (*p*), and in cases where they had repudiated liability to their assured they might (*q*) be estopped from relying upon it.

Settlement may be breach of duty to insurers.—It should always be remembered that an assured who settles a claim with a third party, besides breaking a term of his policy (*r*), may be prejudicing the rights which his insurers are entitled to by virtue of the doctrine of subrogation (*s*).

3. Costs of settlement.—The liability as between insurers and assured (*t*) for the costs of settling a case, both those incurred on behalf of the assured and those payable to the third party, will in general be determined according to the same principles as those applicable to actual litigation. Thus if an assured left to deal with his own defence incurs solicitor's costs, and expenses of employing other expert advisers (*u*) for the purpose of enabling a just computation of the amount really due to a third party he will, it is submitted, be entitled to recover these from his insurers (*v*) in a proper case (*w*).

(*l*) As to collusion and fraud see *ante*, chapter III, p. 152.

(*m*) As to when a judgment obtained by fraud or collusion can be reopened or questioned as between insurers and a third party claiming against them, either by assignment, under the Third Parties Act, 1930 (*supra*), or under s. 10 of the Road Traffic Act, 1934, see *ante*, chapter III and chapter V.

(*n*) *Ante*, chapter III, p. 120.

(*o*) *I.e.* by assignment from the assured, as in *Jenkins v Deane* (1933), 103 L. J. K. B. 250, and *Barrett v London General Insurance Co.*, [1935] 1 K. B. 238.

(*p*) S. 36 (1) (b), 23 Halsbury's Statutes 637.

(*q*) This is affected by some doubt, since the estoppel would be between insurers and assured. See *Vandepille v. Preferred Accident Insurance Corporation of New York*, [1933] A. C. 70.

(*r*) The clause requiring him not to make any admission, compromise, etc. See *ante*, chapter VIII, p. 596.

(*s*) As to this doctrine, and the assured's duty not to do anything in prejudice of insurers' rights, see *ante*, p. 711.

(*t*) As to the liability between solicitor and client see *ante*, p. 719.

(*u*) *E.g.* a doctor, a motor engineer, or a claims assessor.

(*v*) Or if they have employed such solicitor or, etc., they will be obliged to pay for their services. In *Whistland v Autocar Insurance Co* (1927), 27 Ll. L. R. 418, where the assured recovered the amount of a claim compromised by him, it is not reported whether he recovered the costs of settlement.

(*w*) *I.e.* where the liability settled is one covered by the policy and the assured acts reasonably. (*f*), however, *Eclipse Policies v. Marchbank*, *ante*, p. 737.

4. Settlement between insurers and assured.—As has been seen, this will be void as against a third party unless it is

- (1) in respect of a claim not required to be covered, and
- (2) made before the assured's bankruptcy or liquidation (a).

PART 7.—CONFIDENTIAL COMMUNICATIONS BETWEEN INSURERS AND ASSURED

1. Whether correspondence privileged from production.—It is sometimes thought that letters and other communications (b) passing between an assured and his insurers relating to an accident out of which a third party claim arises, are necessarily privileged from production in an action by such third party against the assured. These cannot, however, be privileged unless they are either

- (1) confidential communications between the assured and his professional legal advisers (c), passing directly or through the agency of another.
- (2) Documents prepared by the assured for the use of his professional legal advisers in assisting or advising him in pending or threatened litigation (d).

Some communications made by the assured to his insurers might come under one or other of the above heads. But many would not. It is not within the scope of this book to review the great number of authorities, many of which appear to conflict, upon the question when privilege will attach to documents under the above heads. But in view of the many cases in which it has been held that communications to other than professional advisers (e), however confidential in character (f), are not privileged, it is impossible to say that, as so far decided, communications and reports (g) made by an assured to his insurers before he is put in train with the solicitors who are to conduct his case are privileged. If and when the point comes to be tested some difficulty may be experienced in getting round the decision in *Jones v. Great Central Railway* (h). In that case the House of Lords (i) held that reports and letters sent by a member of a trades union to the executive of the union for the purpose of their considering his case were held not to be privileged, although the member was bound by the rules to send the documents in question to the committee of his union in order to enable them to consider whether to fight his case and to furnish information by which their solicitor could conduct the contemplated action. In other words, the position seems precisely similar to that of an insured motorist who gives his insurers, as he is generally bound by his policy (k) to do, full and frank

(a) *I.e.* a claim not required to be covered by s. 36 of the Road Traffic Act, 1930. See *ante*, chapter III, p. 147.

(b) *E.g.* a claims form.

(c) See 10, 13 Halsbury's Laws, 2nd Edn. 381, 725, and see current Annual Practice, notes to Order 31, r. 1.

(d) *Ibid.* See also *Re Crocker and Taxation of Costs*, [1936] Ch. 696; [1936] 2 All E. R. 899.

(e) And not even to such when consulted privately, although for the purpose of obtaining their professional opinion.

(f) *E.g.* to clergymen or doctors. See 10 Halsbury's Laws, 2nd Edn. 381.

(g) *E.g.* the claims form which he fills up at the outset. (h) [1910] A. C. 4.

(i) Lord LOREBURN, L.C., and Lords MACNAGHTEN, JAMES OF HEREFORD and ATKINSON affirming without dissent a unanimous decision of VAUGHAN WILLIAMS, BUCKLEY and KENNEDY, L.JJ., in the Court of Appeal.

(k) For the usual clause in a motor policy which imposes this duty see *ante*, chapter VIII, p. 590.

information regarding an accident from which a third party claim may arise. Nevertheless, in holding that there was no privilege (l) the court said (m) :

"Both client and solicitor may sue through an agent, and therefore communications to or through the agent are within the privilege. But if communications are made to him (n) as a person who has himself to consider and act upon them, then the privilege is gone" (o).

The decision in *The Hopper No. 13* (p) will, however, assist the defendant in many cases.

It might be argued that communications and reports from the assured to his insurers, although not privileged from production, may be irrelevant on the ground that they cannot be used in evidence, and so could be omitted from the assured's affidavit of documents. It is, however, no ground for failing to disclose a document that it would be inadmissible in evidence (r), and these documents would clearly be relevant (s). The duty to disclose documents of this kind (t), if it exists, would in some cases extend not only to replies or other communications from the insurers to their assured, but also to documents prepared by them as his agent (a). It is suggested, however, that discovery of these could generally be resisted on the ground that they were prepared for the use of the assured's legal advisers in the conduct of his case (b).

An unusual aspect of the doctrine of privilege was considered in *Re Crocker and Taxation of Costs* (c), an interlocutory proceeding in the case of *Groom v. Crocker* (d) which has already been discussed (e). The defence of an assured was conducted by solicitors employed by his insurers, who admitted negligence on his behalf, but, he asserted, without any express authority from him. The policy contained the usual clause entitling insurers to control proceedings. The assured, in an action for libel against the solicitors, applied to the solicitors for production of all relevant documents in the proceedings brought by the third party against him. The solicitors refused to allow the assured to inspect such documents on the ground that they belonged to the insurers who had refused their consent. It was held that inspection must be given, though delivery up of the documents would not be ordered.

(l) Lord LOREBURN, L.C. said, at p. 5 that he could see that the decision would put at a disadvantage those who are obliged to co-operate in order to obtain legal advice or assistance.

(m) *Per* Lord LOREBURN, L.C., *ibid.*, at p. 6.

(n) *I.e.* the agent or other person.

(o) For a very full discussion of the law relating to legal professional privilege see the judgments in *O'Rourke v. Darbishire*, [1920] A.C. 581.

(p) [1925] P. 52. In that case it was held that where a report was made for the purpose of ultimately being put before the insurers' solicitors it was privileged. It is not easy to reconcile this with *Jones v. Great Central Railway* (*supra*).

(q) See *Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882), 11 (1) B.D. 55, at p. 62, *per* Lord ESHER, *Bustros v. White* (1870), 1 (1) B.D. 423, *per* JESSEL, M.R., at p. 425, *Hutchinson v. Glover* (1875), 1 (1) B.D. 138, at p. 141, *O'Rourke v. Darbishire*, [1920] A.C. 581, at pp. 606, 615, 620.

(r) See current Annual Practice, notes to O. 31.

(s) *I.e.* documents prepared by the assured relating to an accident, claim forms, etc.

(a) *E.g.* possibly documents passing from one department of the insurance office to another, such as from the head office to a local claims assessor, or *vice versa*.

(b) With what accuracy must be determined by the facts in each case. The distinction between these and those prepared by the assured himself would in many cases be fine.

(c) [1936] Ch. 606; [1936] 2 All E.R. 809, *per* CLAYTON, J.

(d) [1939] 1 K.B. 194; [1938] 2 All E.R. 394 (C.A.).

(e) *Ante*, pp. 729 *et seq.*

2. Other duties to disclose.—The duty to discover documents of this class must be contrasted with the duty which rests upon insurers (*f*) to give all relevant information to a third party concerning any ground upon which they seek to repudiate liability on a policy under which the assured's rights have been transferred to the third party by operation of the Third Parties (Rights against Insurers) Act, 1930 (*g*), and also with the assured's duty (*h*) in certain cases (*i*) to inform the third party fully as to any insurance covering that party's claim.

PART 8.—SUMMARY OF REMEDIES AVAILABLE TO THIRD PARTY, ASSURED, AND INSURERS

In different parts of this book the various rights of third parties who have suffered in a motor accident personal injury, damage to property, or loss caused by death; of insured persons and their friends, relatives and wives under a motor policy in respect of such accidents; and the rights and liabilities of insurers generally, have been described. In this section it is proposed for the sake of comprehensive reference to summarise the alternative or cumulative remedies available to each of these three classes of persons to protect their positions or enforce their rights upon the happening of a motor accident.

1. Immediate remedies of third party injured by motor accident.

(a) Road Traffic Act claims.

1. Demand for information from owner or driver, or both, as to his or their insurance (*k*) if the claim is in respect of death or bodily injury, and is made by one against liability to whom insurance is compulsory (*l*).

2. If the owner or driver is uninsured, compliance with the three conditions precedent to the liability of the M.I.B. (*m*).

3. Action for damages (*n*) against the owner or the driver of the vehicle or against both (*o*) or against the personal representatives of an owner or a driver who is dead (*p*).

4. If the driver is uninsured, and unable to pay, action against any person who caused or permitted him to drive uninsured (*q*).

(b) Claims other than Road Traffic Act claims.

5. If the owner or driver has become bankrupt (*r*) or gone into liquidation (*s*), demand for information from his insurers (*t*) as to his rights under any policy (*u*).

(*f*) Under s. 3 of the Third Parties (Rights against Insurers) Act, 1930 (*infra*), *ante*, chapter III. (g) *Ante*, chapter III.

(*h*) Under s. 13 of the Road Traffic Act, 1934, *ante*, chapter V, p. 329.

(*i*) *I.e.* in cases to which the Road Traffic Acts, 1930-34, apply.

(*k*) Under s. 13 of the Road Traffic Act, 1934, *ante*, chapter V, p. 329.

(*l*) *I.e.* not a voluntary passenger or a workman injured in the course of his employment by the proposed defendant.

(*m*) *I.e.* (i) Notice to M.I.B. of intention to commence proceedings against the persons liable for the damages resulting from the accident; (ii) Joinder of all persons responsible as defendants; (iii) Assignment of judgment obtained against the persons responsible to M.I.B. See chapter VI, *ante*, p. 375.

(*n*) For negligence at Common Law (see chapter I), or for breach of statutory duty. (*ibid.*)

(*o*) Against both if uninsured or if the driver was acting as the servant or agent of the owner (see *ante*, chapter I).

(*p*) Under the Law Reform Act, 1934. See *ante*, chapter I.

(*q*) *Monk v. Warbey*, [1935] 1 K. B. 75.

(*r*) Other than an infant.

(*s*) If a company, *ante*, chapter III.

(*t*) Under s. 3 of the Third Parties (Rights against Insurers) Act, 1930, *ante*, chapter III.

(*u*) *I.e.* covering his driving.

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6. If the owner or driver of the vehicle has become bankrupt or is dead and his estate is being administered in bankruptcy, action against his insurers, or, if the policy so provides, arbitration (a).

2. Remedies of third party after judgment or settlement obtained against assured.

(a) Road Traffic Act claims.

1. Action against defendant insurers who refuse to pay (b) (if the judgment has not been satisfied under the M.I.B. Agreements (c)).

(b) Claims other than Road Traffic Act claims.

2. 5 and 6, above.

3. If he can obtain a valid assignment of a policy, purporting to cover the defendant, action on the policy (d), or arbitration proceedings thereunder.

4. In certain cases, garnishee proceedings against the defendant insurers (e).

3. Remedies of assured.

(a) Before judgment or settlement.

1. Action for declaration as to his rights under policy if these are disputed (f).

2. In certain cases, joinder of his insurers as third party in action brought against him (g).

(b) After judgment or settlement.

1. Action or arbitration on policy against insurers who refuse to pay indemnity, claiming either payment of monies due under policy or damages for breach of contract (h).

2. Proceedings for declaration as to his rights under policy if these are disputed (i).

4. Remedies of insurers against assured.

(a) Before judgment.

1. Proceedings if possible to bring themselves within the saving clauses of subsection (2) of section 10 of the Road Traffic Act, 1934 (k), provided liability disputed is in respect of compulsory insurance (l).

(b) After judgment or settlement.

2. If third party liability has been discharged (m) various actions for recovery of monies paid or (n) for damages for breach of contract (o) or both.

(c) Claim for costs paid or incurred on assured's behalf (p).

(a) Under the Third Parties Act, 1930, s. 1, *ante*, chapter I.

(b) Under s. 10 (1) of the Road Traffic Act, 1934, *ante*, chapter V.

(c) See *ante*, chapter VI, p. 304.

(d) As in *Jenkins v Deane* (1933), 103 L. J. K. B. 250; *Barrett v London General Insurance Co.*, (1935) 1 K. B. 238, and *Taylor v Eagle Star Insurance Co.* (1940), 67 Ll. L. R. 130.

(e) *Ante*, chapter III.

(f) *Ante*, chapter IX, p. 679.

(g) *Ante*, chapter IX, pp. 681 *et seq.*

(h) *Ante*, chapter IX, pp. 680 *et seq.*

(i) *Ante*, chapter IX, p. 679.

(k) *Ante*, chapter V, p. 297.

(l) See s. 36 (1) (b) of Road Traffic Act, 1930; 23 Halsbury's Statutes 637.

(m) By virtue of s. 38 of the Road Traffic Act, 1930, *ante*, chapter IV, or s. 10 (4) or 12 of the Act of 1934, *ante*, chapter V, pp. 327-8. If the third party's judgment has been satisfied by virtue of the M.I.B. Agreements (chapter VI, *ante*), execution of the assigned judgment against the assured.

(n) See *ante*, chapter IX, p. 669.

(o) *I.e.* breach of policy.

(p) *Ante*, pp. 731 *et seq.*

5. Remedies of insurers against third parties.

1. Enforcement of rights of subrogation (a) against third parties responsible for a loss or liability in respect of which they have indemnified their assured (b).

2. Enforcement of rights of contribution (c) against other insurers covering the same risks.

3. Assignment of third party's judgment against the assured. Where the third party has obtained judgment against the assured and another defendant, the insurers may be able to purchase an assignment of the judgment and so enforce contribution against the other defendant (d).

PART 9.—DUTY NOT TO MENTION INSURANCE TO JURIES

Having dealt briefly with the subject of motor insurance, this book may fitly be concluded by reminding the reader of the present limits of the old rule that, when defending or prosecuting proceedings in a running-down action, he must not (e), if the case is tried before a jury, make any reference to, or even the least hint of (f), the fact that either party may or may not be insured (g).

1. History of rule.—A story is told (h) of how, in the early days of motor running-down cases, a barrister who specialised in that work one day appeared on behalf of a plaintiff in a county court. In the peroration of his opening speech, this advocate exhorted the gentlemen (i) of the jury to waste no sympathy upon the rascally motorist who had inflicted such terrible injuries upon his client, since he had proved his depravity in advance by insuring with a large and wealthy company against its consequences. When the commotion created by this announcement amongst the other lawyers present had subsided, the advocate blandly informed the judge that before coming to court he had carefully ascertained that telling the jury of the defendant's insurance would not be a ground for granting a new trial, but merely a gross breach of professional etiquette.

So in *Wright v. Hearson* (j), the defendant, who had been held liable in a County Court action for knocking down the plaintiff with his motor car, appealed on the ground that he had been cross-examined by the plaintiff's counsel as to whether he was not insured. He had refused to answer the question, and the County Court judge told the jury that it had nothing to do with the case and that in those days every prudent man was insured.

The Divisional Court, whilst holding that the question was most irregular and improper (k), refused to grant a new trial, on the ground that it must be

(a) *Ante*, pp 690 *et seq*

(b) *Ante*, p 760

(c) See *ante*, p. 719, as to contribution.

(d) This of course depends upon the willingness of the third party to give the assignment. But if given, there is no reason why contribution should not be enforced in this way.

(e) On pain of having the jury discharged and having to pay the costs thereby wasted. See below.

(f) Or read any letter from which this might be inferred. See *Ellis v. Mayhew* (*infra*), and *Ashew v. Grimmer* (*infra*). (g) See *Ellis v. Mayhew* (1926) unreported.

(h) See *Ashew v. Grimmer* (1927), 43 T L R. 354, where the story was repeated by counsel in court.

(i) Now members.

(j) [1916] W. N. 216.

(k) "It was irregular and was calculated to prejudice the defendant with the jury. It should be stated emphatically that counsel are not entitled to do such a thing in order to prejudice the minds of the jury. It is the duty of counsel to know and observe the rules governing what they may and what they may not do in the conduct of cases; they may not disregard those rules and trust to not being checked in time. In proportion as counsel voluntarily observe those rules so will their standing and reputation grow." *Per ROWLAT, J.*, *ibid*, at p. 216

assumed that the County Court judge had as far as he could effaced the impression created by the question. It was added that the County Court judge might, upon the question being asked, have discharged the jury and ordered the plaintiff to pay the costs thrown away.

In *Askew v. Grimmer* (l), the jury in a running-down case were told by plaintiff's counsel that the defendant was insured. The defendant's counsel at once jumped up and demanded that the jury be discharged, stating that he had no reported authority for his right to ask it, but citing the story set out above (m). BRANSON, J., held that in the special circumstances (n) of that case the trial should proceed.

In *Ellis v. Mayhew* (o), in one letter read to the jury the word "assured" occurred. Counsel for the defendant applied for the case to be withdrawn from the jury and tried by another. The Lord Chief Justice suggested that the jury should be discharged and the trial proceed before him alone. This suggestion was accepted by both parties (p).

In *Gowar v. Hales* (q), it was held that insurers were not to be brought in as third party in cases tried with a jury (r), on the ground, *inter alia*, that it was a rule of practice and etiquette that the jury ought not to be informed of the defendant's insurance. The late Lord Justice SCRUTTON made the following interesting observations upon the changing temper of juries:

"The ways of juries with underwriters have undergone some change in the course of my experience. When first I was called to the Bar it was very difficult for an insurance company to get a verdict in their favour from a jury. Better counsel (s) prevailed, and the time came with a more extended insurance practice when one could rely fairly confidently on a fair hearing from a jury, although there was a slight prejudice against an insurance company which took the premium and did not pay. Then came the introduction of the motor policy with third party claims, direct claims for amounts claimed by third parties instead of claims for damage to the subject-matter, and, for part of my experience, it was almost impossible in fact to get a jury to find in favour of motorists when there were very few motors. As time went on and as probably half the jurors owned motors themselves, the view of juries changed and they might be relied on to decide fairly between plaintiff and defendant even although the defendant was a motorist—in fact it was very difficult, and I believe it still is very difficult, to get any criminal conviction against a motorist from a jury.

"But if it was not a question of an action against a motorist but a question whether an insurance company should pay a person who was damaged by a motor, it was found extremely difficult to get fair hearings from juries, with the result that it has been established as a rule of practice at the Bar, which the judges enforce, that in an action against a motorist the jury ought not to be told that the defendant is insured" (t).

In *Grinham v. Davies* (u), counsel for the plaintiff read a letter to the jury from which, the County Court judge held, they might infer (as the fact was)

(l) [1927] 43 T. L. R. 354.

(m) *Ante*, p. 749.

(n) Which were that if the defendant had said what was alleged, it might turn out that he was not insured at all.

(o) [1926] unreported: tried before HEWART, C. J., in March 1926, and referred to in *Grinham v. Davies*, [1929] 2 K. B. 249, at p. 252.

(p) For a case where a special jury was informed without reported objection of insurance, see *Duckinson v. Del Solar*, [1930] 1 K. B. 376, and see further, *ante*, chapter VIII, p. 601.

(q) [1928] 1 K. B. 191.

(r) See, however, *ante*, chapter IX, for cases where this has been allowed or done.

(s) I.e. presumably the Lord Justice was referring to the state of mind of juries, and not to quality of the advocacy with which they were addressed.

(t) [1928] 1 K. B. 191, at p. 196.

(u) [1929] 2 K. B. 249.

that he was insured. The judge thereupon discharged the jury, and ordered a new trial. On appeal to the Divisional Court, it was held that this course was correct. The previous authorities (v) were reviewed, and it was held that

- (1) The rule was one of practice and etiquette rather than law ;
- (2) If the rule is violated it is a matter of discretion for the trial judge (w) as to whether he will discharge the jury or let the case proceed.

2. Effect of the Road Traffic Acts, 1930 and 1934.—It was thought that after the passing of these two Acts, and the operation of a system of compulsory insurance against third party risks, the reasons underlying the rule had lost their force, and that it might be abolished. The rule has indeed been modified, as will be seen from a description of the case of *Harman v. Crilly, Zurich General Accident and Liability Insurance Co., Third Parties* (a), but the modification was not effected immediately after the 1930 Act had come into force. In *Jones v. Birch Brothers, Ltd.* (b), SCRUTTON, L.J., treated the rule as unaffected by the fact that insurance had become largely compulsory, and he quoted with approval his own previous observations on it (c). Nevertheless, the Lord Justice did not expressly state that the rule was to be applied to any cases other than those where there was a jury. In *Carpenter v. Ebbelwhite* (d) joinder of the insurers as third parties by the injured plaintiffs in a running-down action was refused by the Court of Appeal, on the ground that the declaration claimed by the plaintiffs against the insurers that they were obliged to satisfy any judgment obtained by the plaintiffs against the assured defendant could not be granted, in so far as no dispute had at that stage arisen between the insurers and the assured defendant, nor could any dispute arise until after the disposal of the running-down action between the plaintiffs and the assured. The claim for a declaration against the insurers was therefore premature and could not be entertained at that stage (e). SLESSER, L.J., went further, and stated that in view of the universal practice as to non-disclosure of the fact of insurance as laid down in *Gowar v. Hales* (f), it would tend to embarrass the fair trial of the action if a declaration was sought against insurers in the present proceedings.

The remarks of SLESSER, L.J., were considered to be too wide in the case of *Harman v. Crilly, Zurich General Accident and Liability Insurance Co., Third Parties* (g). In that case, a trial before a judge alone, the defendant-assured issued a third party notice against their insurers, claiming a declaration of indemnity under the policy. The grounds of repudiation of liability

(v) Set out in text above.

(w) He derives this discretionary power (i) by virtue of the rules of practice ; and (ii) by virtue of the much wider rule that it is the duty of the judge to see fair play, and prevent any unfair appeal to the jury. Per SALTER, J., [1929] 2 K. B. 249, at p. 250.

(a) [1943] K. B. 168 ; [1943] 1 All E. R. 140.

(b) [1933] 2 K. B. 597.

(c) In *Gowar v. Hales*, [1928] 1 K. B. 191.

(d) [1939] 1 K. B. 347 ; [1938] 4 All E. R. 41. See also *Murfin v. Ashbridge and Martin*, [1941] 1 All E. R. 231 (C. A.)

(e) Per GREER, L. J. At p. 359, the Lord Justice used these words about the rule :

" With regard to the point that the joinder of the insurance company in the action is embarrassing because it would be necessarily unavoidable that the jury would know that there could not be any claim against the insurance company unless they decided the case in favour of the plaintiffs, that reasoning does not appeal to me because, since the time when it has been provided by statute that every owner of a motor car must be insured, that matter would be present to the minds of the jury just as much though not a word was said about it, as if it was proclaimed from the house tops."

(f) [1928] 1 K. B. 191.

(g) [1943] K. B. 168 ; [1943] 1 All E. R. 140.

by the insurers have already been discussed (*h*). An application by insurers to set aside the third party notice on the ground that the fair trial of the action would be liable to be prejudiced was refused by the Court of Appeal.

LORD GREENE, M.R., quoted with approval the words of GREER, L.J., in *Carpenter v. Ebblewhite* (*i*), as to the effect of the Road Traffic Acts on the rule and added :

" Now, it is perfectly clear from that (*h*), that in the view of Lord Justice GREER, even in the case of juries, the old practice is now out of date and the reason for it has disappeared. In this case it is not necessary for us to consider what may happen if and when actions of this character (*l*) are again tried with juries. In present circumstances this action with which we are concerned will be tried by a Judge alone, and I find the position of the authorities to be this . . . that even in the case of juries the question is, to say the least of it, an open one, and that no Judge has ever suggested that when the trial is to be before a Judge alone, the principle which was derived from jury trials would apply."

3. Present limits of the Rule.—From the case last quoted, the following are the suggested limits to the old rule that juries may not be informed whether the defendant in a running-down action is protected by insurance in respect of the claim made against him.

(i) The rule as it applied before the Road Traffic Acts, 1930 and 1934, came into operation is confined alone to trials before a jury.

(ii) Now, after the Road Traffic Acts, 1930 and 1934, the rule has no application to running-down actions before a judge alone. Even if juries may be reintroduced to try such actions, reference to insurance protecting the defendant may not have the effect of requiring, in proper cases, a discharge of the jury and a new trial.

(iii) Before juries, if ever they do return to this type of case, a reference to the *absence* of insurance of the defendant in a Road Traffic Act claim should normally be avoided (*m*).

(*h*) *Ante*, p. 669.

(*i*) [1939] 1 K B 347; [1938] 4 All E. R. 41.

(*h*) *I.e.* Lord Justice GREER's remarks (see note (*e*), *supra*) in *Carpenter v. Ebblewhite* (*supra*).

(*l*) *I.e.* running-down actions.

(*m*) See note (*m*), p. 751, *ante*.

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